CITY OF VANCOUVER 2024 DISPARITY STUDY
Final Report

Prepared for:

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KEEN INDEPENDENT RESEARCH

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SUMMARY REPORT — Executive Summary

The City of Vancouver seeks to ensure equitable opportunities for minority- and woman-owned businesses competing for its construction, professional services, goods and other services contracts.

Keen Independent Research LLC (Keen Independent) conducted this disparity study to analyze whether there are disparities in the utilization of minority- and woman-owned businesses (MBE/WBEs)[1] in City of Vancouver contracts and subcontracts.

Utilization, Availability and Disparity Analyses

Examining contracts and subcontracts awarded from January 2015 through December 2022, about 9 percent of City of Vancouver contract dollars went to MBE/WBEs.

The City spends most of its procurement dollars with businesses in the local region. Keen Independent identified the Portland-Vancouver-Hillsboro, Oregon-Washington Metropolitan Statistical Area (MSA)[2] as the geographic market area for construction, professional services and goods industries and the Pacific Northwest[3] for the goods industry for the study. Keen Independent analyzed the availability of MBE/WBEs and other firms to perform City contracts and subcontracts based on a survey of companies in the Portland-Vancouver and Pacific Northwest areas. MBE/WBEs were 24 percent of firms indicating qualifications and interest in City contracts and subcontracts.

There was not equal availability of MBE/WBEs for each type and size of City contract. Through a contract-by-contract analysis of firms available to perform specific types and sizes of City contracts and subcontracts, Keen Independent determined that 27 percent of City dollars might go to MBE/WBEs if there were a level playing field for those companies.

MBE/WBE utilization in City contracts overall (9%) was less than expected based on the availability analysis (27%). There were substantial disparities for African American-, Hispanic American-, Native American- and white woman-owned firms and smaller disparities for Asian American-owned firms. Keen Independent also performed disparity analyses for each MBE/WBE group by industry. There were substantial disparities for most MBE/WBE groups for construction, professional services, goods and other services procurements.

Conclusions

Disparities between MBE/WBE utilization and availability indicate a need for the City to consider a remedial program to level the playing field for MBEs and WBEs so that they can equitably compete for City contracts and subcontracts. The City should review all of the results in the disparity study to evaluate the need to level the playing field for minority- and woman-owned businesses and other disadvantaged businesses to compete for its contracts and subcontracts. Efforts to increase MBE and WBE participation in City opportunities should be an area of focus.

[1] Keen Independent refers to all certified and non-certified firms when discussing MBE/WBE participation unless it is noted. Please see Appendix A. Definition of Terms.

[2] Clark County, Skamania County in Washington and Clackamas County, Columbia County, Multnomah County, Washington County and Yamhill County in Oregon.

[3] Clark County, Skamania County, Cowlitz County, Kittitas County, Pierce County, Yakima County, Thurston County and Lewis County in Washington and Clackamas County, Columbia County, Multnomah County, Washington County and Yamhill County in Oregon.

Remedial Actions for City of Vancouver Consideration

In the final pages of the Summary Report, Keen Independent discusses remedial actions for City of Vancouver consideration. City of Vancouver might consider the following:

1. Establish an overall three-year aspirational goal for MBE/WBE utilization.

2. Devote additional resources to business assistance and relationship-building for potential MBE/WBE and other small business bidders, including potential subcontractors.

3. Promote and participate in regional partnerships that support development of MBE/WBEs and other small businesses.

4. Continue to directly contact MBE/WBEs and other small businesses for bids and proposals on contracts below the threshold for public advertisement, including on purchases of less than $50,000.

5. Authorize the use of preference points for small businesses competing for publicly advertised contracts (as allowable under state law).

6. Authorize aspirational contract goals program that requires prime contractors to consider MBE/WBEs (or socially and economically disadvantaged firms in general) for subcontract opportunities, as allowable under federal and state law.

7. Track compliance and program success.

8. Allocate sufficient internal resources for program success.

SUMMARY REPORT — Introduction

Background

The City of Vancouver ("City") seeks to level the playing field for minority- and woman-owned businesses competing for its contracts.

This research examines whether there are any barriers to minority- and woman-owned businesses seeking work with the City. The study identifies how the City can develop and implement new program elements to address observed disparities in City procurements.

2024 Disparity Study

Keen Independent Research LLC (Keen Independent) conducted this disparity study to analyze whether there are disparities in the utilization of minority- and woman-owned businesses (MBE/WBEs) in City contracts and subcontracts.

Government programs that provide preferences or requirements regarding use of minority- or woman-owned businesses can be challenged in court. The disparity study is based on relevant case law, including legal decisions in the Ninth Circuit Court of Appeals.

The 2024 Disparity Study helps the City identify the types of assistance minority- and woman-owned businesses might need to fully participate in its contracts and subcontracts and in the broader local economy.

Research methods. The study included:

- A survey of firms in Portland-Vancouver metro area and Pacific Northwest available to perform public sector work related to construction, professional services, goods and other services (referred to as "study industries");
- Identification of the ownership of prime contractors, subcontractors and other vendors on past City contracts;
- Disparity analyses that compare participation of minority- and woman-owned firms on City contracts with what would be expected from the availability analysis;
- Interviews with business owners and representatives; and
- Other research about the local marketplace.

Appendix A provides definitions of terms used in this study.

Study team. Keen Independent Research is a national economic consulting firm. David Keen, Principal, has led about 200 disparity studies for similar agencies and has served as an expert witness successfully defending contract equity programs in court. The study team also included local subconsultant Donaldson Consulting, survey firm Customer Research International (CRI) and law firm Holland & Knight.

Public input. The 2024 Disparity Study started in August 2023 with submission of a draft report in June 2024. The City provided opportunities for public input from the outset. Keen Independent reached out to thousands of businesses, trade association representatives and others through surveys, in-depth interviews and other research. More than 270 businesses, trade association representatives and other interested individuals provided comments and other input through these methods.

SUMMARY REPORT — Legal framework

Across the country, state and local governments have enacted minority- and woman-owned business enterprise programs to:

a. Ensure that they are not engaged in discrimination in their contracting;
b. Remedy specific identified past discrimination or its present effects in their marketplace;
c. Remove and address barriers to participation in contracting by minority- and woman-owned business enterprises; and
d. Take affirmative steps to dismantle a system in which they were passive participants in private marketplace discrimination.

As described in the following pages, different standards of legal review apply when defending minority-owned business, woman-owned business and small business enterprise (SBE) programs in court. The different standards of legal review are:

- Strict scrutiny (for MBE programs);
- Intermediate scrutiny (for WBE programs); and
- Rational basis (for programs based on, business size or other non-racial or gender factors).

Disparity studies, based on the court decisions and legal framework summarized in the following pages, are an accepted and recognized method to analyze information regarding participation of minority- and woman-owned businesses in government contracting and the marketplace. Disparity studies examine the types of evidence approved by the U.S. Supreme Court and lower courts that have reviewed public programs involving minority- and woman-owned businesses.

1. United States Supreme Court

Strict Scrutiny Standard of Review for MBE Programs

In 1989, the U.S. Supreme Court in *City of Richmond v. J.A. Croson Company* established "strict scrutiny" as the standard of legal review for race-conscious programs adopted by state and local governments.[4] Applying this standard, the U.S. Supreme Court held that the City's minority business enterprise program violated the Equal Protection Clause of the Fourteenth Amendment.

Strict scrutiny requires that:

- A governmental entity has a "compelling governmental interest" in remedying past identified discrimination or its present effects; and
- The program adopted be "narrowly tailored" to achieve the goal of remedying the identified discrimination.[5]

The strict scrutiny standard has since been followed by lower courts reviewing minority business programs. It is the most difficult legal standard to meet that the U.S. Supreme Court could establish short of prohibiting such programs altogether.

Appendix L provides a detailed discussion of the strict scrutiny standard, other legal standards and court decisions pertaining to minority- and woman-owned business programs and related programs.[6]

2. U.S. Supreme Court in 1989 that ruled in *City of Richmond v. J.A. Croson Co.*

[4] 488 U.S. 469 (1989).

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

[6] The U.S. Supreme Court applied strict scrutiny when reviewing race-conscious measures related to university admissions in its June 2023 decision in *Students for Fair Admissions v. Harvard* (600 U.S. ___ (2023)). This case was about racial diversity in university admissions and does not directly relate to government procurement.

Compelling governmental interest. The first test 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.[7] 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.[8]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.[9]

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."[10]

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.'"[11] 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.[12] 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.[13]

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."[14]

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[7] *Id.*

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

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

[10] *Id*.

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

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

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

[14] 488 U.S. at 492.

Narrow tailoring. The second test 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;
- The impact of a race-, ethnicity- or gender-conscious remedy on the rights of third parties;[15] and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[16]

A government agency must satisfy both requirements of the strict scrutiny standard. A race-conscious program that fails to meet either one is unconstitutional.

[15] *See*, *e.g.*, *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe,* 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 605-610 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1008-1009 (3d. Cir. 1993); *see also*, *Geyer Signal, Inc.*, 2014 WL 1309092.

[16] *See, e.g., Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; *see also Geyer Signal, Inc.*, 2014 WL 1309092..

Intermediate Scrutiny Standard of Review for WBE Programs

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, as well as Washington state courts, apply intermediate scrutiny to gender-conscious programs. Washington state is within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit.[17]

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both "sufficient probative" evidence or "exceedingly persuasive justification" in support of the stated rationale for the program; and

2. Substantially related to the achievement of that underlying objective.[18]

In sum, the types of analyses relevant to supporting a WBE program are similar to those for an MBE program. Keen Independent's utilization, availability, disparity and marketplace analyses for white woman-owned firms in this disparity study parallel those for minority-owned firms.

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 woman-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.[19]

Intermediate scrutiny, as interpreted by the 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.[20] The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny.

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[17] *See e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195 (9th Cir. 2013); *H. B. Rowe,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnat*i, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n,* 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *Geyer Signal, Inc., 2014* WL 1309092; *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. Coria*, 839 P.2d 890 (S.Ct. Wash.1992); *State v. Carter*, 823 P.2d 523 (Ct. App. Wash. 1992).

[18] *See e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. Coria*, 839 P.2d 890 (S.Ct. Wash.1992); *State v. Carter*, 823 P.2d 523 (Ct. App. Wash. 1992).

[19] *Id*. The Seventh Circuit Court of Appeals, however, in *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender-based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

[20] *See e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P.*

Rational Basis Standard of Review for SBE Programs

Small business programs and other race- and gender-neutral efforts are not subject to strict scrutiny or intermediate scrutiny standards of legal review. They can be challenged in court but are more easily defended.

- Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.[21]

- When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.[22]

Courts in applying the rational basis test generally find that a challenged law is upheld "as long as there could be some rational basis for enacting [it]," that is, that "the law in question is rationally related to a legitimate government purpose."[23]

So long as government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.[24]

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v. Seibels, 31 F.3d 1548 (11th Cir. 1994); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006) (We apply **intermediate scrutiny** if the individual is a member of a "semisuspect" class or the state action threatens "important" rights); *State v. Coria*, 839 P.2d 890 (S.Ct. Wash.1992); *State v. Carter*, 823 P.2d 523 (Ct. App. Wash. 1992).

[21] *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); s*ee also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *see, Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[22] *See, Heller v. Doe*, 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass'n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *see, e.g. Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[23] *See, e.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *see, e.g., Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[24] *Id.; Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (*citing FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *see, e.g.,*

Washington State Civil Rights Act: RCW 49.60.400

Initiative Measure No. 200 was approved by the State of Washington voters in 1998. Initiative 200 is an Act relating to "prohibiting government entities from discriminating or granting preferential treatment based on race, sex, color, ethnicity, or national origin…;" and adding new sections to Chapter 49.60 RCW.

RCW 49.60.400 is known as the Washington State Civil Rights Act. RCW 49.60.400(1) provides that the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[25] The Washington State Civil Rights Act (the "Act") was amended in 2013 to add provisions regarding providing the Act does not prohibit schools under chapter 28A.715 RCW from implementing a policy of Indian preference in employment or prioritizing the admission of tribal members in certain circumstances.

Significantly, the Act also provides a federal program exception as follows: "This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state."[26] For purposes of this section of the Act, the term "state" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.[27]

Referendum 88 (Initiative 1000) was rejected by Washington voters in 2019. That Referendum sought to allow affirmative action policies in public employment, contracting and education. Referendum 88 requested voters to approve the Washington state legislature's passage of Initiative 1000, which curtailed the state's 1998 prohibition on preferential treatment based on race or gender. The Referendum would have amended the Act (RCW 49.60.400) that prohibits the state from granting preferential treatment to an individual or group based on certain characteristics in public employment, public education, and public contracting. The rejection of the Referendum means that RCW 49.60.400 stayed in place as it was adopted in 1998 and amended in 2013.[28]

Thornock v. Lambo, 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[25] RCW 49.60.400(1).

[26] RCW 49.60.400(6).

[27] RCW 49.60.400(7).

[28] *See* Washington state Attorney General Use of Race- or Sex-Conscious Measures or Preferences to Remedy Discrimination in State Contracting, AGO 2017 No. 2 – Mar20 2017.

Procurement Policies

The City follows guidelines outlined in Washington Statutes and City policies when procuring construction, goods and services.

Figure 3 on the following page summarizes the City's procurement processes for each study industry. Appendix M gives more detail on City procurement procedures.

Bidding thresholds. The City sets different bidding requirements based on the type of work and procurement value.

- Informal solicitations. Informal solicitations are used for goods procurements of $10,000 or less and services procurements of $50,000 or less.
- Quotes. Quotes are used for goods procurements of more than $10,000 and up to $50,000; some goods procurements from $50,000 to $300,000 also use quotes.
- Request for proposals (RFPs). RFPs are issued for some services and goods procurements of more than $50,000 up to $300,000.
- Request for qualifications (RFQs). RFQs are used for architecture and engineering procurements.
- Invitations to Bid (ITBs). ITBs are issued for some goods, services and construction procurements over $300,000.

Method for award. The City bases awards of contracts on different methods depending on the category of the procurement:

- Informal solicitations. Informal solicitations do not require competitive bidding, but procurement department must strive to find the best possible value;
- Quotes. The City must obtain three quotes. The award is made to the responsive, responsible bidder with the lowest price;
- Request for proposals (RFPs). RFPs require formal solicitations. The award is made to the highest score proposal.
- Request for qualifications (RFQs). RFQs require formal solicitations. The award is made to the most qualified, followed by price negotiations.
- Invitations to bids (ITB). ITBs require formal solicitations. The award is made to the responsive, responsible bidder with the lowest price.

Advertising requirements. For competitive bids and proposals, the City of Vancouver publicly advertises in local and regional newspapers.

Bonding requirements. For construction contracts, the City requires a bid deposit of up to 5 percent of the total bid. For public works contracts above $50,000, the City may also require performance and payment bonds (as of July 1, 2024).

3. Summary of City of Vancouver procurement practices

	Goods	Services	Architecture & engineering*	Construction
Bidding thresholds				
Informal solicitation	$10,000 or less	$50,000 or less	N/A	N/A
Quote	$10,001–$50,000; $50,001–$300,000	N/A	N/A	$50,000 or less; $50,001–$300,000
Invitation to Bid (ITB)	$300,001+	$300,001+	N/A	$300,001+
Request for Proposal (RFP)	$50,001–$300,000; $300,001+	$50,001–$300,000; $300,001+	N/A	
Request for Qualifications (RFQ)	N/A	N/A	All A&E contracts require a level of RFQ	N/A
Method of award				
Informal solicitation	Best possible value	Best possible value	N/A	N/A
Quote	Responsive, responsible bidder with lowest price	Responsive, responsible bidder with lowest price	N/A	Responsive, responsible bidder with lowest price
Invitation to Bid (ITB)	Responsive, responsible bidder with lowest price	Responsive, responsible bidder with lowest price	N/A	Responsive, responsible bidder with lowest price
Request for Proposal (RFP)	Proposal most advantageous to City	Proposal most advantageous to City	N/A	Proposal most advantageous to City
Request for Qualifications (RFQ)	N/A	N/A	Most qualified, followed by price negotiations	N/A
Means of public advertising	City Procurement Portal; advertisement in the local and regional newspapers (RFPs and ITBs)	City Procurement Portal; advertisement in local and regional newspapers (RFPs and ITBs)	City Procurement Portal; advertisement in local and regional newspapers (RFQs)	City Procurement Portal; advertisement in local and regional newspapers (RFPs and ITBs)
Other				
Emergency provision where requirements are waived	Yes	Yes	Yes	Yes
Bonding requirements	N/A	N/A	N/A	Public works projects of $300,001+: bid bonds for all bidders (5% of total bid); performance or payment bonds for all projects above $50,000.

Note: *Includes program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping and other related services

Keen Independent obtained data on City construction, professional services, goods and other services contracts to determine utilization of MBE/WBEs in City contracts and subcontracts.

Contract and Subcontract Data

The City provided procurement data for contracts awarded from January 1, 2015, through December 31, 2022.

The City provided access to the Washington State Department of Labor and Industries public works project database to obtain subcontract data on City construction contracts. The City also provided subcontract data on City professional services contracts.

In total, Keen Independent examined 3,564 procurements ($579 million) and 2,057 subcontracts ($108 million). Appendix B describes methods used to analyze these data.

Types of Work in City of Vancouver Contracts

Based on information in the contract and subcontract records, Keen Independent coded the primary type of work involved in each prime contract and subcontract using North American Industry Classification System (NAICS) and Standard Industrial Classification (SIC) codes. NAICS and SIC codes are standardized federal systems for classifying firms into a subindustry according to the detailed type of work they perform.

Figures 4 through 7 on the following pages show dollars of prime contracts and subcontracts for City procurements according to the primary type of work performed. There were 41 different types of work that accounted for about 89 percent of the total contract dollars. The largest single category of City spending was architecture and engineering.

The availability analysis discussed later in this report focused on these subindustries.

Construction

Figure 4 includes a summary of City dollars going to construction prime contracts and their subcontracts by type of work performed. In total, about $323 million City dollars went to construction contracts and subcontracts.

- About 49 percent of City construction dollars went to water and sewer line and road construction ($159 million).
- Public building construction, electrical works and park and playground construction made up about 22 percent of City construction dollars combined.
- Other subindustries such as excavation, plumbing, concrete flatwork, inspection and testing and roofing accounted for about 14 percent of construction contract and subcontract dollars.

In total, these ten types of work listed in Figure 4 accounted for about 85 percent of all City construction contract dollars. Keen Independent's availability survey for construction focused on firms performing these ten types of work.

4. Spending by type of work on City of Vancouver construction contracts, 2015–2022

Type of work	Dollars (1,000s)	Percent of industry
Water and sewer line construction	$ 85,879	26.54 %
Road construction	73,544	22.72
Public building construction	27,669	8.55
Electrical work including lighting and signals	21,538	6.65
Park, playground and recreational area construction	20,431	6.31
Excavation, site prep, grading and drainage	13,253	4.09
Plumbing and HVAC	11,783	3.64
Concrete flatwork	11,072	3.42
Inspection and testing	4,061	1.25
Roofing	4,770	1.47
Subtotal	**$ 273,999**	**84.66 %**
Other construction	$ 26,758	8.27 %
Professional services	1,405	0.43
Goods	15,517	4.79
Other services	5,963	1.84
Total	**$ 323,641**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Professional Services

Figure 5 examines the subindustries accounting for about 89 percent of City professional services contract dollars (including subcontracts on professional services contracts).

- About two-thirds of City professional services dollars was for architecture and engineering.
- Criminal defense services and computer system design and IT maintenance contracts and subcontracts accounted for about 12 percent of City professional services dollars.
- Environmental consulting services and other types of work accounted for 9 percent of professional services dollars.

The availability survey included the major types of professional services shown in Figure 5.

5. Spending by type of work on City of Vancouver professional services contracts, 2015–2022

Type of work	Dollars (1,000s)	Percent of industry
Architecture and engineering	$ 109,463	68.39 %
Criminal defense services	12,161	7.60
Computer system design and IT maintenance	7,309	4.57
Environmental consulting services	6,221	3.89
Public relations	4,072	2.54
Appraisal services	1,739	1.09
Transportation planning	1,625	1.02
Subtotal	**$ 142,589**	**89.09 %**
Other professional services	$ 14,704	9.19 %
Construction	2,532	1.58
Other services	232	0.15
Total	**$ 160,058**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Goods

Figure 6 examines major areas of City spending on goods.

- One-third of City goods spending was for cars and trucks and building materials.
- Industrial equipment and supplies and electrical equipment each accounted for about 10 percent of goods contract dollars.
- Fire trucks and engines and firefighter and police equipment accounted for about 15 percent of City goods contract dollars.
- Combined, construction equipment, petroleum products, vehicle parts and other types made up about 19 percent of goods contract dollars.

The availability survey included the major types of goods spending shown in Figure 6. (As with other industries, the study team excluded types of goods purchases primarily made from a national market. See Appendix B for additional information.)

6. Spending by type of work on City of Vancouver goods contracts, 2015–2022

Type of work	Dollars (1,000s)	Percent of industry
Cars and trucks	$ 19,394	17.55 %
Building materials	17,130	15.50
Industrial equipment and supplies	11,752	10.64
Electrical equipment	11,537	10.44
Fire trucks and engines	9,387	8.50
Firefighter and police equipment	6,961	6.30
Construction equipment	6,298	5.70
Petroleum and petroleum products	5,581	5.05
Vehicle parts and supplies	4,021	3.64
Horticultural materials	2,190	1.98
Small arms and ammunition	1,650	1.49
Farm and garden equipment	1,474	1.33
Subtotal	**$ 97,375**	**88.12 %**
Other goods	$ 13,128	11.88 %
Construction	0	0.00
Total	**$ 110,502**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Other Services

Figure 7 examines major areas of City spending on other services.

- Staffing services, janitorial services and waste collection accounted for about 46 percent of City other services contract dollars.
- About 21 percent of other services dollars went to landscaping, security guards and security systems services.
- Combined, about 14 percent of other services contract dollars went to equipment repair, vehicle repair, elevator inspection and other types of work.

The availability survey included the major types of other services spending shown in Figure 7.

7. Spending by type of work on City of Vancouver other services contracts, 2015–2022

Type of work	Dollars (1,000s)	Percent of industry
Staffing services	$ 16,943	18.19 %
Janitorial services	13,418	14.40
Waste collection and disposal	12,155	13.05
Landscaping services	7,606	8.17
Security guard services	6,472	6.95
Security systems services	6,021	6.46
Equipment repair	4,183	4.49
Vehicle repair and maintenance	3,606	3.87
Elevator (inspection, service and repair)	1,866	2.00
Printing	1,648	1.77
Remediation services	1,057	1.13
Portable toilet rental	870	0.93
Subtotal	**$ 75,846**	**81.42 %**
Other services	$ 17,240	18.51 %
Construction	29	0.03
Professional services	11	0.01
Goods	25	0.03
Total	**$ 93,151**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Geographic Market Area

Keen Independent determined the relevant geographic market area for each of the study industries (construction, professional services, goods and other services industries). The geographic market area for an industry reflects location of firms receiving most of the City's contract dollars for that industry.

Construction, professional services and other services industries. Firms in the Portland-Vancouver-Hillsboro, Oregon-Washington Metropolitan Statistical Area (MSA) received most of the dollars of contracts and subcontracts for City of Vancouver construction, professional services and other services contracts, after excluding the types of purchases typically made from national markets.

Firms in this area accounted for 82 percent of City construction, professional services and other services contract dollars (see Figure 8), including the local offices of firms that are headquartered elsewhere.) Therefore, the availability analysis for the construction, professional services and other services industries focused on firms in this area. This area consists of the following counties:

- Clackamas County, OR;
- Columbia County, OR;
- Multnomah County, OR;
- Washington County, OR;
- Yamhill County, OR;
- Clark County, WA; and
- Skamania County, WA.

Note that Keen Independent also refers to this area as the "Portland-Vancouver marketplace."

8. Geographic market area for City of Vancouver construction, professional services and other services contracts

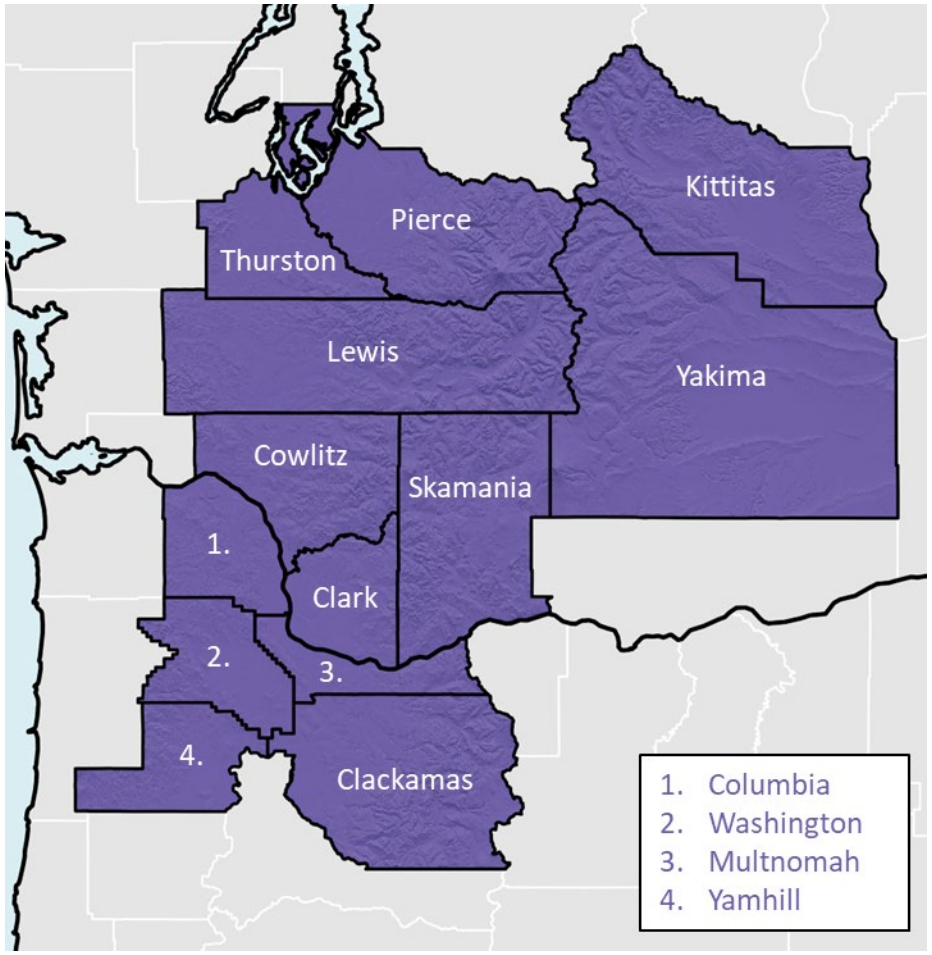
Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Goods industry. The City's spending on goods purchases goes well beyond the Portland-Vancouver marketplace to include other parts of Washington state.

Firms with locations in the counties shown in Figure 9 received 76 percent of City goods contract dollars. Therefore, the availability analysis for the goods industry focused on firms in this area (identified as "Pacific Northwest" region for purposes of this study). This area consists of the Portland-Vancouver-Hillsboro, Oregon-Washington Metropolitan Statistical Area (MSA) plus the following counties in Washington state:

- Cowlitz County;
- Kittitas County;
- Pierce County;
- Yakima County;
- Thurston County; and
- Lewis County.

9. Geographic market area for City of Vancouver goods contracts



Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Keen Independent examined U.S. Census Bureau data, results from the availability survey conducted for this study, and other data sources on conditions for minority- and woman-owned firms in the local marketplace.[29] As summarized in the following five pages, the combined information indicates that people of color and women face barriers entering study industries as employees and business owners.[30] Once formed, there is evidence of greater barriers for minority- and woman-owned firms in the marketplace, including when competing for work.

Entry and Advancement as Employees in Study Industries

Employment and advancement are preconditions to business ownership in study industries. Barriers for people of color and women entering and advancing within the local construction industry, for example, could depress the number of businesses owned by minorities and women.

Entry into study industries. People of color were about 29 percent of the workforce in Portland-Vancouver metro area based on Census data for years between 2018 and 2022. Women accounted for about 47 percent of all workers. Analysis of the local workforce in the study industries indicates that there could be barriers to employment for some minority groups and women in certain industries.

- Construction. Among construction workers, African Americans, Asian Americans and women were underrepresented. These differences were statistically significant.
- There was underrepresentation of people of color in construction trades such as plumbers, HVAC mechanics, equipment operations and roofers when compared to representation in the construction industry as a whole. There was also low representation of women in construction trades.
- Relatively few Asian Americans, Native Americans and women working in the construction industry were managers.

Professional services. After controlling for educational attainment, African Americans, Hispanic Americans and women constituted a smaller than expected portion of the local professional services workforce. These differences were statistically significant.

Goods. In the goods industry, African Americans, Asian Americans and women represented a smaller portion of workers than would be expected. These differences were statistically significant.

Other services. Asian Americans and women were a smaller portion of workers in the other services industry than would be expected. These differences were statistically significant.

These statistically significant disparities in employment in certain industries in the Portland Vancouver metro area are consistent with evidence that some courts have found sufficient to raise an inference of racial and gender discrimination. Appendix E provides detailed results regarding entry and advancement of workers in industries in the local marketplace.

[29] Keen Independent considers the relevant geographic market area for this study to be the Portland-Vancouver metro area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts. Appendices E through I show full marketplace analysis results.

[30] Keen Independent uses people of color and minorities interchangeably.

Business Ownership

Keen Independent examined whether there were differences in business ownership rates for workers in the local area construction, professional services, goods and other services industries related to race, ethnicity and gender.

- Construction. Hispanic Americans and women working in the local construction industry were less likely than non-Hispanic whites and men, respectively, to own a business.

  After statistically controlling for factors including age and number of elderly people at home, a statistically significant difference in the business ownership rate persisted for Hispanic Americans. This disparity was substantial.

- Professional services. In the local professional services industry, Asian Americans and Hispanic Americans were less likely than non-Hispanic whites to own a business.

  After statistically controlling for factors such as home ownership and having an advanced degree, there were no statistically significant differences in the business ownership rates for any group.

- Goods. In the Pacific Northwest goods industry, Native Americans were less likely than non-Hispanic whites to own a business. After controlling for personal characteristics, there was no statistically significant difference for this group.

- Other services. In the Portland-Vancouver other services industry, Asian Americans were less likely than non-Hispanic whites to own a business.

  After controlling for personal characteristics, statistically significant differences persisted for Asian Americans. This disparity was substantial.

  Business ownership rates for white women working in this industry exceeded those for white men.

These substantial and statistically significant disparities in business ownership for certain minority groups in the study industries in the local market area are consistent with evidence that some courts have found sufficient to raise an inference of discrimination.

The disparities in business ownership rates also suggest that if there were a level playing field for all groups working in the study industries to form and sustain businesses, there would be a greater number of minority- and woman-owned firms in certain study industries.

Appendix F presents detailed results of the business ownership analyses conducted for this study.

Analysis of Access to Capital

Business start-up and long-term business success depend on access to capital. Discrimination at any link in that chain may produce cascading effects that result in racial and gender disparities in business formation and success.

The information presented here indicates that people of color and women continue to face disadvantages in accessing capital that is necessary to start, operate and expand businesses.

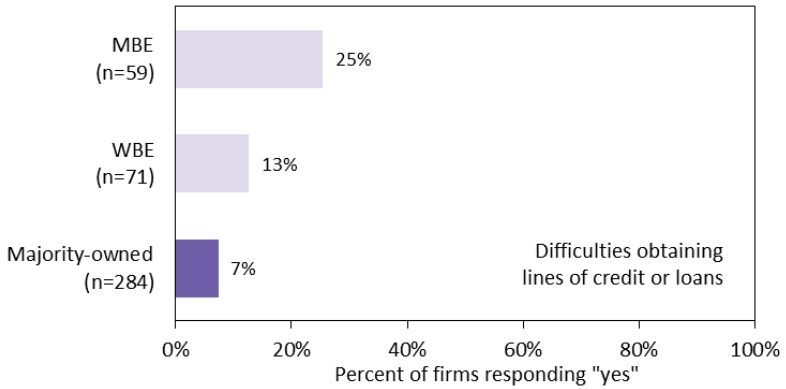
National results. Capital is required to start companies, so barriers to accessing capital can affect the number of people of color and women who are able to start businesses. In addition, minority and female entrepreneurs start their businesses with less capital (based on national data). Several studies have demonstrated that lower start-up capital adversely affects prospects for those businesses. Key results include:

- Personal and family savings of the owner was the main source of capital for startups among many U.S. businesses, but African American and Hispanic American households had considerably lower amounts of wealth than non-Hispanic white households.
- Nationally, minority- and woman-owned employer businesses (except Asian American-owned businesses) were more likely to use personal credit cards as a source of start-up capital, which is a more expensive form of debt than business loans from financial institutions.
- Among firms across the country, female- and minority-owned companies were less likely than non-Hispanic white male-owned companies to secure business loans from a bank or financial institution as a source of start-up capital.
- Nationally, minority- and woman-owned firms were more likely to not apply for additional financing because firm owners believed that they would not be approved by a lender.

Appendix G discusses this information in more detail.

Quantitative information about access to capital for businesses available for City work. In the availability survey of firms available for City work, the Keen Independent study team asked respondents questions about different types of potential difficulties in the local marketplace. The share of MBEs (25%) and WBEs (13%) reporting difficulties obtaining lines of credit or loans was much higher than share of majority-owned firms reporting such difficulties (7%), as shown in Figure 10. (Note that "majority-owned firms" in this study are businesses not owned by people of color or women.)

10. Responses to availability survey question concerning loans



Source: Keen Independent Research from 2024 availability survey.

Bonding. Among firms indicating in the availability survey that they had tried to obtain a bond, MBEs and WBEs were more likely to report difficulties obtaining bonding than majority-owned firms.

Quantitative information about homeownership and mortgage lending. Wealth created through homeownership can be an important source of funds to start or expand a business. Any discrimination in the home purchase and home mortgage markets can negatively affect the formation of firms by people of color in the local area and the success and growth of those companies.

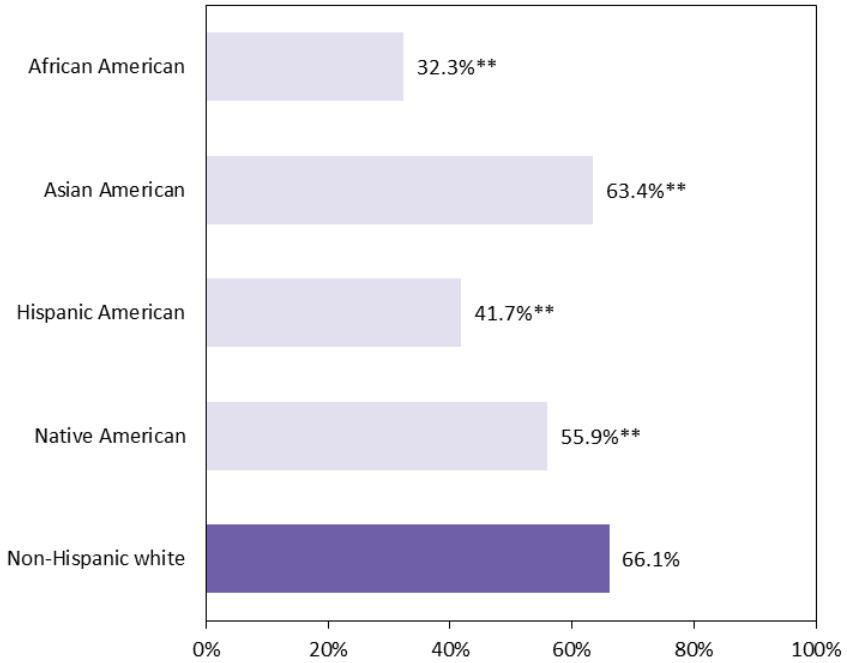
- Home equity is an important source of funds for business start-up and growth. Relatively fewer people of color in the Portland-Vancouver marketplace own homes compared with non-Hispanic whites (see Figure 11). People of color who own homes tend to have lower home values than non-Hispanic white homeowners.

- High-income people of color applying for conventional home mortgages in the Portland-Vancouver marketplace were more likely to have their applications denied than high-income non-Hispanic whites, except for Native Hawaiian and other Pacific Islanders). This may indicate racial discrimination in mortgage lending and may affect access to capital for people of color to start and expand businesses.

- Some minority groups were also more likely to have subprime loans than non-Hispanic whites. This may be evidence of predatory lending practices affecting people of color in the Portland-Vancouver marketplace.

The results concerning the local housing and financial industries presented in this report may be consistent with evidence that some courts have found sufficient to raise an inference of racial discrimination. This could affect opportunities for people of color to start and successfully operate companies in the local market area. See Appendix G for additional analyses relating to homeownership and mortgage lending.

11. Percentage of Portland-Vancouver metro area households that are homeowners, 2018–2022



Note: ** Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2017–2021 ACS Public Use Microdata sample. The 2018–2022 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Business Success

Keen Independent explored many different types of business outcomes in the Portland-Vancouver marketplace for minority- and woman-owned firms compared with majority-owned companies. In summary, many different data sources and measures suggested disparities in marketplace outcomes for minority- and woman-owned businesses. These sources provide evidence of greater barriers for people of color and women to start and operate businesses in the Portland-Vancouver are construction, professional services, goods and other services industries.

The pattern of disparities regarding business success of minority- and woman-owned firms in certain studies industries in the Portland-Vancouver marketplace may be consistent with evidence that some courts have found sufficient to raise an inference of discrimination. These factors might place minority- and woman-owned companies at a disadvantage compared with majority-owned firms when competing for City work.

Business closure, expansion and contraction. The study team used the most recent SBA study of minority business dynamics to examine business closures, expansions and contractions for privately held businesses between 2002 and 2006. The SBA study reported results for each state including Washington state. Compared with majority-owned firms in Washington state, that study found that:

- African American- and Asian American-owned firms were less likely to expand; and
- African American-, Asian American- and Hispanic American-owned businesses were more likely to close.

Data for the COVID-19 pandemic also indicate that MBEs and WBEs were more likely to close than other firms.

Business revenue and earnings. The study team used data from several different sources to analyze business receipts and earnings for businesses owned by people of color and women.

- In general, analysis of U.S. Census Bureau data for the state from the 2017 Annual Business Survey showed lower average receipts for businesses owned by people of color and women in than businesses owned by non-Hispanic whites or men.
- National data indicated that these general patterns persist across the study industries.

Data from 2018–2022 American Community Survey for the Portland-Vancouver and Pacific Northwest marketplaces indicated that:

- For the study industries combined, African American, Hispanic American and Native American business owners had lower business earnings than non-Hispanic white business owners and women had lower business earnings than men who owned businesses.
- Average earnings for Asian American and African American construction business owners (combined) were less than earnings for non-Hispanic white business owners. Business earnings for people of color in the goods industry were less than earnings for other business owners. This was also true for female versus male business owners in the professional services industry and the goods industry. Hispanic Americans, other people of color and women who owned other services businesses had lower business earnings than non-Hispanic whites and men. These differences persisted for women business owners in the professional services, goods and other services industries after controlling for other factors.
- Data from the availability survey showed lower revenue for MBEs and WBEs compared with majority-owned firms.

Bid capacity. From Keen Independent's availability survey, minority- and woman-owned firms had lower bid capacity than majority-owned firms in the Portland-Vancouver marketplace study industries. Further analysis indicated that those differences could be explained by the types of work they perform and length of time in business.

Difficulties with prequalification, insurance and project size. Answers to availability survey questions concerning marketplace barriers indicated that relatively more MBEs and WBEs than majority-owned firms face difficulties related to:

- Being prequalified;
- Insurance requirements; and
- Large project size.

For additional information about the types of difficulties companies experience in the local marketplace, see the qualitative information from in-depth interviews in Appendix J.

Payment and approvals. Responses to questions concerning difficulty obtaining payment and approvals indicated that:

- MBEs and WBEs were more likely than majority-owned firms to report difficulties receiving payment from prime contractors.
- MBEs were also more likely than other firms to report difficulties receiving payment from other customers and obtaining approval of work from inspectors or prime contractors.

Difficulties learning about bid opportunities. Availability survey results also indicate that:

- A higher percentage of MBEs and WBEs firms reported difficulties learning about bid opportunities with the City of Vancouver and in the private sector in the marketplace relative to majority-owned firms.
- MBEs were also more likely than other firms to report difficulties learning about subcontracting opportunities with prime contractors in the local area.

Bid restrictions. A key result from bid restriction questions was that MBEs more frequently indicated competitive disadvantages due to the pricing they receive from suppliers.

Qualitative Information about Marketplace Conditions

The Keen Independent study team collected qualitative information from business owners and managers, representatives from trade organizations and other groups. The study team conducted in-depth interviews and facilitated other group meetings with business owners, trade organization representatives and others and incorporated the results into this Appendix.

For anonymity, Keen Independent analyzed and coded comments without identifying any of the participants.

Keen Independent provided opportunities for public comments via mail and the designated study telephone hotline, website and email address.[31] Keen Independent also reviewed relevant qualitative information from other local studies.

The following five pages summarize some of these results. The 51-page Appendix J provides a much richer analysis of the qualitative input received. Appendix J is based on input from more than 275 businesses, trade association representatives and others.

Note that the comments in Appendix J and the following pages identify individuals by number, not by name. (Appendix J explains the numbering system in further detail.)

Working with the City of Vancouver. Many businesses providing input to the study team expressed interest in working with the City of Vancouver as experiences working with the City. Some businesses indicated positive experiences working with City and several shared negative experiences or challenges to doing business with the City. Examples of positive comments are provided below.

[Working with the City] was pretty easy actually. There was a need, and I was contacted by City staff to see if I'd be interested.

I-12. White male owner of a professional services firm

Issues with procedures. Some interviewees expressed that the challenges related to doing business with the City of Vancouver stem from a lack of transparency in the procurement process.

It is really helpful for organizations to go through a closed bidding process for [specified industry] assessments instead of having something out in the wild. Having a more intimate conversation is better than a lot of bids all over the place.

AS-140. White male owner of a professional services firm

I don't come across any bids. I don't know where to look. [The City of Vancouver] is not an easy city to work with. I get a lot of bid requests through Washington State and Vancouver is rarely there.

I-26. Hispanic American female owner of an other services firm

[31] The study phone hotline number was (602) 704-0125; email address was vancouverwadisparity2024@keenindependent.com; and the website was https://www.keenindependent.com/studies/vancouverwadisparity2024.

Access to capital. Business owners and others reported that access to capital is critical to success and difficult for companies to secure.

I've seen access to capital issues all over the place 'big time,' be it bank savings and loans, whatever it may be. There is always access to capital issues that minority-owned small businesses are faced with.

I-7. African American male owner of a professional services firm

Maybe working capital [is a barrier]. Especially if we're working for a general [contractor], sometimes it takes 60 days or longer to get paid and so you have to have enough capital to pay your suppliers and your payroll until you start getting paid.

I-27. White female owner of a construction-related firm

How access to capital is related to the size of contracts a firm bids. Interviewees described ways access to capital can impact the size of contracts firms can bid.

Not being able to get loans, not having any kind of ability to get bonding [has been a challenge]. That was a lot of work to try and get bonding because again the first thing they asked for is your credit score and your personal net worth information.

I-19. African American female owner of a construction-related firm

It's challenging as a small business to work towards contracting with larger scale projects. [I'm] having a hard time with contracts in the public sector in bonded contracts.

AS-175. White male owner of a professional services firm

Relationship between business access to capital and personal finances. Some interviewees explained the connection between business lending and one's personal finances.

I financed a $100,000 [specialty equipment] …. When it shows my income versus what [debt] I have out there … I have the student loans … plus I have a $100,000 loan for [specialty equipment], it shows that my debt [to income] ratio isn't good, even though … I've never missed a payment; my credit score is high.

I-6. White female owner of a goods firm

Barriers to access to business capital for people of color and women. Some business owners and representatives described barriers to access to capital that are specific to people of color and women.

The idea that I haven't proven myself to be able to have financing is just mind blowing to me when we like to put people of color on posters at banks and say, look at how much we're doing for our community …. You're doing it with businesses that are already established and grown. That has been the most challenging.

I-10. Native American female owner of a professional services firm

[Access to capital] has been a massive obstacle for my wife and I because we have either been unable to secure a source of capital or whenever we find a lender that will be willing to lend us for our operations, the interest rates are simply inconsistent with the level of profit margins that we can expect from any contract.

I-30. Hispanic American owner of a professional service firm

Issues with prompt payment. Slow payment can be especially damaging for groups of firms that do not have the same access to capital as others.

It's challenging … being a business owner and dealing with cash flow, … dealing with the individual organization's payment terms and trying to stay up with technology along with being lean and live off the land so it's like the polarity of it all.

I-14. White female owner of a professional services firm

[Prompt payment is] what I'm worried about with the next wave of work. [Clients], they're taking three, four months … you want me to sit on this waiting for six months total from start to payment. I'm a small [business] leveraging half of my staff to your project.

I-24. Native American male owner of a professional services firm

Bonding and insurance. Bonding and insurance requirements can present difficulties for businesses in the marketplace.

Insurance and bonds can be difficult for small businesses who are entering the market.

AS-110. White female owner of a construction-related firm

We once put up a … pickup as collateral to bond a job; it's changed a lot since then. I think it's harder now for someone to start out because of what's required to get bonding and insurance.

I-27. White female owner of a construction-related firm

When it comes to public sector procurement or payment performance bonds, if you're a small business and you don't have a whole bunch of liquid, it's impossible. It's just frankly impossible.

I-5. White male owner of a construction-related firm

Contractor-subcontractor relationships. Business owners and representatives reported on relationships between prime and subcontractors in the local marketplace. Some interviewees reported that certain prime contractors or customers are reluctant to work with newer or smaller businesses.

I think [subcontractor-prime contractor relationships are] really strong here …. The general contractor finds their electrical contractor, they find their plumbing contractor that they [know] do good work and that they have a great working relationship with … and part of their bid is we already know we have all these subs, we don't need to send out another bid to find all these people.

TO-4. White female representative of a trade association

Encourage the prime contractors to have some kind of list or someone that we can contact or try and get as a subcontractor with them.

I-22a. White female owner of a construction-related firm

We've also learned just by experience what kind of contract language we need in a contract. That's another issue too … because the main thing is the indemnity agreement, some contractors try to make it all on the sub that they're responsible for all the work, everyone's bad, things that happen fall on the subcontractor.

I-27. White female owner of a construction-related firm

I've seen it where minorities come into the job and the quality has been way down low and it's a real challenge to deal with them. That to me is a tough part to get over.

I-11. White male owner of a construction-related firm

Other challenges for small and diverse businesses. Interviewees discussed several other challenges that small and diverse businesses face doing business in the local marketplace, including denial of opportunity to bid, unfair rejection of bids, bid shopping and lack of feedback on bids.

You cannot get a contract if you do not have any contract experience. You should be able to bid based on merit.

AS-152. White male representative of a goods firm

[Project owners] are supposed to take the low bid. They're not supposed to try to tell someone else what the low bid was and have them change their bid even though it has happened. There's no real recourse if that does happen.

I-27. White female owner of a construction-related firm

The communication follow-up on the selection of who [the City] chose and why would be helpful, it's granted upon request, [but] it ends up being an entire process to go through …. Being transparent from the get-go would lend more clarity to the participants that didn't get it.

I-14. White female owner of a professional services firm

Stereotyping and double standards. Many interviewees discussed challenges experienced by minority- and woman-owned firms or other small businesses that are not typically faced by other businesses.

Gender-based stereotyping and discrimination. Some business owners and representatives reported negative stereotyping of women as "less fit" than men, as well as gender-based discrimination.

Being in the transportation sector of commerce is hard because I'm a woman-based company … so nobody wants to deal with a woman because I don't know anything about transportation …. Once they take that step and they listen to me then they realize that I do have the knowledge that they don't think I have.

I-6. White female owner of a goods firm

In the past, years ago there were some generals that talked down to me. But I haven't [recently] dealt with that it's changed a lot ….

I-27. White female owner of a construction-related firm

Racial stereotyping. Some business owners of color and others described incidents of stereotyping people of color as less capable.

Job sites can be hostile at times because we are a minority company.

AS-74. African American male representative of a construction-related firm

The color of your skin means you will encounter racism.

AS-127. Hispanic American male owner of an other services firm

In general, I always just feel like I always have to do better, kind of go above [and beyond] the rest than everybody else.

I-17. African American female owner of a professional services firm

"Good ol' boy" and other closed networks. Many business representatives reported that the "good ol' boy" network or other closed networks persist in the marketplace. Some indicated that they once existed, but are less pervasive now.

I can see the general consensus in our industry being primarily led by older white men. I think, as a woman, I do recognize that a bit more.

I-23. White female representative of a professional services firm

The 'good ol' boys,' absolutely [exist] … and the women are not included in those [closed] networks. It's hard for me.

I-6. White female owner of a goods firm

It feels like [there's a 'good ol' boy network']. I've approached many school districts in the State of Washington, for example and it feels like if you're not part of that group or they don't know you, it's very hard to penetrate. That's what I'm doing now is I'm just trying to get into meet everybody and get to know who the key players are.

I-31. Hispanic American male owner of a professional services firm

I would say ['good ol' boy networks'] used to [exist] … I think with the information age for sure it's all public information …. There are always people trying to work an angle of something, but I really think that with the information age and the public records … I think that ['good ol' boy networks' are] really a thing of the past.

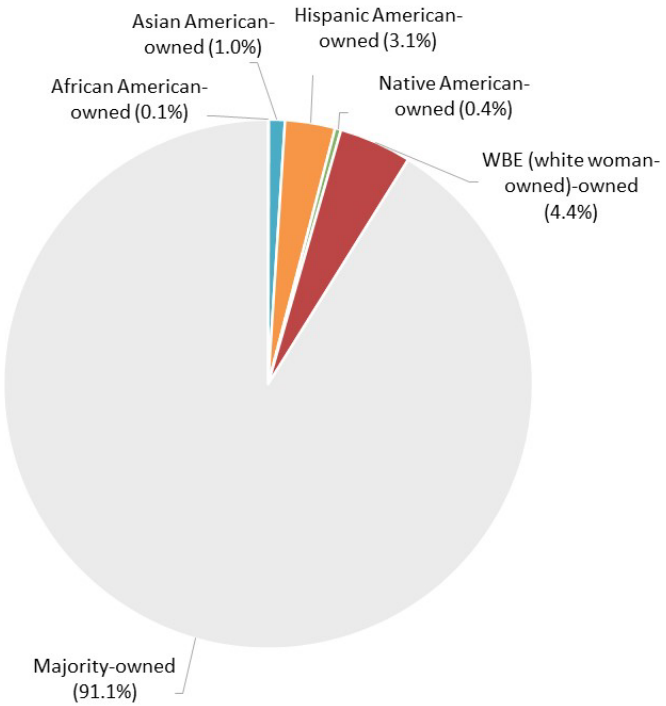
I-25. White male representative of a woman-owned construction-related firm

City of Vancouver Utilization of Minority- and Woman-owned Firms and Other Businesses

Keen Independent examined the ownership of firms performing City contracts and subcontractors during the January 1, 2015, through December 31, 2022, study period.

Of the $687 million in City contract dollars going to businesses during this period, about $61 million (9%) went to minority- and woman-owned companies (including non-certified firms). Figure 12 presents these results.

12. Share of City of Vancouver contract dollars going to MBEs and WBEs, 2015–2022



Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Utilization Analysis by Group

Participation of MBE/WBEs on City contracts and subcontracts (2015–2022) included:

- About $30 million going to 148 different white woman-owned businesses (393 contracts or subcontracts);
- About $21 million going to 45 different Hispanic American-owned businesses (118 contracts or subcontracts);
- About $7 million going to 31 different Asian American-owned businesses (49 contracts or subcontracts);
- 71 contracts or subcontracts totaling $3 million to six different Native American-owned businesses; and
- Ten procurements totaling $331,000 to seven different African American-owned businesses.

The bottom portion of Figure 13 examines utilization based on firm certification. Of the $61 million of contract dollars awarded to MBE/WBEs, $31 million went to firms certified as MBE or WBE by the Washington Office of Minority and Women's Business Enterprises (OMWBE), with the balance going to non-certified firms.

Results for certified MBE/WBE firms do not include firms certified as DBEs in Washington state or companies certified by the Oregon Certification Office for Business Inclusion and Diversity (COBID).

13. City of Vancouver contract dollars going to MBEs and WBEs, 2015–2022

	Number of procurements	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	10	$ 331	0.05 %
Asian American-owned	49	6,692	0.97
Hispanic American-owned	118	20,978	3.05
Native American-owned	71	2,531	0.37
Total MBE	248	$ 30,532	4.44 %
WBE (white woman-owned)	393	30,470	4.43
Total MBE/WBE	**641**	**$ 61,002**	**8.87 %**
Majority-owned firms	4,980	626,350	91.13
Total	**5,621**	**$ 687,352**	**100.00 %**
OMWBE-certified firms			
African American-owned	2	$ 180	0.03 %
Asian American-owned	11	2,483	0.36
Hispanic American-owned	30	11,307	1.65
Native American-owned	22	1,809	0.26
Total MBE	65	$ 15,779	2.30 %
WBE (white woman-owned)	64	15,569	2.27
Total OMWBE-certified	**129**	**$ 31,348**	**4.56 %**
Non-OMWBE	5,492	656,004	95.44
Total	**5,621**	**$ 687,352**	**100.00 %**

Note: Number of procurements includes contracts and subcontracts.

Source: Keen Independent analysis of City of Vancouver procurement data (2015–2022).

Keen Independent also analyzed MBE/WBE utilization for each study industry.

Construction

Keen Independent examined MBE/WBE participation in 2,800 City construction contracts and subcontracts in the study period. Of the $323 million in City construction contract dollars, about 6 percent went to minority- and woman-owned companies. The share of dollars going to different groups was as follows:

- About $9 million went to 65 different white woman-owned companies (222 contracts or subcontracts);
- About $7 million went to 28 different Hispanic American-owned businesses (70 contracts or subcontracts);
- Five different Native American-owned businesses received about $2 million in construction contract dollars (69 contracts or subcontracts);
- About $222,000 went to five different Asian American-owned businesses (6 contracts or subcontracts); and
- Seven subcontracts totaling about $37,000 were awarded to four African American-owned businesses.

The bottom of Figure 14 shows utilization for OMWBE MBE/WBE certified firms. About $8 million went to 21 different OMWBE-certified firms (86 contracts or subcontracts).

14. City of Vancouver construction contracts dollars going to MBEs and WBEs, 2015–2022

	Number of procurements	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	7	$ 37	0.01 %
Asian American-owned	6	222	0.07
Hispanic American-owned	70	7,421	2.29
Native American-owned	69	1,964	0.61
Total MBE	152	$ 9,644	2.98 %
WBE (white woman-owned)	222	8,811	2.72
Total MBE/WBE	**374**	**$ 18,455**	**5.70 %**
Majority-owned firms	2,426	305,186	94.30
Total	**2,800**	**$ 323,641**	**100.00 %**
OMWBE-certified firms			
African American-owned	1	$ 5	0.00 %
Asian American-owned	4	60	0.02
Hispanic American-owned	23	3,049	0.94
Native American-owned	21	1,742	0.54
Total MBE	49	$ 4,856	1.50 %
WBE (white woman-owned)	37	2,849	0.88
Total OMWBE-certified	**86**	**$ 7,705**	**2.38 %**
Non-OMWBE	2,714	315,936	97.62
Total	**2,800**	**$ 323,641**	**100.00 %**

Note: Number of procurements includes contracts and subcontracts.

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Construction contracts prime contract utilization. Keen Independent separately examined the utilization of MBEs and WBEs in construction prime contracts and subcontracts.

About $223 million in construction contract dollars that went to prime contractors, 4 percent of which went to minority- and woman-owned businesses. (This excludes the contract amounts that were subcontracted out.) Figure 15 presents these results.

- Five different Hispanic American-owned businesses received about $4 million in City construction prime contract dollars (9 prime contracts);
- About $2 million went to 16 different white woman-owned businesses (34 prime contracts).
- Two different Native American-owned businesses received about $2 million (4 prime contracts); and
- About $71,000 went to two different Asian American-owned businesses (3 prime contracts).

As shown in the bottom section of Figure 15, OMWBE MBE/WBE-certified firms received 2 percent of City of Vancouver prime construction contract dollars.

15. City of Vancouver construction prime contracts dollars going to MBEs and WBEs, 2015–2022

	Number of subcontracts	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	0	$ 0	0.00 %
Asian American-owned	3	71	0.03
Hispanic American-owned	9	3,955	1.77
Native American-owned	4	1,551	0.70
Total MBE	16	$ 5,577	2.50 %
WBE (white woman-owned)	34	2,257	1.01
Total MBE/WBE	**50**	**$ 7,833**	**3.51 %**
Majority-owned firms	799	215,027	96.49
Total	**849**	**$ 222,860**	**100.00 %**
OMWBE-certified firms			
African American-owned	0	$ 0	0.00 %
Asian American-owned	2	48	0.02
Hispanic American-owned	4	1,626	0.73
Native American-owned	4	1,551	0.70
Total MBE	10	$ 3,224	1.45 %
WBE (white woman-owned)	7	747	0.34
Total OMWBE-certified	**17**	**$ 3,972**	**1.78 %**
Non-OMWBE	832	218,888	98.22
Total	**849**	**$ 222,860**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Construction subcontract utilization. Keen Independent examined the utilization of MBEs and WBEs in construction subcontracts. About $100 million in construction contract dollars went to subcontractors, 11 percent of which went to minority- and woman-owned businesses. Figure 16 presents these results.

- About $7 million in subcontract dollars went to 55 different white woman-owned businesses (188 subcontracts);
- 24 different Hispanic American-owned businesses received about $3 million in City construction subcontract dollars (61 subcontracts);
- Five different Native American-owned businesses received about $413,000 in subcontract dollars (65 subcontracts);
- About $151,000 in subcontract dollars went to three different Asian American-owned businesses (3 subcontracts); and
- Four African American-owned businesses received about $37,000 in subcontract dollars (7 subcontracts).

As shown in the bottom section of Figure 16, OMWBE-certified firms received 4 percent of City construction subcontract dollars.

16. City of Vancouver construction subcontract dollars going to MBEs and WBEs, 2015–2022

	Number of subcontracts	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	7	$ 37	0.04 %
Asian American-owned	3	151	0.15
Hispanic American-owned	61	3,466	3.44
Native American-owned	65	413	0.41
Total MBE	136	$ 4,067	4.04 %
WBE (white woman-owned)	188	6,554	6.50
Total MBE/WBE	**324**	**$ 10,621**	**10.54 %**
Majority-owned firms	1,627	90,159	89.46
Total	**1,951**	**$ 100,781**	**100.00 %**
OMWBE-certified firms			
African American-owned	1	$ 5	0.00 %
Asian American-owned	2	12	0.01
Hispanic American-owned	19	1,424	1.41
Native American-owned	17	191	0.19
Total MBE	39	$ 1,632	1.62 %
WBE (white woman-owned)	30	2,102	2.09
Total OMWBE-certified	**69**	**$ 3,733**	**3.70 %**
Non-OMWBE	1,882	97,047	96.30
Total	**1,951**	**$ 100,781**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Professional Services

Keen Independent examined MBE/WBE participation in 773 locally funded professional services contracts and subcontracts in the study period. Of the $160 million in City professional services contract dollars, about 14 percent went to minority- and woman-owned companies. (See Figure 17.)

- About $13 million went to 57 different white woman-owned companies (100 contracts or subcontracts);
- About $5 million went to eight different Hispanic American-owned businesses (20 contracts);
- 18 different Asian American-owned businesses received about $4 million in professional services contract dollars (22 contracts or subcontracts);
- One Native American-owned business received about $500,000 in professional services contracts (1 contract); and
- Two contracts and subcontracts totaling less than $200,000 were awarded to two different African American-owned businesses.

As shown in the bottom section of Figure 17, $10 million went to 14 different OMWBE-certified firms (33 contracts or subcontracts).

17. City of Vancouver professional services contracts dollars going to MBE and WBEs, 2015–2022

	Number of procurements	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	2	$ 194	0.12 %
Asian American-owned	22	3,687	2.30
Hispanic American-owned	20	4,614	2.88
Native American-owned	1	500	0.31
Total MBE	45	$ 8,995	5.62 %
WBE (white woman-owned)	100	13,005	8.13
Total MBE/WBE	**145**	**$ 22,001**	**13.75 %**
Majority-owned firms	628	138,057	86.25
Total	**773**	**$ 160,058**	**100.00 %**
OMWBE-certified firms			
African American-owned	1	$ 175	0.11 %
Asian American-owned	5	2,380	1.49
Hispanic American-owned	6	768	0.48
Native American-owned	0	0	0.00
Total MBE	12	$ 3,324	2.08 %
WBE (white woman-owned)	21	6,453	4.03
Total OMWBE-certified	**33**	**$ 9,777**	**6.11 %**
Non-OMWBE	740	150,281	93.89
Total	**773**	**$ 160,058**	**100.00 %**

Note: Number of procurements includes contracts and subcontracts.

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Professional services contracts prime contract utilization. Similar to construction contracts, Keen Independent examined the utilization of MBEs and WBEs in professional services prime contracts and subcontracts.

About $152 million in professional services contract dollars went to prime consultants. About 14 percent went to minority- and woman-owned businesses. Figure 18 presents these results.

- About $12 million went to 51 different white woman-owned businesses (84 prime contracts);
- Eight different Hispanic American-owned businesses received about $5 million in City professional services prime contract dollars (20 prime contracts);
- 15 different Asian American-owned businesses received about $4 million (18 prime contracts);
- About $500,000 went to one Native American-owned businesses (1 prime contracts); and
- One African American -owned business received about $175,000 (1 prime contracts).

As shown in the bottom section of Figure 18, OMWBE MBE/WBE-certified firms received 6 percent of City prime professional services contract dollars.

18. City of Vancouver professional services prime contracts dollars going to MBE and WBEs, 2015–2022

Business ownership			
African American-owned	1	$ 175	0.11 %
Asian American-owned	18	3,639	2.39
Hispanic American-owned	20	4,614	3.03
Native American-owned	1	500	0.33
Total MBE	40	$ 8,928	5.85 %
WBE (white woman-owned)	84	12,273	8.05
Total MBE/WBE	**124**	**$ 21,202**	**13.90 %**
Majority-owned firms	561	131,296	86.10
Total	**685**	**$ 152,498**	**100.00 %**
OMWBE-certified firms			
African American-owned	1	$ 175	0.11 %
Asian American-owned	4	2,348	1.54
Hispanic American-owned	6	768	0.50
Native American-owned	0	0	0.00
Total MBE	11	$ 3,291	2.16 %
WBE (white woman-owned)	19	6,218	4.08
Total OMWBE-certified	**30**	**$ 9,509**	**6.24 %**
Non-OMWBE	655	142,989	93.76
Total	**685**	**$ 152,498**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Professional services subcontract utilization. Keen Independent examined the utilization of MBEs and WBEs in professional service subcontracts. About $8 million in professional contract dollars went to subconsultants, with less than 1 percent of those dollars going to minority- and woman-owned businesses. Figure 19 presents these results.

- About $732,000 in subcontract dollars went to ten different white woman-owned businesses (16 subcontracts);
- Four different Asian American-owned businesses received about $48,000 in City professional services subcontract dollars (4 subcontracts); and
- One African American-owned businesses received about $19,000 in subcontract dollars (1 subcontract);

As shown in the bottom section of Figure 19, OMWBE certified firms received about 0.2 percent of City professional subcontract dollars.

19. City of Vancouver professional services subcontract dollars going to MBEs and WBEs, 2015–2022

	Number of subcontracts	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	1	$ 19	0.01 %
Asian American-owned	4	48	0.03
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	5	$ 67	0.04 %
WBE (white woman-owned)	16	732	0.46
Total MBE/WBE	**21**	**$ 799**	**0.50 %**
Majority-owned firms	67	6,761	4.22
Total	**88**	**$ 7,560**	**4.72 %**
OMWBE-certified firms			
African American-owned	0	$ 0	0.00 %
Asian American-owned	1	32	0.02
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	1	$ 32	0.02 %
WBE (white woman-owned)	2	236	0.15
Total OMWBE-certified	**3**	**$ 268**	**0.17 %**
Non-OMWBE	85	7,292	4.56
Total	**88**	**$ 7,560**	**4.72 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Goods

MBEs and WBEs were awarded about 4 percent of the City's goods contract dollars. Figure 20 presents these results.

- Four Asian American-owned businesses received about $2 million in City goods contract dollars (7 contracts);
- Seven different Hispanic American-owned businesses received about $1 million in goods contract dollars (26 contracts);
- About $1 million went to 13 different white woman-owned companies (34 contracts).

Of this MBE/WBE utilization, $43,000 went to one OMWBE-certified firm (2 goods contracts).

20. City of Vancouver goods contracts dollars going to MBEs and WBEs, 2015-2022

	Number of procurements	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	0	$ 0	0.00 %
Asian American-owned	7	2,097	1.90
Hispanic American-owned	26	1,426	1.29
Native American-owned	0	0	0.00
Total MBE	33	$ 3,523	3.19 %
WBE (white woman-owned)	34	1,148	1.04
Total MBE/WBE	**67**	**$ 4,672**	**4.23 %**
Majority-owned firms	1,326	105,831	95.77
Total	**1,393**	**$ 110,502**	**100.00 %**
OMWBE-certified firms			
African American-owned	0	$ 0	0.00 %
Asian American-owned	2	43	0.04
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	2	$ 43	0.04 %
WBE (white woman-owned)	0	0	0.00
Total OMWBE-certified	**2**	**$ 43**	**0.04 %**
Non-OMWBE	1,391	110,459	99.96
Total	**1,393**	**$ 110,502**	**100.00 %**

Note: Number of procurements includes contracts and subcontracts.

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Other Services

MBEs and WBEs were awarded 17 percent of City other services contract dollars. Figure 21 presents these results.

- About $8 million went to two different Hispanic American-owned businesses (2 contracts);
- About $8 million went to 19 different white woman-owned companies (37 contracts and subcontracts);
- Five different Asian American-owned businesses received about $687,000 in other services contract dollars (14 contracts and subcontracts); and
- A contract was awarded to an African American-owned business for about $100,000 and to a Native American-owned business for $67,000.

About $14 million went to five different OMWBE certified firms (8 contracts and subcontracts).

21. City of Vancouver other services contracts dollars going to MBEs and WBEs, 2015–2022

	Number of procurements	Dollars (1,000s)	Percent of dollars
Business ownership			
African American-owned	1	$ 100	0.11 %
Asian American-owned	14	687	0.74
Hispanic American-owned	2	7,516	8.07
Native American-owned	1	67	0.07
Total MBE	18	$ 8,369	8.98 %
WBE (white woman-owned)	37	7,506	8.06
Total MBE/WBE	**55**	**$ 15,875**	**17.04 %**
Majority-owned firms	600	77,276	82.96
Total	**655**	**$ 93,151**	**100.00 %**
OMWBE-certified firms			
African American-owned	0	$ 0	0.00 %
Asian American-owned	0	0	0.00
Hispanic American-owned	1	7,490	8.04
Native American-owned	1	67	0.07
Total MBE	2	$ 7,556	8.11 %
WBE (white woman-owned)	6	6,266	6.73
Total OMWBE-certified	**8**	**$ 13,823**	**14.84 %**
Non-OMWBE	647	79,328	85.16
Total	**655**	**$ 93,151**	**100.00 %**

Note: Number of procurements includes contracts and subcontracts.

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Small Business Utilization

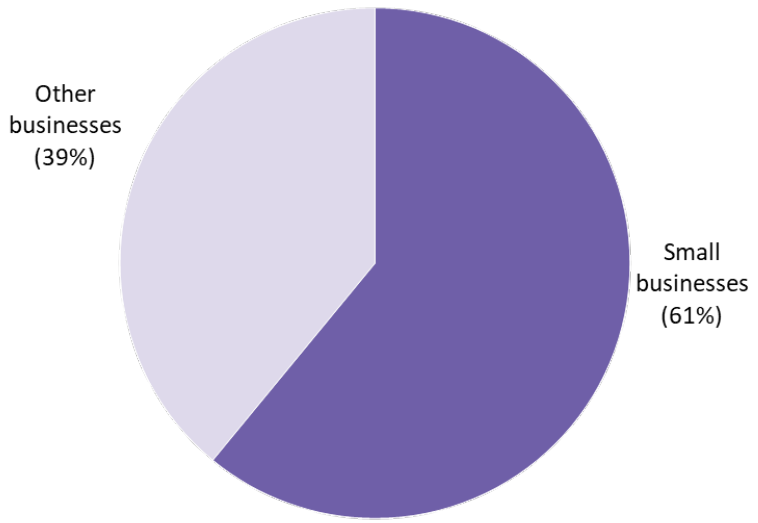
Keen Independent also evaluated small business participation in City contracts and subcontracts. The study team classified businesses as small according to the U.S. Small Business Administration's size standards using revenue data available from Dun & Bradstreet and responses to the 2024 availability survey, as well as certification data from directories and ownership sources detailed in Appendix B.

As shown in Figure 22, 61 percent of City contract dollars went to small businesses.

Keen Independent also researched the share of dollars going to small businesses by industry:

- About 60 percent of City construction dollars overall went to small businesses (76 percent of construction subcontract dollars went to small businesses).
- For professional services, about 57 percent of contract dollars went to small businesses.
- About 68 percent of City dollars for good purchases went to small businesses (after excluding types of purchases typically made from national markets).
- About 63 percent of contract dollars for other services purchases went to small businesses.

22. City of Vancouver contract dollars going to small businesses, 2015–2022



Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Disparity studies compare the actual utilization of MBE/WBEs to what would be expected based on the availability of firms to perform that work. Keen Independent conducted a survey of businesses in the regional market areas to identify companies indicating that they were qualified and interested (ready, willing and able) to work on City of Vancouver contracts and subcontracts. The survey asked about the types of work performed, sizes of contracts they bid and the ownership of the firm. Figure 23 outlines the steps to completing the survey.

Methodology

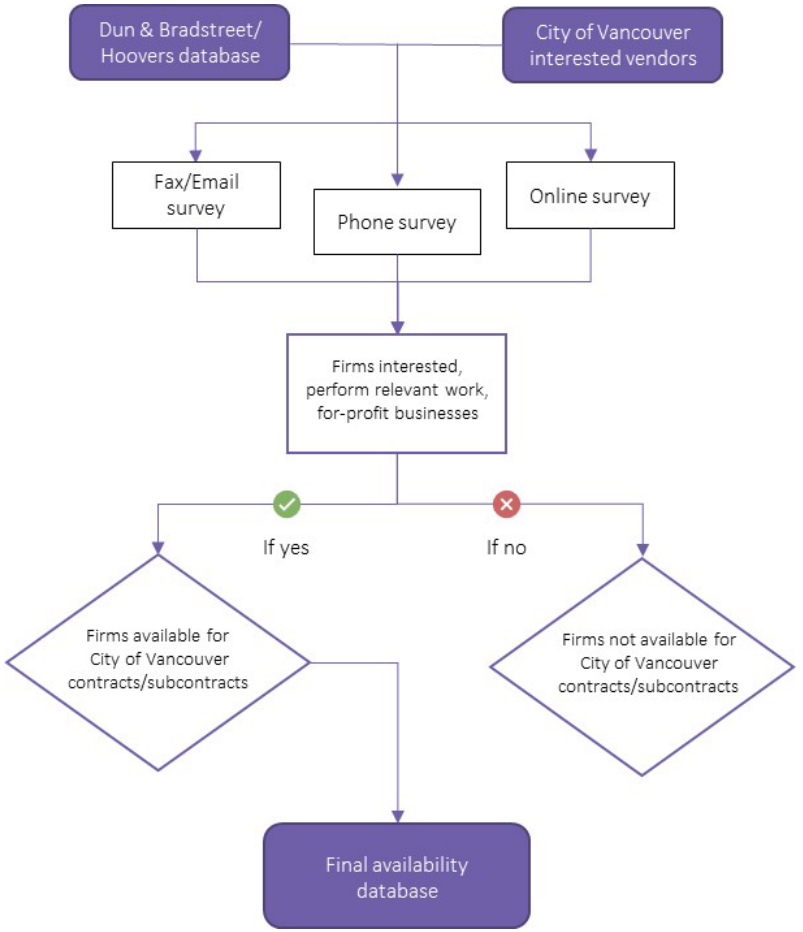
List of firms to be surveyed. In addition to a City of Vancouver list of firms that had previously expressed interest in bidding on its contracts, Keen Independent compiled a list of firms to be contacted in the availability survey from the Dun & Bradstreet (D&B) Hoover's business establishment database.

Use of D&B information has been accepted and approved by federal courts in connection with disparity study methodology. The study team obtained listings for companies that D&B identified as:

- Having a location in the Portland-Vancouver-Hillsboro, OR-WA MSA and performing construction, professional services and other services or that the study team determined were potentially related to work frequently purchased by the City; and
- Having a location in the Portland-Vancouver metro area plus the counties of Cowlitz, Kittitas, Pierce, Yakima, Thurston and Lewis in Washington and providing goods that the study team determined were potentially related to goods frequently purchased by the City.

About 19,000 business establishments were on this initial list. Only some of these businesses were successfully contacted and expressed qualifications and interest in City contracts or subcontracts, as described in the following pages.

23. Availability survey process



Availability surveys. The study team conducted telephone surveys with business owners and managers of businesses on the combined City of Vancouver interested firms list and D&B list. Customer Research International (CRI) performed the surveys under Keen Independent's direction. Surveys were completed in January 2024.

Survey execution. CRI used the following steps to complete telephone surveys with business establishments.

- CRI contacted firms by telephone.[32]
- Interviewers indicated that the calls were made on behalf of City of Vancouver to gather information about companies interested in performing work for the City of Vancouver.
- Some firms indicated in the phone calls that they did not perform relevant work or had no interest in City of Vancouver work, so no further survey questions were necessary. (Such surveys were treated as complete at that point.)
- When a business was unable to conduct the interview in English, the study team called back with a bilingual interviewer (English/Spanish) to collect basic information. Keen Independent followed up with these firms with a bilingual interviewer (English/Spanish) to offer the option of filling out a written version of the full survey (in English).
- Up to six phone calls were made at different times of day and days of the week to attempt to reach each company.

Information collected. Survey questions covered topics including:

- Types of work performed or goods supplied;
- Qualifications and interest in performing work or supplying goods for the City of Vancouver;
- Qualifications and interest in performing work as a prime contractor and/or as a subcontractor;
- Largest prime contract or subcontract bid on or performed in the Portland-Vancouver metro area (for construction, professional services and other services) and in the Pacific Northwest (for goods) in the past ten years;
- Year of establishment; and
- Race/ethnicity and gender of firm owners.

Screening firms for the availability database. Keen Independent considered businesses to be potentially available for certain types of City of Vancouver contracts or subcontracts if they reported possessing all of the following characteristics:

- Were a private business;
- Performed work relevant to public sector contracts; and
- Reported qualifications and interest in work with City of Vancouver and indicated whether they were qualified and interested in prime contracts or subcontracts or both.

[32] The study team offered business representatives the option of completing surveys via fax or email if they preferred not to complete surveys via telephone.

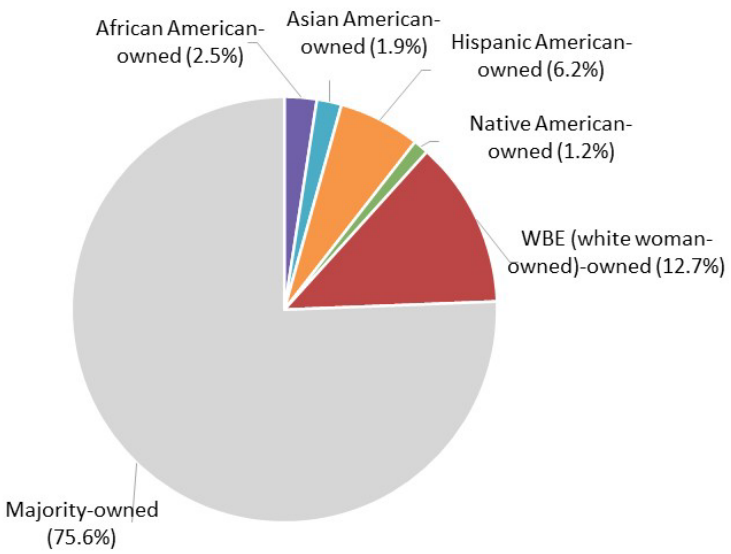
Availability Survey Results

The study team successfully contacted 5,141 businesses in this survey, or 31 percent of the 19,365 firms that were called which had working phone numbers. Most of those businesses did not indicate interest or qualifications in performing work for City of Vancouver. The following results are for those firms that did indicate qualifications and interest.

- In total, about 12 percent of Portland-Vancouver metro area [33] firms available for City of Vancouver contracts were owned by people of color; and
- About 13 percent of qualified and interested businesses were white woman-owned.

Appendix C presents information about survey response rates, confidence intervals and analysis of any differences in response rates between groups. It also provides a copy of the survey instrument.

24. Number of businesses included in the availability database, 2024



Note: Percentages may not add to totals due to rounding.
Source: Keen Independent Research 2024 availability survey.

[33] Keen Independent considers the relevant geographic market area for this study to be the Portland-Vancouver metro area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts.

Methodology for Developing Dollar-Weighted Availability Benchmarks

Although MBE/WBEs comprise a large share of total firms available for City work, there are industry specializations in which there are relatively few minority- and woman-owned firms. Also, the study team found that minority- and woman-owned firms are less likely than other companies to be available for the largest City contracts.

Keen Independent conducted a contract-by-contract availability analysis based on the specific types and sizes of City contracts and subcontracts for January 2015 through December 2022 and dollar-weighted those results.

- The study team used the availability database developed in this study, including information about the type of work a firm performed, the size of contracts or subcontracts it bid, and the race, ethnicity and gender of its ownership.
- To determine availability for a contract or subcontract, Keen Independent first identified and counted the firms indicating that they performed that type of work of that size.
- The study team then calculated the MBE and WBE share of firms available for that contract (by race/ethnic group).
- Once availability had been determined for every City contract and subcontract, Keen Independent weighted the availability results based on the share of total City contract dollars that each contract represented.

Figure 25 provides an example of this dollar-weighted analysis. Appendix C further discusses these methods.

25. Example of an availability calculation for a City contract

One of the subcontracts examined was for plumbing and HVAC work ($96,168) on a 2022 contract. To determine the number of MBE/WBEs and majority-owned firms available for that subcontract, the study team identified businesses in the availability database that:

a. Were in business in 2022;

b. Indicated that they performed plumbing and HVAC work;

c. Indicated qualifications and interest in such subcontracts; and

d. Reported bidding on work of similar or greater size in the past 10 years in the market area.

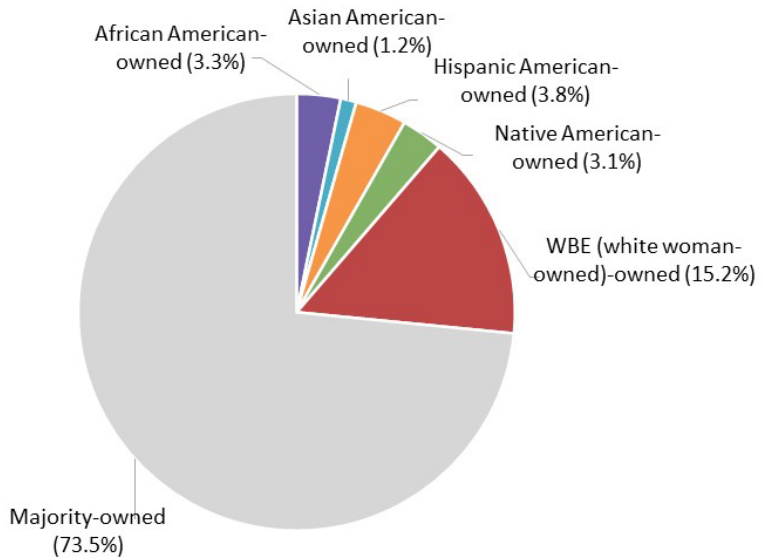
There were 55 businesses in the availability database that met those criteria. Of those businesses, 10 were MBE/WBEs. Therefore, MBE/WBE availability for the subcontract was about 18.1 percent (10/55 = 18. 1%).

The contract weight was $96,168 ÷ 687 million = 0.01% (equal to its share of total procurement dollars). Keen Independent made this calculation for each prime contract and subcontract and then summed the results.

Dollar-Weighted Availability Results

After performing the availability analysis described on the previous page, Keen Independent determined that about 27 percent of City contract dollars might be expected to have gone to MBEs and WBEs during the 2015–2022 study period if there were a level playing field for those companies. (See Figure 26.)

26. Dollar-weighted availability for City of Vancouver contracts



Note: Percentages may not add to totals due to rounding.

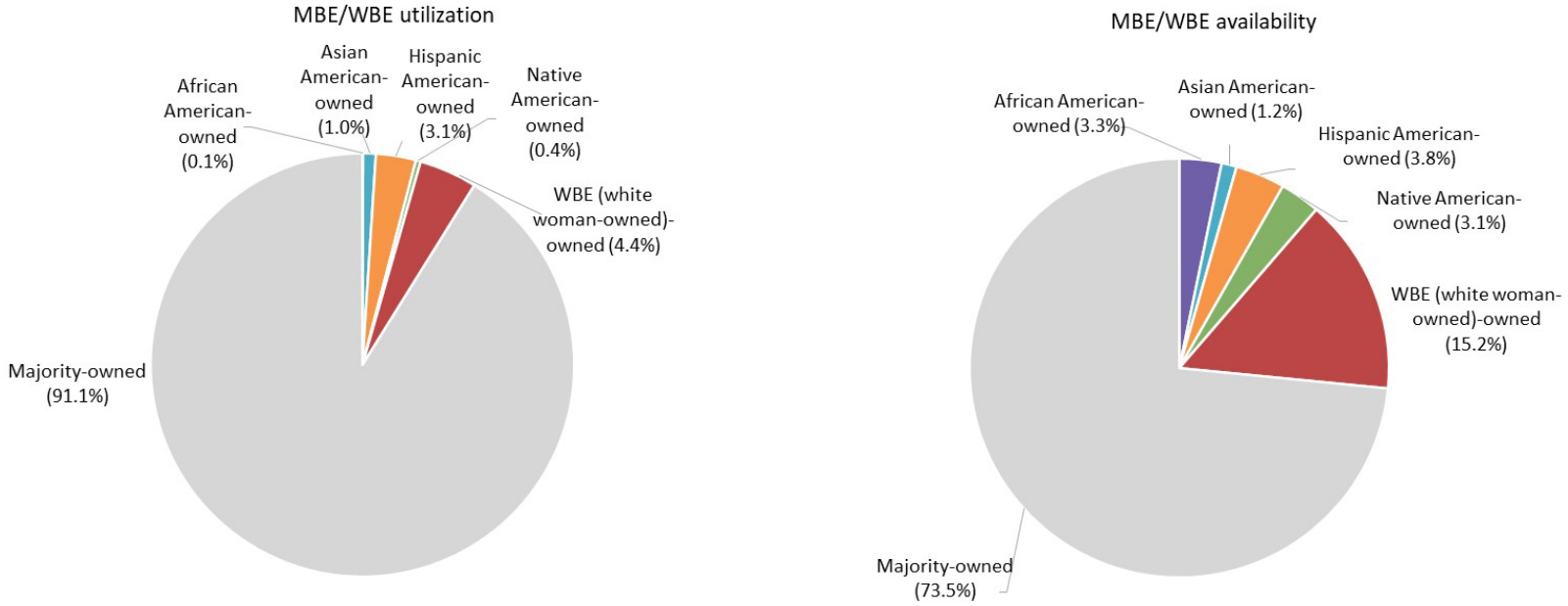
Source: Keen Independent Research 2024 availability survey and analysis of City of Vancouver contracts (2015–2022).

Comparing Overall MBE/WBE Utilization and Availability

Disparity analyses compare the share of contract dollars going to MBE/WBEs with the dollar-weighted availability benchmarks described in previous pages.

As shown in Figure 27, the share of City of Vancouver contract dollars going to minority- and woman-owned firms (8.9%) was 18 percentage points less than what might be expected based on the analysis of firms available to perform specific types and sizes of City contracts and subcontracts (26.6%). 0

27. Utilization and availability of MBE/WBEs for City of Vancouver contracts, 2015–2022



Source: Keen Independent Research 2024 availability survey and analysis of City of Vancouver contracts (2015–2022).

Disparity Analysis by Group

Figure 28 compares utilization and availability for each MBE group and for white woman-owned firms. For January 1, 2015, through December 31, 2022, City procurements, utilization was below availability benchmarks for African American-, Asian American-, Hispanic American-, Native American- and white woman-owned businesses.

Following relevant court decisions, Keen Independent calculated disparity indices to compare utilization and availability.

- A disparity index is calculated by dividing utilization by availability and multiplying by 100, where a value of "100" equals parity.
- An index of less than 80 is described as "substantial."

Each of the comparisons of utilization and availability for African American-, Hispanic American-, Native American- and white woman-owned businesses generated a disparity index below 80, which was therefore substantial. Hispanic American-owned businesses had a disparity index that was below 80 (rounded up to 80 after removing the decimal point).

The following pages show that substantial disparities are evident for African American-, Hispanic American and white woman-owned firms for each study industry and when examining both construction and professional services prime contracts and subcontracts. Except for the other services industry, this was also true for Native American-owned firms.

There were substantial disparities for Asian American-owned firms for some industries and not for others, as explained in the following pages.

28. Utilization and availability of MBE/WBEs for City of Vancouver contracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.05 %	3.25 %	1
Asian American-owned	0.97	1.17	84
Hispanic American-owned	3.05	3.82	80
Native American-owned	0.37	3.10	12
Total MBE	4.44 %	11.34 %	39
WBE (white woman-owned)	4.43	15.21	29
Total MBE/WBE	**8.87 %**	**26.55 %**	**33**
Majority-owned	91.13	73.45	124
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent Research 2024 availability survey and analysis of City of Vancouver procurements 2015–2022.

Disparity Analysis by Industry

Keen Independent calculated the utilization, weighted availability and disparity indices for City procurements by study industry.

Construction disparity analysis. Figure 29 compares utilization and availability for each MBE group and for white woman-owned firms for City construction contracts:

- Overall utilization of MBE/WBEs was below what might be expected from the availability analysis. The disparity index for MBE/WBEs was 21 (a substantial disparity).
- Utilization was substantially lower than availability for African American-, Asian American-, Native American- and white woman-owned businesses.
- Utilization exceeded availability for Hispanic American-owned businesses.

29. Disparity analysis for City of Vancouver construction contracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.01 %	2.16 %	1
Asian American-owned	0.07	1.44	5
Hispanic American-owned	2.29	1.51	151
Native American-owned	0.61	5.52	11
Total MBE	2.98 %	10.64 %	28
WBE (white woman-owned)	2.72	16.12	17
Total MBE/WBE	**5.70 %**	**26.76 %**	**21**
Majority-owned	94.30	73.24	129
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

City of Vancouver construction prime contracts. Figure 30 examines utilization and availability for City construction prime contracts.

- Prime contract utilization was below availability for businesses owned by African Americans, Asian Americans, Native Americans and white women. Each of these disparities was substantial (disparity indices less than 80).
- Utilization was higher than availability for Hispanic American-owned businesses for City construction prime contracts.

30. Disparity analysis for City of Vancouver construction prime contracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.00 %	1.86 %	0
Asian American-owned	0.03	1.35	2
Hispanic American-owned	1.77	0.50	200+
Native American-owned	0.70	6.78	10
Total MBE	2.50 %	10.50 %	24
WBE (white woman-owned)	1.01	16.08	6
Total MBE/WBE	**3.51 %**	**26.58 %**	**13**
Majority-owned	96.49	73.42	131
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

City of Vancouver construction subcontracts. Figure 31 examines utilization and availability for City construction subcontracts.

- For City construction subcontracts, there was a substantial disparity between the utilization and availability of businesses owned by African Americans, Asian Americans, Native Americans and white women.
- Utilization was less than availability for Hispanic American-owned businesses as subcontractors on City construction contracts, but the disparity was not substantial (disparity index of 92).

31. Disparity analysis for City of Vancouver construction subcontracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.04 %	2.83 %	1
Asian American-owned	0.15	1.65	9
Hispanic American-owned	3.44	3.75	92
Native American-owned	0.41	2.73	15
Total MBE	4.04 %	10.95 %	37
WBE (white woman-owned)	6.50	16.20	40
Total MBE/WBE	**10.54 %**	**27.15 %**	**39**
Majority-owned	89.46	72.85	123
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

Professional services disparity analysis. Keen Independent compared the utilization and availability of MBEs and WBEs for City professional services contracts.

- Utilization of MBE/WBEs for City professional services contracts was about 14 percent. Availability of MBE/WBEs was higher, at about 20 percent. The disparity index for MBE/WBEs together was 70 (a substantial disparity).
- Utilization was less than availability for African American-, Hispanic American-, Native American- and white woman-owned businesses. These disparities were substantial for each of these groups.
- Utilization (2.3%) was higher than availability (0.4%) for Asian American-owned businesses for City professional services contracts.

32. Disparity analysis for City of Vancouver professional services contracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.12 %	0.42 %	29
Asian American-owned	2.30	0.43	200+
Hispanic American-owned	2.88	5.56	52
Native American-owned	0.31	1.58	20
Total MBE	5.62 %	7.99 %	70
WBE (white woman-owned)	8.13	11.76	69
Total MBE/WBE	**13.75 %**	**19.74 %**	**70**
Majority-owned	86.25	80.26	107
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

City of Vancouver professional services prime contracts. Figure 33 examines utilization and availability for City professional services prime contracts.

- For City professional services, prime contract utilization was below availability for businesses owned by African Americans, Hispanic Americans, Native Americans and white women. Each of these disparities was substantial.
- Utilization was higher than availability for Asian American-owned businesses.

33. Disparity analysis for City of Vancouver professional services prime contracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.11 %	0.26 %	44
Asian American-owned	2.39	0.39	200+
Hispanic American-owned	3.03	5.55	55
Native American-owned	0.33	1.55	21
Total MBE	5.85 %	7.74 %	76
WBE (white woman-owned)	8.05	11.83	68
Total MBE/WBE	**13.90 %**	**19.57 %**	**71**
Majority-owned	86.10	80.43	107
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

City of Vancouver professional services subcontracts. Figure 34 examines utilization and availability as subconsultants on City professional services contracts.

For City professional services, subcontract utilization was below availability for African American-, Asian American-, Hispanic American-, Native American- and white woman-owned firms. Each disparity was substantial.

34. Disparity analysis for City of Vancouver professional services subcontracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.01 %	3.56 %	0
Asian American-owned	0.03	1.29	2
Hispanic American-owned	0.00	5.76	0
Native American-owned	0.00	2.34	0
Total MBE	0.04 %	12.94 %	0
WBE (white woman-owned)	0.46	10.32	4
Total MBE/WBE	**0.50 %**	**23.26 %**	**2**
Majority-owned	99.50	76.74	130
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

Goods disparity analysis. Figure 35 presents disparity results for City goods contracts for the 2015–2022 study period.

- Utilization was substantially below availability for African American-, Hispanic American-, Native American- and white woman-owned businesses.
- Utilization (1.9%) was higher than availability (0.9%) for Asian American-owned businesses.

35. Disparity analysis for City of Vancouver goods contracts, 2017–2022

	Utilization	Availability	Disparity index
African American-owned	0.00 %	2.32 %	0
Asian American-owned	1.90	0.93	200+
Hispanic American-owned	1.29	2.00	65
Native American-owned	0.00	0.83	0
Total MBE	3.19 %	6.08 %	52
WBE (white woman-owned)	1.04	15.85	7
Total MBE/WBE	**4.23 %**	**21.92 %**	**19**
Majority-owned	95.77	78.08	123
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

Other services disparity analysis. Figure 36 compares utilization and availability for each MBE group and for white woman-owned firms. City procurements for other services:

- Utilization of MBE/WBEs was about 17 percent, about 23 percentage points below availability (43.0%).
- Utilization was below availability for African American-, Asian American-, Hispanic American- and white woman-owned firms. Each disparity was substantial.
- Utilization (0.1%) was higher than availability (0.01%) for Native American-owned businesses. (Note that it is difficult to compare utilization and availability when both results are very small.)

36. Disparity analysis for City of Vancouver other services contracts, 2015–2022

	Utilization	Availability	Disparity index
African American-owned	0.11 %	12.99 %	1
Asian American-owned	0.74	1.74	42
Hispanic American-owned	8.07	11.01	73
Native American-owned	0.07	0.01	200+
Total MBE	8.98 %	25.75 %	35
WBE (white woman-owned)	8.06	17.25	47
Total MBE/WBE	**17.04 %**	**43.00 %**	**40**
Majority-owned	82.96	57.00	146
Total	**100.00 %**	**100.00 %**	

Note: Percentages may not add to totals due to rounding.
Disparity index = 100 × Utilization/Availability.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

Statistical Confidence in Results

Keen Independent conducted additional analyses to assess whether the disparities for MBEs and WBEs could have occurred by chance (whether results are "statistically significant").

Examination of whether chance in sampling could explain any disparities. Keen Independent can reject sampling in the collection of utilization and availability information as a cause for any disparities.

- Keen Independent attempted to compile a complete "population" of City contracts for the study. There was no sampling of City contracts or subcontracts. Using a population of contracts provides statistical confidence in utilization results. Not all subcontracts could be collected as submission of these data was voluntary. However, subcontract data were substantially complete; additional subcontract data would have little-to-no impact on overall study results.

- Keen Independent's availability survey attempted to obtain a population of firms within Portland-Vancouver metro area [34] for City contracts. There was no sampling of firms to be included in the survey since Keen Independent obtained the complete list of firms that Dun & Bradstreet identified as doing business within relevant lines of work (in addition to City lists of interested firms).

- The overall response rate to the availability survey was high (31%) and the confidence interval for MBE/WBE availability is within +/- 1.0 percentage points.

Statistical simulation to examine chance in contract awards. One can be more confident in making certain interpretations from the disparity results if they are not easily replicated by chance in contract awards. Keen Independent performed Monte Carlo simulation to determine whether chance could explain the disparities observed for minority- and woman-owned firms on City contracts.

None of the 10,000 simulations produced utilization equal to or less than the observed utilization for African Americans, Hispanic Americans- and Native Americans-owned firms (combined) and for woman-owned firms. Therefore, one can be confident that the disparities observed for the above groups were not due to chance in contract awards.

It is important to note that this test may not be necessary to establish statistical significance of results. It also may not be appropriate for very small populations of firms. Appendix D provides further discussion. [35]

[34] Keen Independent considers the relevant geographic market area for this study to be the Portland-Vancouver metro area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts.

[35] Even if there were zero utilization of a group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contracts and subcontracts in the analysis. Results can also be affected by the size distribution of contracts and subcontracts.

Conclusions

The totality of quantitative and qualitative information for City contracts and the local marketplace may indicate a need for the City to continue and develop its measures to level the playing field for minority- and woman-owned firms and to promote full opportunities for all MBE/WBEs to do business with the City. The evidence may be consistent with raising an inference of discrimination affecting certain racial and ethnic groups of minority-owned businesses as well as woman-owned businesses in certain industries.

- For City construction contracts, there were substantial disparities for African American-, Asian American-, Native American and white woman-owned firms. These disparities persisted when separately examining prime contracts and subcontracts. There were no disparities for Hispanic American-owned firms for the industry as a whole or for construction prime contracts or subcontracts.
- For City professional services contracts, there were substantial disparities for African American-, Hispanic American-, Native American- and white woman-owned firms. There was a substantial disparity for each of these groups and for Asian American-owned firms for professional services subcontracts.
- For City goods contracts, there were substantial disparities for African American-, Hispanic American-, Native American- and white woman-owned firms.
- For City other services contracts, there were substantial disparities for African American-, Asian American-, Hispanic American-and white women owned. There was no disparity for Native American-owned firms even though utilization was very low.

The City should review all of the results in the disparity study and other information it may have to determine remedial actions to promote minority- and woman-owned businesses to compete for its contracts.

Need for Action

Keen Independent presents remedial actions for City of Vancouver consideration in the following pages. A summary list of these actions is presented below.

37. Summary of remedial actions for City of Vancouver consideration

Remedial actions for City of Vancouver consideration

1. Establish an overall three-year aspirational goal for MBE/WBE goal
2. Devote additional resources to business assistance and relationship-building efforts
3. Promote and participate in regional partnerships
4. Continue to contact MBE/WBEs and other small businesses for bids and proposals on contracts below $50,000
5. Authorize the use of preference points for small businesses competing for publicly advertised contracts
6. Authorize aspirational contract goals program that requires prime contractors to consider MBE/WBEs (or socially and economically disadvantaged firms in general) for subcontract opportunities
7. Track compliance and program success
8. Allocate sufficient resources for program success

1. Overall Three-Year Aspirational MBE/WBE Goal

The City of Vancouver might consider setting an overall annual aspirational goal for participation of MBE/WBEs in its contracts to be achieved over a three-year period. This three-year goal would be purely aspirational and meant to serve as baseline to compare against actual MBE/WBE participation. (The overall MBE/WBE goal is for all MBE/WBEs, including MBE/WBE that are not certified and MBE/WBEs from other states.)

Approach to determining an overall aspirational MBE/WBE goal. How to determine an aspirational goal using multiple sources of information is outlined in regulations regarding the Federal DBE Program for USDOT-funded contracts (in 49 Code of Federal Regulations Part 26). Those regulations suggest setting an overall goal based on:

- Current availability of minority- and woman-owned firms (a combined goal, not disaggregated by group); and
- Other factors such as past utilization of those firms.

City of Vancouver might consider setting an overall goal of 18 percent for MBE/WBE participation, the average of MBE/WBE availability in the marketplace and actual MBE/WBE utilization on City contracts during the study period (a methodology for establishing overall aspirational goals set forth in federal regulations for the Federal DBE Program).

- As discussed previously in this report, the MBE/WBE availability benchmark for City contracts was 27 percent. This availability metric was based on the availability of firms to perform the types and sizes of City prime contracts and subcontracts during the 2015–2022 study period (based on dollar-weighted availability analysis). The metric includes MBEs and WBEs that are certified and non-certified. (This benchmark pertains to contracts included in the study after exclusions, including national market purchases.)
- About 9 percent of City contract and subcontract dollars during the study period went to MBE/WBEs, including MBE/WBE-certified and non-certified firms.
- The average of these two numbers is 18 percent.

The above discussion of an overall aspirational goal includes both certified and non-certified minority- and woman-owned companies. The City would track progress toward achieving the overall aspirational MBE/WBE goal by counting OMWBE certified as well as self-identified minority- and woman-owned firms (those identifying themselves to the City as minority- or woman-owned in their vendor registration).

2. Additional Business Assistance and Relationship-Building

The City currently engages in outreach efforts and provides some business education materials on its procurement website.

Local business community liaison. The City might consider devoting resources to a position dedicated to establishing and maintaining relationships with MBE/WBEs and other small businesses in the Portland-Vancouver metro area, as well as trade organizations, business assistance programs, certifying agencies and other public bodies' business community liaisons. Other entities have established similar positions or offices, including the Equity in Contracting and Workforce Programs Manager for the City of Tacoma.

While the City is engaged in outreach efforts and producing training materials, a local business community liaison could ensure that the City reaches the targeted audience for such efforts and strengthens communications between the City and the local business community.

Outreach and training. The City might take additional steps to assist prime contractors and subcontractors in bidding and performing City contracts.

Training materials. Some of the interviewees in this study recommended that City additional training materials and opportunities for contractors new to bidding on City contracts.

- The City currently has some training materials on its purchasing website but might devote additional resources producing online and printed materials that more comprehensively cover how businesses can navigate the City bidding process.
- Prime contractors in the region might benefit from materials on how to reach MBE/WBEs for contracts with MBE/WBE goals (if enacted) and small businesses could benefit from training on how to formulate a bid or proposal meeting City standards of quality.

Introductions to buyers and prime contractors. The City could participate in regional vendor fairs or hold its own to introduce potential MBE/WBE and other small business bidders to City staff involved in procurement decisions. The City could participate in similar events to introduce potential MBE/WBE and other small subcontractors to prime contractors and consultants that often bid on City contracts.

Additional outreach. The City might engage in additional outreach efforts for diverse businesses and other small businesses to inform firms about upcoming bid opportunities and encourage them to participate in City bids and subcontract opportunities. In some instances, outreach focused on a particular large City project can be effective.

3. Promotion and Participation in Regional Partnerships

Information about the local marketplace indicates that access to capital is a barrier to small businesses in the region, especially MBE/WBEs. The City might also consider assigning financial resources to MBE/WBEs and small businesses so they can compete for City contracts.

The City may consider participating in or creating programs related to:

- Working capital and other loans for small firms working on City projects; and
- A bond guarantee program for small construction firms seeking public sector work.

Examples of working capital and other loan programs. There are several examples of regional or statewide working capital programs across the country that focus on capital needs for business development or construction contractors.

For example, StartUp Washington provides microloans and other loans to small local businesses that might otherwise have difficulty applying for conventional loans in the state.

The Washington State Office of Minority and Women's Business Enterprise (OMWBE) operates the Linked Deposit Program, which allows certified MBE/WBEs to receive an interest rate reduction of up to 2 percentage points when obtaining a loan from a participating lender. The program is not a loan guarantee program, and MBE/WBEs still need to meet the lenders' requirements.

In other states, Wisconsin DOT has operated a working capital loan program since the 1980s. WisDOT provides a loan guarantee and banks issue the loans. DBEs awarded a contract or a subcontract from a WisDOT prime contractor or professional consultant can apply for the loan. Loans can be up to $100,000. The bank evaluates the loan application and makes the final decision on issuing the loan. WisDOT contract or subcontract is used as collateral.

Examples of bonding programs. Bonding is often a significant hurdle for small contractors to compete for public agency work, even relatively small projects. There may be a need for assistance in obtaining bonds for City construction projects. A partnership that includes the City and other regional agencies might be the best way to approach this barrier for some small contractors.

As an example of a bond guarantee program, the Colorado Department of Transportation partnered with Lockton Companies to launch the Bond Assistance Program in July 2019, for construction contracts of $3 million or less. CDOT provides a guarantee of 50 percent.

Firms certified as emerging small businesses, including DBEs, are eligible to participate. A potential participant starts the process by undergoing an assessment of whether it is bondable. A firm can participate in the program on one contract only. The surety fee is 2 percent of the contract, and the ESB must participate in a funds control program with the management company (0.75% fee).

Obtaining bonding through the program also helps a contractor meet CDOT's prequalification requirements to bid on a construction contract. For firms not yet prequalified, it provides proof of bonding. For firms that are prequalified, it can be used to increase the size of contract on which the firm can bid as a prime. Florida DOT has a similar Bond Guarantee Program. There are other examples around the country as well.

4. Direct Contacts to MBE/WBEs and Other Small Businesses for Small Purchases

The City currently reaches out to MBE/WBEs and other small businesses for bids and proposals on contracts below $50,000. The City should continue these efforts.

The City can make such direct requests for bids and proposals even more effective if it continues to build its lists of MBE/WBEs and other small businesses that can bid or propose on specific types of small purchases frequently made by the City.

5. Small Business Enterprise Preference Points

The City of Vancouver might consider establishing a Small Business Enterprise (SBE) evaluation preference, to the extent possible under state law.

Example of program operation. An SBE evaluation preference might be implemented as follows:

- For competitive bids awarded to the lowest bidder, small businesses bidding as prime contractors would receive a preference price reduction of 5 percent of the bid amount. This preference price reduction is for evaluation purposes only as the small business would receive an award at its bid price. (There would be a ceiling on the total dollar value of a preference, for example, not to exceed $50,000 for a single procurement.)

- For competitive proposals, small businesses presenting a proposal as prime contractors would receive an additional 5 percentage point preference.

The City would need to monitor the program, including collecting and analyzing data necessary to evaluate how frequently the price preference is used and makes a difference in contract awards, the size of the preference, and its benefit to minority- and woman-owned firms.

SBE program eligibility. Keen Independent recommends that any City SBE program use the same criteria as applied in federal or state programs.

- Federal regulations in 13 CFR Part 121 set forth small business eligibility for federal programs and preferences, including those related to procurement. The U.S. Small Business Administration periodically updates definitions of what constitutes a small business for firms within each subindustry. The SBA expresses those definitions in terms of annual revenue or sometimes number of employees for the NAICS code of the business.[36] For example, the standard for a small engineering firm at the time of this report was average annual revenue up to $25.5 million.

- The SBA size standards are used when defining a small business in the Federal Disadvantaged Business Enterprise (DBE) Program. Firms in Washington and Oregon can be certified as SBEs under this program. Firms certified as DBEs also meet these SBE criteria.

- The Washington OMWBE uses these and additional criteria when evaluating business size for certification as an MBE, WBE, socially and economically disadvantaged business enterprise (SEDBE) and public works small business enterprise (PWSBE). Any of these types of firms certified by OMWBE would meet the SBA size standards.

  The State of Oregon also certifies small businesses (as Emerging Small Businesses, or ESBs), using revenue limits that are more restrictive than described above. The City might consider recognizing this certification as well in any future City SBE program.

[36] North American Industry Classification System.

6. MBE/WBE Aspirational Contract Goals Program (or Socially Economically Disadvantaged Firms in General)

As another remedial measure to address identified discrimination or other disadvantages for minority- and women-owned firms (and firms owned by other socially and economically disadvantaged individuals), the City should consider an aspirational contract goals program. The program would address underutilization of MBE/WBEs as subcontractors on City construction and professional services projects by requiring prime contractors to reach out to MBE/WBEs and other firms owned by socially and economically disadvantaged individuals for involvement as subcontractors in City projects. It would encourage efforts to provide subcontract opportunities to targeted firms, but not mandate a certain level of participation on these projects.

This report documents the already high participation of small businesses as subcontractors on City construction and professional services contracts. Therefore, a program that would encourage prime contractors to consider SBEs in general as subcontractors would not be an effective remedy for the disparities in their utilization of MBE/WBEs as subcontractors. A program focusing on outreach to MBE/WBE subcontractors (as well as those owned by other socially and economically disadvantaged individuals) appears to be needed.

Therefore, the City should consider an aspirational contract goals program for small businesses owned by people of color or women who have been determined to be social and economically disadvantaged as well as white men who have demonstrated social and economic disadvantage (SEDBEs), as determined by the State of Washington (through OMWBE certification). This program would apply to the City's locally funded contracts (not to federally or state-funded contracts).

The program might include the elements shown to the right.

MBE/WBE/SEDBE aspirational contract goals. The City should consider the following program elements.

- Identifying construction and professional services contracts eligible for MBE/WBE/SEDBE participation (including setting a minimum contract size).
- Setting no goal or a 0 percent goal when appropriate (either insufficient subcontract opportunities or insufficient MBE/WBE/SEDBE availability for those subcontracts).
- Prior to advertising a contract for bid, setting a customized combined MBE/WBE/SEDBE contract goal based on the types and sizes of subcontract opportunities and availability of MBE, WBE and SEDBEs to perform that work (flexible goals depending on the type of project).
- Requiring bidders to provide an *Inclusion Plan* describing bidders' outreach efforts.
- Evaluating the Inclusion Plan (a component of determining whether the bid was responsive).
- Monitoring MBE/WBE/SEDBE utilization throughout the contract.

Inclusion Plan. The MBE/WBE/SEDBE aspirational contract goal program requires bidders to submit, at the time of bid and Inclusion Plan that would contain (a) a description of the efforts made to reach out to eligible, certified MBE/WBE/SEDBE firms for subcontract opportunities; (b) a list of all contractors, consultants and suppliers to be utilized in the contract, including those that are eligible, certified MBEs, WBEs and SEDBEs and the dollar amounts of work committed to those companies; and (c) documentation of those efforts. Documentation of that the bidder has met the aspirational goal for MBE/WBE/SEDBE participation might qualify as satisfying the documentation requirements, with no other information needed.

MBE/WBE/SEDBE program eligibility. If it adopts this program, the City should focus the outreach program to MBEs, WBEs, and SEDBEs certified by a state agency as socially and economically disadvantaged in Washington state or in Oregon that are located within the Portland-Vancouver metropolitan area (see earlier discussion of relevant geographic market area for the disparity study). Appropriate certifications might also include firms certified as disadvantaged business enterprises (DBEs) in Washington state or in Oregon that are located in the Portland-Vancouver metropolitan area.

Not all certified MBE/WBE/DBEs in the local marketplace should automatically be considered eligible. To be narrowly tailored, the City should consider all evidence available to it for each racial, ethnic and gender group for each industry. For example, for the City construction subcontracts examined in this disparity study, utilization was substantially below availability for African American-, Asian American-, Native American- and white woman-owned businesses but not for Hispanic American-owned companies. For professional services, there were substantial disparities as subcontractors for each MBE group and for WBEs. A remedial program might need to focus on those groups of firms for which substantial disparities in City subcontracts were found, potentially excluding other socially and economically disadvantaged firms in Washington and Oregon.

Program compliance. The City would need to monitor compliance with the Inclusion Plan through the life of the project. The City might consider requiring prime contractors to submit reports of payments made to all subcontractors and suppliers involved in eligible City contracts. This may require the purchase of and training concerning contract and subcontract data collection software.

These systems could also be used to monitor prompt payment of subcontractors.

The City would need to identify remedies for any non-compliance as part of its program design, potentially including withholding payments to financial penalties to potential cancellation of the contract.

Further legal review. The City should consult its legal counsel as it considers any remedial program in light of federal and state law. Further, the program cited above are provided as examples, not necessarily templates for a City of Vancouver aspirational contract goals program.

The City may consider reviewing existing MBE/WBE programs implemented in Washington state including the Port of Seattle and City of Tacoma.

7. Tracking Compliance and Program Success

The City might consider developing internal processes and information systems for ongoing tracking of MBE/WBE participation (by racial, ethnic and gender group) for both its contracts and subcontracts.

Comprehensive MBE/WBE participation tracking will require prime contractors to both continue to voluntarily supply ownership information for their own companies, as well as the ownership of their subcontractors.

Tracking of MBE/WBE utilization should include certified and non-certified firms.

Tracking systems. The City may require new or modified contract data tracking software systems that can automate the subcontract payment data collection process. The Washington DOT and City of Tacoma systems provide examples for the City of Vancouver.

Required information. At minimum, the City should ensure that its contract and subcontract tracking systems include the following elements:

- A relational database linking contract, subcontract and other professional agreement identification numbers to invoice identification numbers.
- Contract funding sources (local, state or federal).
- Contract award amount and award date.
- Awarded vendor (with vendor identification number).
- Program elements applied to the contract (aspirational MBE/WBE/City SEDBE goals or other program elements such as targeted outreach, if any).
- If no program applied, reason for non-application (e.g., emergency purchase, cooperative agreement, joinders, no identified subcontract opportunities).
- An indicator for whether the prime contractor subcontracted any element of the contract.

Additionally, some City construction and professional services contracts are of sufficient size that large subcontracts may be subcontracted out to second-tier subcontractors. The City of Vancouver should also prepare to collect and track such information from prime contractors.

8. Allocating Sufficient Resources for Program Success

The remedial actions for City consideration outlined here will require time, resources and staff training to implement and operate. The City will need to make those resources available and plan a multi-year effort for successful implementation. Some of the needs for additional resources are reviewed below.

Program development. Keen Independent has provided a list of recommendations that the City might take into consideration as it develops a comprehensive and robust remedial program. Drafting and enacting authorizing policy may require several months, as will program implementation and administration (including staff training, purchase or modification of existing contract tracking systems and preparing prime contractors for updated procedures on contracts awarded after program authorization).

Communications and outreach. To ensure the success of a remedial program, the City should devote additional resources to communications, direct business outreach and training materials. Some of the business lists Keen Independent developed in this study can help marketing and communications efforts.

Program administration. Sufficient staff positions and staff training will be needed to accommodate the suggested MBE/WBE/SEDBE aspirational contract goals program, including the identification of opportunities for MBE/WBE/SEDBE participation, establishing contract goals and reviewing good faith efforts.

Contract compliance. The City might consider increasing staff and funds to ensure contract compliance, including the management of data systems to track subcontractor payments as well as the review of committed versus actual MBE/WBE/SEDBE participation.

Comprehensive reporting of utilization. The City should develop the information systems for ongoing tracking and at least annual reporting of (a) utilization of certified firms and (b) utilization of minority- and woman-owned firms regardless of certification.

This should include disaggregating results by the specific contracting program, if any, applied to contracts and then monitoring the success of each program. The reporting should be for MBE/WBE**/**SEDBEs overall and by specific racial, ethnic and gender group (as well as for small contracts).

Formal evaluation prior to program sunset/reauthorization. About every five to six years, the City should review the effectiveness of the MBE/WBE/SEDBE program and whether it continues to be needed or should be improved.

In particular, authorization of the aspirational contract goals element of the program (or entire program) would include a sunset date, upon which time the program would discontinue or be reauthorized as a whole or with modifications.

APPENDIX A. Definition of Terms

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

A&E. "A&E" refers to architecture and engineering (i.e., "A&E contracts"). Architectural and engineering services are classified as part of "professional services."

Anecdotal evidence. Anecdotal or "qualitative" evidence includes personal accounts and perceptions of incidents, including any incidents of discrimination, told from each individual interviewee's or participant's perspective.

Apprentice. For this report, an apprentice is a worker who is enrolled in a training program to learn a trade in the construction industry.

Availability analysis. The availability analysis examines the number of minority-, woman- and majority-owned businesses ready, willing and able to perform the specific types of construction, professional services, goods or other services purchased in a local government's contracts.

"Availability" is often expressed as the percentage of contract dollars that might be expected to go to minority- or woman-owned firms based on analysis of the specific type, size and timing of each participating entity prime contract and subcontract and the relative number of minority- and woman-owned firms available for that work.

Bid. A competitive proposal to complete a contract or project.

Bid capacity. A business enterprise's capacity to bid for a contract or project of a certain size.

Bid shopping and manipulation. Bid shopping and manipulation is the unfair practice of coercing or changing bids.

Bond. A bond is a financial assurance that all aspects of the contract will be satisfied. Construction companies are commonly required to present a certain bond amount when bidding for a contract.

Business. A business is a for-profit enterprise, including all its establishments (synonymous with "firm" and "company").

Business establishment. A business establishment (or simply, "establishment") is a place of business with an address and working phone number. One business can have many business establishments in different locations.

Business listing. A business listing is a record in the Dun & Bradstreet (D&B) database (or other database) of business information. A D&B record is a "listing" until the study team determines it to be an actual business establishment with a working phone number.

Certification Office of Business Inclusion and Diversity (COBID). The Certification Office of Business Inclusion and Diversity or "COBID" is the state agency responsible for certification of minority- and woman-owned firms, Disadvantaged Business Enterprises (DBE), Airport Concessions Disadvantaged Business Enterprises (ACDBEs) and Emerging Small Businesses (ESBs) in Oregon. COBID also administers a Service Disabled Veteran (SDV) certification.

Certified MBE or WBE. A firm certified as a minority- or woman-owned business. Without the word "certified" in front of "MBE" or "WBE," Keen Independent is referring to a minority- or woman-owned firm that might or might not be certified as such.

Closed network. Closed networks, such as "good ol' boy" networks, are formal or informal associations that exclude certain firms from participating in bids or contracts.

A. Definition of Terms

Code of Federal Regulations or CFR. Code of Federal Regulations ("CFR") is a codification of the federal agency regulations. An electronic version can be found at www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR

Consultant. A consultant is a business performing professional services contracts.

Contract. A contract is a legally binding agreement between the purchaser and seller of construction, goods or services.

Contract element. As used in this report, a contract element is either a prime contract or subcontract.

Contractor. A contractor is a business performing construction contracts.

Control. Control means exercising management and executive authority for a business.

***Croson* decision.** The U.S. Supreme Court decision that established the standard of strict scrutiny that race-conscious contracting programs must satisfy in order to be constitutional (under the Equal Protection Clause). *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See Appendix L.

Disadvantaged Business Enterprise (DBE). A "DBE" is a firm that is certified as such under federal regulations governing the Federal Disadvantaged Business Enterprise (DBE) Program. A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the federal regulations and guidelines in the Federal DBE Program (49 CFR Part 26) can be certified as a DBE.

Members of certain racial and ethnic groups identified under "minority-owned business enterprise" in this appendix may meet the presumption of social disadvantage. Women are also presumed to be socially disadvantaged.

Examination of economic disadvantage includes considering the three-year average gross revenues and the business owner's personal net worth (at the time of this report, a maximum of $1.32 million excluding equity in the business and primary personal residence) (https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise).

Some minority- and woman-owned businesses do not qualify as DBEs under 49 CFR Part 26, including because of gross revenue or net worth limits.

A business owned by a non-minority male may also be certified as a DBE on a case-by-case basis if the business enterprise meets its burden to show it is owned and controlled by one or more socially and economically disadvantaged individuals according to the requirements in 49 CFR Part 26.

Some local and state governments use the term "DBE" outside of the federal program in connection with their own minority- and woman-owned business programs. (Where necessary, Keen Independent identifies that specific usage of "DBE" in this report.)

Disparity. A disparity is an inequality, difference or gap between an actual outcome and a reference point or benchmark. For example, a difference between an outcome for one racial or ethnic group and an outcome for non-minorities may constitute a disparity.

A. Definition of Terms

Disparity analysis. Disparity analysis compares actual outcomes with what might be expected based on other data. Analysis of whether there is a "disparity" between the utilization and availability of minority- and woman-owned businesses is one tool used to examine whether there is evidence consistent with discrimination.

Disparity index. A disparity index in the context of this study is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected to go to a group given the relative availability of that group for those contracts. For purposes of this study, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100.

A disparity index of 100 indicates "parity" or utilization "on par" with availability. Disparity index figures closer to 0 indicate larger disparities between utilization and availability. For example, the disparity index would be "50" if the utilization of a particular group was 5 percent of contract dollars and one might expect 10 percent of dollars to go to this group based on the availability analysis.

Dun & Bradstreet (D&B). D&B is the leading global provider of lists of business establishments and other business information (see www.dnb.com). Hoovers is the D&B company that provides these lists. Companies are not required to pay to be listed in its database.

Employer firms. Employer firms are firms with paid employees other than the business owner and family members.

Enterprise. An enterprise is an economic unit that is a for-profit business or business establishment, not-for-profit organization or public sector organization.

Establishment. See business establishment.

Federal Disadvantaged Business Enterprise (DBE) Program. Federal DBE Program refers to the Disadvantaged Business Enterprise Program established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. The regulations for the Federal DBE Program are set forth in 49 CFR Part 26, which can be found at http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl.

Federally funded contract. A federally funded contract is any contract or project funded in whole or in part (a dollar or more) with U.S. Department of Transportation, U.S. Environmental Protection Agency, U.S. Department of Housing and Urban Development or other federal financial assistance, including loans.

Firm. See business.

Geographic market area. The geographic market area is the area in which the businesses receiving most of a local government's contracting dollars are located. Counties or functional economic areas (such as metropolitan statistical areas) that group multiple counties are the geographic units used to define these areas. The geographic market area is also referred to as the "local marketplace." The court decisions related to race- and gender-conscious programs discuss disparity analyses in connection with the relevant "geographic market area."

The geographic market area is calculated by examining the share of dollars going to firms in different locations, and often separately determined by industry (such as construction, professional services, goods and other services contracts).

A. Definition of Terms

Goals program. A program in which a public agency sets a percentage goal for participation of DBEs, MBE/WBEs, small businesses or another group on a contract-by-contract basis. These programs typically require that a bidder either meet the participation percentage goal provided for that contract or show good faith efforts to do so as part of its bid or proposal. Sometimes also called a participation goal or contract goal.

Good faith efforts. Those efforts undertaken by a bidder or proposer that show reasonable steps to achieve a contract goal or other program requirement provided in solicitation documents even if the bidder was not fully successful. See 49 CFR Part 26, Appendix A, Guidance on Good Faith Efforts.

"Good ol' boy" network. See closed networks.

Industry. For the purpose of this study, an industry is a broad classification for businesses providing construction, professional services, goods or other services.

Legal framework. Legal framework is the review of relevant case law used as the basis for study methodology.

Local agency. A local agency is any public sector entity that is a political subdivision of the state government.

Majority-owned business. A majority-owned business is a for-profit business that is not owned and controlled by minorities or women (see definition of "minorities" below).

Market area. See geographic market area.

Metropolitan Statistical Area (MSA). Metropolitan statistical areas (MSAs) are geographic areas designated by the U.S. Office of Management and Budget. These areas mark population centers that are economically and socially integrated based on U.S. Census Bureau data. See https://www.census.gov/programs-surveys/metro-micro/about.html

Minorities. Minorities (people of color) are persons who are citizens or lawful permanent residents who belong to one or more of the racial or ethnic groups:

- African Americans are persons having origins in any of the black racial groups of Africa.
- Hispanic Americans include persons having origins of the peoples of Mexico, Puerto Rico, Cuba, Central or South American, regardless of race.
- Asian Americans are persons who have origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent or the Pacific Islands
- Native Americans persons which are American Indians, Eskimos, Aleuts or Native Hawaiians.

Minority-owned business (MBE). An MBE, sometimes referred to as a minority-owned business, is a business that is at least 51 percent owned and controlled by one or more individuals who belong to a minority group. Minority groups in this study include those listed under the definition of minorities above. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business.

Businesses owned by minority women are also counted as MBEs in this study (where that information is available). In this study, "MBE-certified businesses" are those that have been certified by a government agency as a minority-owned company.

A. Definition of Terms

Monte Carlo analysis. A statistical simulation of the probability that the results of a group of events can be explained by random chance in the outcomes of individual events. Keen Independent uses Monte Carlo analysis to examine whether any disparities in utilization of a particular group in an agency's contracts might have occurred by chance in contract and subcontract awards.

Neutral remedy. Actions and measures to foster, assist and increase minority business participation in public contracting, including, but not limited to, removing barriers, opening opportunities, training, outreach and other efforts to assist and strengthen businesses without regard to race, ethnicity, or gender.

Non-response bias. Non-response bias occurs when the observed responses to a survey question differ (in a non-random way) from what would have been obtained if all individuals in a population, including non-respondents, had answered the question.

North American Industry Classification System (NAICS) codes. NAICS codes are the detailed industry sector codes adopted by the U.S. Census Bureau. They provide one way to define industries (such as "construction") when reporting an agency's utilization of firms and the availability of firms. Codes are established at various levels of detail. See http://www.census.gov/epcd/www/naics.html.

Owned. Owned indicates at least 51 percent ownership of a company. For example, a "minority-owned" business is at least 51 percent owned by one or more minorities.

People of color. See definitions under minorities.

Prime consultant. A prime consultant is a professional services firm that performs a prime contract for a client.

Prime contract. A prime contract is a contract between a prime contractor or a prime consultant and a client.

Prime contractor. A prime contractor is a firm that performs a prime contract for a client.

Private sector. Economies of private business enterprises doing work for private clients not doing work for government clients.

Procurement. A direct purchase, consulting agreement, prime contract or other acquisition of construction, professional services, goods or other services. This term is intended to encompass all types of government purchasing and contracting.

Professional services. Professional services are fields in the service sector requiring special training. Some professional services require holding professional licenses such as architects and accountants.

Project. A project refers to a construction and/or professional services endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

Race-and gender-conscious measures. Race- and gender-conscious measures are remedial efforts directed towards MBEs and/or WBEs. An MBE/WBE contract goal is one example of a race- and gender-conscious measure.

Note that the term is a shortened version of "race-, ethnicity-, and gender-conscious measures." For ease of communication, the study team has truncated the term to "race- and gender-conscious measures."

A. Definition of Terms

Race- and gender-neutral measures. Race- and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm 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-up firms, and other methods open to all businesses or any disadvantaged business regardless of race or gender of ownership. A broader list of examples can be found in 49 CFR Section 26.51(b). See Appendix L.

Note that the term is more accurately "race-, ethnicity-, and gender-neutral" measures. For ease of communication, the study team has shortened the term to "race- and gender-neutral measures."

Racial or ethnic minority group. See minorities.

Relevant geographic market area. See geographic market area.

Remedial measure. A remedial measure, sometimes shortened to "remedy," includes a program to address barriers to full participation of minorities or women, or minority- or woman-owned firms or to remedy identified discrimination or disparities in a marketplace, which may be race-, ethnic- or gender-neutral or race, ethnic- or gender-based.

Remedy. See remedial measure.

SBA 8(a). SBA 8(a) is a U.S. Small Business Administration business assistance program for small, disadvantaged businesses owned and controlled by at least 51 percent socially and economically disadvantaged individuals.

Small business. A small business is a business with low revenues or size (based on revenue or number of employees) relative to other businesses in the industry. "Small business" does not necessarily mean that the business is certified as such.

Small Business Administration (SBA). The SBA refers to the United States Small Business Administration, which is an agency of the United States government that assists small businesses.

Small Business Enterprise (SBE). A firm certified as a small business according to the size criteria of the certifying agency.

Stakeholders. Internal and external individuals and groups who have an interest in the study.

State- or locally funded contract. A state-funded contract is any City contract or project that is entirely or partially funded with Washington State funds (and does not use federal funds). A locally funded contract uses City of Vancouver funds but no state or federal funds.

Statistically significant difference. A statistically significant difference refers to a quantitative difference for which there is a high probability that random chance can be rejected as an explanation for the difference. This has applications when analyzing differences based on sample data such as most U.S. Census datasets (could chance in the sampling process for the data explain the difference?), or when simulating an outcome to determine if it can be replicated through chance. Often a 95 percent confidence level is applied as a standard for when chance can reasonably be rejected as a cause for a difference.

Subconsultant. A subconsultant is a professional services firm that performs services for a prime consultant as part of the prime consultant's contract for a client.

A. Definition of Terms

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 the prime contractor's contract for a client.

Subcontract goals program. See "goals program."

Subcontractor. A subcontractor is a firm that performs services for a prime contractor as part of a larger project.

Subindustry. For this study, a specialized component within a broader economic sector such as construction. Electrical work is a subindustry within the construction industry, for example.

Subrecipient. A subrecipient is a local entity receiving financial assistance passed through another agency. For example, if the City of Vancouver uses USDOT funds that flow through the Washington Department of Transportation, it is a subrecipient of those monies.

Substantial disparity. Several courts have held that a "substantial disparity" is one where the disparity index is less than "80," which indicates evidence or inferences of discrimination affecting the outcome being examined.

Supplier. A supplier is a firm that sells supplies to a prime contractor as part of a larger project (or in some cases sells supplies directly to the public agency).

Trade associations. Organizations that provide business assistance or representation for businesses and workers. Chambers of commerce and professional associations are examples of organizations grouped as "trade associations" in this study.

United States Environmental Protection Agency (EPA). In addition to administering federal regulations regarding environmental protection, the EPA provides funds that support state and local infrastructure projects and other contracts. The EPA has certain requirements regarding participation of minority- and female-owned businesses, small businesses and other targeted businesses in EPA-assisted contracts for construction, equipment, services and supplies.

United States Department of Housing and Urban Development (HUD). HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and female-owned business participation in HUD-funded contracts, as well as participation of project residents in those contracts.

Chapter 15 of the HUD Procurement Handbook 7460.8 Rev.2 identifies required assistance to small and other disadvantaged businesses.

United States Department of Transportation (USDOT). USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration and the Federal Aviation Administration.

Utilization. Utilization refers to the percentage of total contracting dollars of a particular type of work going to a specific group of businesses (for example, MBEs).

Vendor. A vendor is a business that is providing goods or services to a customer.

A. Definition of Terms

WBE. Woman-owned business enterprise. See woman-owned business.

Washington State Office of Minority and Women's Business Enterprises. The Office of Minority and Women's Business Enterprises or "OMWBE" is the state agency responsible for certification of minority- and woman-owned firms, Disadvantaged Business Enterprises (DBE), Airport Concessions Disadvantaged Business Enterprises (ACDBEs) and Small Businesses (ESBs) in Washington.

Woman-owned business (WBE). A WBE is a business that is at least 51 percent owned and controlled by one or more individuals who are non-minority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses unless otherwise specified.

APPENDIX B. City of Vancouver Contract Data — Contract data sources

Keen Independent collected data about City of Vancouver procurements and the firms used as prime contractors and subcontractors on those contracts. The utilization analysis focused on non-federally funded construction, professional services, goods and other services contracts during the January 1, 2015, through December 31, 2022, study period.

From these data, Keen Independent calculated the percentage of contract dollars that went to minority-, woman- and majority-owned businesses. The study team counted certified as well as non-certified minority- and woman-owned businesses when calculating MBE/WBE utilization.

Keen Independent obtained data on City of Vancouver contracts and subcontracts from the following sources:

- City of Vancouver. The City maintains prime contract data including information detailed to the right and on the following page. The City also provided the subcontract data discussed on the next page.
- Washington State Department of Labor and Industries public works project database. Keen Independent obtained information about subcontracts on City construction contracts from the Washington State Department of Labor and Industries (L&I). L&I collects this information from prime contractors.

Keen Independent examined prime contracts and other purchases of $1,000 or more and all available subcontract data, regardless of size.

The study team examined about $687 million of procurements from January 1, 2015, through December 31, 2022.

Contract Data

The City of Vancouver provided the contracts awarded from January 2015 through December 2022. Contract information included:

- Procurement ID;
- Supplier name;
- Description of work;
- Contract amount;
- Amount paid;
- Start date;
- End date; and
- Supplier address.

Purchase Order Data

The City of Vancouver provided purchase order numbers issued from January 2015 through December 2022. Purchase Order data included:

- Purchase order number;
- Supplier name;
- Supplier address;
- Item description;
- Approved date; and
- PO amount.

APPENDIX B. City of Vancouver Contract Data — Contract data sources

Job Order Task Orders

The City of Vancouver also provided information on job order task orders from 2017 through 2022. Job order contract data included:

- Job order number;
- Job order requested date;
- Prime contractor name;
- Subcontractor name;
- Initial value of work;
- Final value of work; and
- Value of work performed (subcontractor).

Request to Sublet Work Forms

The City of Vancouver requests prime contractors to submit a "Request to Sublet Work" on public works contracts. The City of Vancouver provided "Request to Sublet Work" forms for projects awarded from 2021 through 2022. These forms include subcontractor information. Forms included the following data:

- Project name;
- Contract number;
- Date;
- Prime contractor;
- Prime contractor address;
- Subcontractor name;
- Subcontractor address;
- Subcontractor description of work; and
- Subcontractor contract amount.

Hard Copy Contracts and Agreements

The City provided hard copy contracts and agreements for professional services contracts with subcontract opportunities. Data included:

- Procurement ID;
- Procurement date;
- Prime contractor name;
- Prime contractor address;
- Subcontractor name;
- Subcontractor address;
- Subcontractor scope of work; and
- Subcontractor amount.

Washington State Department of Labor and Industries Public Works Database

The City gave Keen Independent access to the Washington State Department of Labor and Industries Public Works Database. Keen Independent obtained subcontract information, including:

- Procurement ID;
- Award date;
- Contract amount;
- Prime contractor name;
- Prime contractor address;
- Subcontractor name;
- Subcontractor address;
- Subcontractor amount intent;
- Subcontractor amount affidavit; and
- Subcontractor tier1 or tier2.

B. City of Vancouver Contract Data — Types of work performed and firm locations

Identification of Types of Work Performed

The study team identified the type of work involved in each contract and subcontract through review of contract work descriptions. Keen Independent also researched firms' websites for information about the types of services those vendors typically provide.

Keen Independent used codes from the federal North American Industry Classification System (NAICS) as well as Standard Industrial Classification System (SIC) for specialized types of work to identify the appropriate subindustry for each type of work.

The study team assigned NAICS and SIC codes to prime contracts and subcontracts based on the following actions:

- Applied algorithms to identify the type of work performed using company name and contract description;
- Examined the primary type of work performed by the firm, as determined through online research and as reported by Dun & Bradstreet (D&B);
- Further analyzed the description of work performed for each of the largest prime contracts (above $500,000) and for all subcontracts;
- Performed further review, especially when the NAICS code information for individual firms obtained through D&B did not appear to match the types of purchases that the City of Vancouver routinely makes (school building construction, for example).

Identification of Most Local Firm Locations

As part of the identification of types of contracts and subcontracts, the study team collected the locations of utilized businesses where local address information was missing in City procurement files.

For all firms, the study team also attempted to identify the company location nearest to Vancouver.

B. City of Vancouver Contract Data — Purchases excluded from the analysis

Exclusions

The study team made certain exclusions of contracts from the data received before preparing a final contract database for the study. Examples include payments to non-businesses and for certain types of work typically purchased from a national market. (This is a standard step in a disparity study.)

Entities that are not businesses were excluded because they do not have "ownership." Such organizations include public sector agencies and not-for-profit entities. Utilities were excluded because they are typically a publicly regulated monopoly with availability limited to one organization for each type of utility service.

Non-business, utilities and other types of exclusions. Exclusions for non-businesses, regulated utilities, travel and other highly specialized procurements included:

- Governments;
- Not-for-profits;
- Educational institutions;
- Utilities;
- Educational services and training;
- Arts, entertainment and recreation;
- Health care services;
- Computer software;
- Finance and insurance;
- Newspapers and other subscriptions; and
- Telecommunications.

Products related to national markets. Keen Independent excluded products typically purchased from national markets. For this study, these exclusions were:

- Computer and computer peripheral equipment;
- Books, periodical and newspapers;
- Medical, dental and hospital equipment; and
- Chemical and allied products.

Exclusions totaled about $221 million for the five-year period.

B. City of Vancouver Contract Data — Ownership of utilized firms

Characteristics of Utilized Firms

For each firm identified as working on a City contract, the study team attempted to collect characteristics of the business and the business owner, including:

- Race/ethnicity; and
- Gender.

The list to the right are examples of sources of information on ownership and whether firms were certified as a minority- or woman-owned businesses.

Ownership data sources included:

- Washington State Office of Minority and Women's Business Enterprises directory;
- State of Oregon Certification Office for Business Inclusion and Diversity directory;
- Small Business Administration;
- Study team availability survey with firm owners and managers;
- Information from previous Keen Independent disparity studies in the region;
- Other review of firm information (e.g., information about ownership on firms' websites);
- Information from Dun & Bradstreet; and
- City of Vancouver staff review.

B. City of Vancouver Contract Data — City of Vancouver review and data limitations

City of Vancouver Review

City of Vancouver staff met with Keen Independent to discuss the approach to data collection, information the study team gathered and preliminary ownership information. Keen Independent reviewed and incorporated feedback throughout the study.

Data Limitations

Limitations concerning procurement data collection include:

- City information on the principal type of work involved in contracts and subcontracts was sometimes imprecise, and company-level data about work performed could span multiple subindustries. This could result in some inaccuracy in the NAICS code assigned to describe the primary work performed or goods supplied in a City contract or subcontract.

- Keen Independent determined race, ethnicity, gender and other ownership information based on many different sources and methods, some of which could be inaccurate.

Based on Keen Independent's experience using these methods in other disparity studies, it does not appear that these limitations would materially affect overall results for the City disparity analyses.

APPENDIX C. Availability Data Collection — Survey methods

Keen Independent collected information from firms about their availability for City of Vancouver contracts through telephone surveys and other methods. Appendix C further explains this process, including:

- Survey methods;
- Business listings;
- NAICS and SIC codes included in the survey;
- Development of the survey instrument;
- Establishments successfully contacted;
- Establishments in the availability database;
- Analysis of potential non-response bias;
- Response reliability;
- Analysis of potential limitations; and
- Survey instrument.

Telephone Surveys

Keen Independent retained Customer Research International (CRI) to conduct surveys with listed businesses.

- Firms were contacted by telephone. CRI made up to six phone calls at different times of day and different days of the week to attempt to reach each company.
- Survey sponsorship. CRI began by saying that the call was made on behalf of City of Vancouver to identify firms interested in working on a wide range of City projects.
- Survey period. Surveys began on December 11, 2023, and CRI completed the survey effort on January 22, 2024.

Other Avenues to Complete a Survey

If a company was not able to complete a survey on the telephone, business owners could request a link to complete the survey online or receive a downloadable version of the survey and return it to CRI.

C. Availability Data Collection — Business listings

Firms contacted in the availability surveys came from two sources:

- Company representatives who had previously identified themselves to the City of Vancouver as interested in learning about future work by being on bidding lists.
- Businesses that Dun & Bradstreet (D&B) identified in certain study-related subindustries in the study area.

Interested Firms Lists

The City of Vancouver provided the following lists:

Bonfire vendor list. Firms registered in Bonfire to receive public contracts notifications from the City.

Municipal Research and Service Center (MRSC) Rosters. Firms can register on the MRSC Roster list. Public agencies like the City of Vancouver can use the MRSC Roster list to contact businesses.

The Bonfire vendor list and the MRSC Rosters included firm name and contact information.

Dun & Bradstreet

The study team obtained a list of firms from Dun & Bradstreet Hoover's database within relevant types of work that had locations in the relevant geographic marketplace.[1] D&B provided phone numbers for these businesses. CRI then contacted them.

D&B's Hoover's affiliate maintains the largest commercially available database of U.S. businesses. The study team used D&B listings to identify firms that might be qualified and interested in doing work for the City of Vancouver. The study team excluded any listings that were government agencies or not-for-profit organizations.

The subindustries to be included in the survey were determined after reviewing City of Vancouver prime contract and subcontract dollars for different types of work. D&B classifies types of work by Standard Industrial Classification (SIC) and North American Industry Classification System (NAICS) (See the Contract and Subcontract Data section of the Summary Report for more information.)

Combining Lists Prior to Survey

Keen Independent attempted to consolidate information when a firm had multiple listings across these data sources. After consolidation, there were 19,365 unique firm listings.

Keen Independent did not draw a sample of those firms for the availability survey; rather, the study team attempted to contact each business identified through telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a "custom census."

Figure C-1 on the next page of this appendix identifies the codes the study team determined were the most related to the contracts and subcontracts examined in the study.

[1] Keen Independent considers the relevant geographic market area for this study to be the Portland-Vancouver metro area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts.

C. Availability Data Collection — NAICS codes included in the survey

C-1. NAICS and SIC codes for D&B availability survey list source

Construction

Public building construction
236220 Commercial and institutional building construction

Road construction
16110205 Resurfacing contractor
16110204 Highway and street paving
237310 Highway, street, and bridge construction

Water and sewer line construction
237110 Water and sewer line and related structures construction

Plumbing and HVAC
238220 Plumbing, heating, and air-conditioning contractors

Electrical work including lighting and signals
17319903 General electrical contractor

Excavation, site prep, grading and drainage
238910 Site preparation contractors

Park, playground and recreational area construction
237990 Other heavy and civil engineering construction

Concrete flatwork (including sidewalk, curb and gutter)
238110 Poured concrete foundation and structure contractors

Roofing
238160 Roofing contractors

Inspection and testing
541350 Building inspection services
541380 Testing laboratories and services

Professional services

Architecture and engineering
541310 Architectural services
541330 Engineering services

Environmental consulting services
541620 Environmental consulting services

Transportation planning
87420410 Transportation planning

Computer system design and IT maintenance
541519 Other computer related services
73790200 Computer related consulting services

Criminal defense services
81110205 Criminal law

Public relations
541820 Public relations agencies
541810 Advertising agencies

Appraisal services
531320 Offices of real estate appraisers

C. Availability Data Collection — NAICS codes included in the survey

C-1. NAICS and SIC codes for D&B availability survey list source (continued)

Goods

Building materials

332311	Prefabricated metal building and component manufacturing
424950	Paint, varnish, and supplies merchant wholesalers
423390	Other construction material merchant wholesalers
327390	Other concrete product manufacturing
327320	Ready-mix concrete manufacturing
332322	Sheet metal work manufacturing
423720	Plumbing and heating equipment and supplies (hydronics) merchant wholesalers
423320	Brick, stone, and related construction material merchant wholesalers
423690	Other electronic parts and equipment merchant wholesalers
423510	Metal service centers and other metal merchant wholesalers

Industrial equipment and supplies

332410	Power boiler and heat exchanger manufacturing
333413	Industrial and commercial fan and blower and air purification equipment manufacturing
332911	Industrial valve manufacturing
335314	Relay and industrial control manufacturing
423840	Industrial supplies merchant wholesalers
423830	Industrial machinery and equipment merchant wholesalers

Electrical equipment

335312	Motor and generator manufacturing
423610	Electrical apparatus and equipment, wiring supplies, and related equipment merchant wholesalers

Construction equipment

423810	Construction and mining (except oil well) machinery and equipment merchant wholesalers

Cars and trucks

55119901	Automobiles, new and used

Vehicle parts and supplies

336211	Motor vehicle body manufacturing
423130	Tire and tube merchant wholesalers
55310107	Truck equipment
423120	Motor vehicle supplies and new parts merchant wholesalers

Fire trucks and engines

50120203	Fire trucks
50870000	Service establishment equipment

Firefighter and police equipment

423490	Other professional equipment and supplies merchant wholesalers
423850	Service establishment equipment and supplies merchant wholesalers

Petroleum and petroleum products

324121	Asphalt paving mixture and block manufacturing
424710	Petroleum bulk stations and terminals
51720000	Petroleum products
424720	Petroleum and petroleum products merchant wholesalers

Small arms and ammunition

332992	Small arms ammunition manufacturing
332994	Small arms, ordnance, and ordnance accessories manufacturing
50990102	Firearms, except sporting
59410202	Firearms

Horticultural materials

424930	Flower, nursery stock, and florists' supplies merchant wholesalers
424910	Farm supplies merchant wholesalers

Farm and garden equipment

333112	Lawn and garden tractor and home lawn and garden equipment
333111	Farm machinery and equipment manufacturing
423820	Farm and garden machinery and equipment merchant wholesalers

C. Availability Data Collection — NAICS codes included in the survey

C-1. NAICS and SIC codes for D&B availability survey list source (continued)

Other services

Staffing services
561312 Executive search services
561320 Temporary help services

Janitorial services
561720 Janitorial services

Waste collection and disposal
562211 Hazardous waste treatment and disposal
562111 Solid waste collection

Landscaping services
561730 Landscaping services

Security guard services
561612 Security guards and patrol services
561621 Security systems services (except locksmiths)

Equipment repair
811210 Electronic and precision equipment repair and maintenance
811310 Commercial and industrial machinery and equipment (except automotive and electronic) repair and maintenance

Vehicle repair and maintenance
811114 Specialized automotive repair

Printing
323111 Commercial printing (except screen and books)

Elevator (inspection, service and repair)
76992501 Elevator: inspection, service and repair

Remediation services
562910 Remediation services

Portable toilet rental
73599904 Portable toilet rental

C. Availability Data Collection — Development of survey instrument

After developing the survey instrument, Keen Independent reviewed it with the City of Vancouver. It is provided at the end of Appendix C.

The study team did not know the race, ethnicity or gender of the business owner when contacting a business establishment. Obtaining that information was a key component of the survey.

Areas of survey questions included:

- Identification of purpose. CRI acknowledged City of Vancouver as the survey sponsor and described its purpose as identifying companies interested in working on a wide variety of projects.
- Verification of correct business name. CRI confirmed that the business reached was the business sought out.
- Contact information. CRI compiled contact information for the establishment and the individual who completed the survey.
- Identification of main lines of business. CRI asked businesses to describe their main line of business. Respondents then selected from a list of the multiple types of work that their firm performed.
- Sole location or multiple locations. CRI asked respondents if their companies had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent then merged responses from multiple locations.)
- Qualifications and interest in future City of Vancouver work. CRI asked about businesses' qualifications and interest in work with public agencies, and for construction and professional services firms, asked whether they were interested in prime contracts and/or subcontracts.
- Largest contracts. CRI asked businesses to identify the dollar range of the largest contract or subcontract on which they had bid or had been awarded during the past ten years.
- Ownership. Businesses were asked if 51 percent of more of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. For companies which identified race/ethnicity as "other," Keen Independent reviewed and assigned the correct classification.
- Business background. CRI asked about the year the firm started, revenue and number of employees.
- Potential barriers in the marketplace. CRI asked questions about potential barriers to starting and expanding a business or achieving success in their industry in the Portland-Vancouver metro area. [2] CRI then asked whether interviewees would be willing to participate in an in-depth interview.
- City of Vancouver apprenticeship program. CRI asked if the City's apprentice labor goals presented a barrier to bid on City's contracts.

[2] Keen Independent considers the relevant geographic market area for this study to be the Portland-Vancouver metro area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts.

C. Availability Data Collection — Establishments successfully contacted

Keen Independent provided CRI a database of 19,365 individual firms for availability surveys (after removing duplicate listings from the data). CRI made up to six attempts to reach each firm (different times and different days of the week).

CRI attempted to interview a company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the survey. Figure C-2 presents the dispositions of the businesses CRI attempted to contact.

- Some listings were non-working or wrong numbers.
- Among the 16,488 firms with working phone numbers, CRI was unable to contact some of them:
  - Some businesses could not be reached after at least six attempts (see "no answer" in Figure C-2).
  - A responsible staff person could not be reached for the survey after repeated attempts.
  - The study team sent email or fax invitations to those who requested to do the survey via fillable PDF or fax, and then followed up with each of these. Some businesses did not complete and return them.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 5,141 businesses or 31 percent of those with working phone numbers. This response rate is consistent with similar availability surveys Keen Independent has performed in other disparity studies in recent years.

C-2. Disposition of attempts to survey business establishments

	Number of firms	Percent of business listings
Beginning list	**19,365**	
Less non-working phone numbers	2,517	
Less wrong number	400	
Firms with working phone numbers	**16,448**	**100 %**
Less no answer	9,946	
Less could not reach appropriate staff member	1,135	
Less unreturned fax/email	209	
Less could not continue in English or Spanish	17	
Firms successfully contacted	**5,141**	**31 %**

Note: Study team made at least six attempts to complete an interview with each establishment.

Source: Keen Independent Research from 2024 Availability Surveys.

C. Availability Data Collection — Establishments in the availability database

Figure C-3 presents the disposition of the 5,141 businesses CRI successfully contacted and how that number resulted in the 693 businesses Keen Independent included in the availability database.

- Establishments not interested in discussing availability for City of Vancouver work. Of the businesses that the study team successfully contacted, 3,917 were not interested in discussing their availability for City of Vancouver work, or reported they were not qualified or interested in work with the City of Vancouver.

  In Keen Independent's experience, those types of responses are often firms that do not perform relevant types of work.

- No longer in business. Some of the survey respondents said that their companies were no longer in business and were not counted as available.

- Do not perform related work. Among the companies indicating that they were qualified and interested, Keen Independent reviewed whether they performed relevant work to City of Vancouver contracts.

- Non-businesses and firms with no local location. Companies indicating that they were not a for-profit business (including non-profits, residences and government agencies) or did not have a firm location in the study area were excluded from the final database.

After those final screening steps, the survey effort produced a database of 693 businesses potentially available for City of Vancouver work.

Note that, when there were multiple responses from a single company, Keen Independent combined those responses into a single, summary data record. Each unique business only appears once in the final availability database.

C-3. Disposition of successfully contacted businesses

	Number of firms
Firms successfully contacted	**5,141**
Less business not interested	3,917
Firms that completed interviews about business characteristics	
Less no longer in business	201
Less don't do related work	42
Less not for-profit businesses	30
Less firms with not locations in the study area	258
Firms included in the availability database	**693**

Note: Study team made up to six attempts to complete an interview with each establishment.

Source: Keen Independent Research from 2024 Availability Surveys.

C. Availability Data Collection — Analysis of potential non-response bias

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;
- Language barriers; and
- Industry differences in reaching respondent.

On the next page of this appendix, Keen Independent compares overall response rates of MBE/WBEs and majority-owned companies.

Research Sponsorship

CRI survey staff introduced themselves by identifying the City of Vancouver as the survey sponsor as businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

Potential Language Barriers

Businesses that only had a Spanish-speaking respondent during an initial call were re-contacted by a Spanish-speaking CRI interviewer. The interviewee was asked if there was anyone available to perform the survey in English. If not, CRI completed a shortened version of the survey with the interviewee. If it appeared that the firm performed work related to City of Vancouver contracts, Keen Independent asked the company if they would like to complete an email or faxed questionnaire (in English). Only one respondent requested a survey. (These additional efforts focused on Spanish-speaking respondents as this was the most common language barrier.)

This approach appeared to eliminate some of the potential language barriers to participating in the availability surveys. Language barriers presented a difficulty in conducting the survey for 17 companies, which was just 0.10 percent of the businesses with working phone numbers.

C. Availability Data Collection — Analysis of potential non-response bias

Industry Differences in Reaching Respondents

There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such differences would not lead to lower or higher availability estimates for MBEs and WBEs than if the study team had been able to successfully reach all firms.

Businesses in highly mobile fields, such as landscaping, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms).

Work specialization as a potential source of non-response bias is minimized because the dollar-weighted availability analysis examines businesses within particular work fields before determining an availability figure. In other words, the potential for landscaping firms to be less likely to complete a survey is encompassed in the availability calculations account because the number of MBE/WBE landscape firms, for example, is compared with the total number of landscape firms when calculating availability for landscaping work. Landscape firms are not compared with engineering firms, for example, in Keen Independent's contract-by-contract availability analysis.

Comparison of Overall Response Rates for MBE/WBEs and Majority-owned Firms

Keen Independent examined whether minority- and woman-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete telephone surveys with MBE/WBEs than with majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that D&B had for firms in the list purchased from this source.

- Based on D&B ownership information, MBE/WBEs were slightly less likely to be successfully contacted than majority-owned firms. D&B-identified MBE/WBE firms were 7 percent of the initial list and 4 percent of successfully surveyed firms.

- Note that D&B records under-identify MBE/WBEs and are not the basis for the availability analysis. (This is also the reason the MBE/WBE percentages shown above are so much lower than found in the availability survey.)

It is possible that there was a lower response rate for MBE/WBEs in this survey that could reduce the estimates of MBE/WBE availability in this study. If so, it would be more difficult to find a disparity for an MBE/WBE group than if response rates were the same.

C. Availability Data Collection — Analysis of potential non-response bias

Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of survey responses in several ways. For example:

- Keen Independent reviewed data from the availability surveys in light of information from other sources. This includes data on the race/ethnicity and gender of the owners of DBE- or MBE/WBE-certified businesses that was compared with survey responses concerning business ownership.
- Keen Independent compared survey responses about the largest contracts that businesses won during the past ten years with actual City of Vancouver contract data.
- For firms indicating a high number of worktypes, the study team reviewed responses.
- Keen Independent reviewed all firms indicating a relatively large bid capacity (indicating contracts bid or awarded of more than $5 million).

C. Availability Data Collection — Analysis of other potential limitations

There are limitations to this approach to collecting availability data.

Using D&B Lists

Keen Independent purchased Dun & Bradstreet business listings for the Portland-Vancouver metro area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts as the starting point for the availability surveys. D&B provides the most comprehensive private database of business listings in the United States. D&B does not require firms to pay a fee to be included — it is completely free (and is separate from its credit rating services). Even so, the database does not include all establishments:

- There can be a lag between formation of a new business and inclusion in D&B listings.
- Because one way for D&B to identify firms is legal filings concerning an entity (such as registering with a Secretary of State or obtaining a business license), any businesses that people operate without being legally registered might not be in D&B's lists.
- Some businesses providing work related to City of Vancouver projects might not be classified in those industries in the D&B data and might not be included in the survey list.
- There were some firms on the list for which D&B did not have phone numbers.

However, there is no other data source available to Keen Independent that is more comprehensive than D&B. There were also other ways firms could complete a survey, including obtaining one from the study website.

Selection of Specific Subindustries

Keen Independent identified specific subindustries primarily using North American Industry Classification System (NAICS) and Standard Industry Codes (SIC) codes build a business list from D&B.

Also, Keen Independent focused on the subindustries that represented the largest area of City of Vancouver spending, including subcontracts. Firms in NAICS codes that represent little spending were not included in Keen Independent's purchase of names from D&B.

Companies Reporting That They Were Not Interested in Discussing City of Vancouver Work

Many firms contacted in the availability survey indicated that they were not interested in City of Vancouver work. This reflects the fact that the study team was necessarily broad when developing the initial lists.

For example, one cannot know based on the D&B data which electrical firms perform public projects and which are focused on residential work. Therefore, Keen Independent acquired a broad list of electrical firms and through surveys identified which firms expressed qualifications and interest in performing electrical work on City of Vancouver projects. Some did not.

There were companies that had actually performed City contracts but responded in the availability survey that they were not interested in discussing their availability for City of Vancouver work. However, these firms accounted for about 5 percent of those responses. These firms were not included in the availability calculations.

C. Availability Data Collection — Analysis of other potential limitations

Not a Count of All Businesses Available for Entity Work

The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of *all* firms available for City of Vancouver contracts that were MBEs or WBEs. Keen Independent did not attempt to develop a list of *every* firm potentially available for *every* type of City of Vancouver procurement. The research appropriately focused on firms in the Portland-Vancouver metro area in subindustries relevant to City of Vancouver work.

- D&B does not capture all firms or have phone numbers for all businesses in its database (discussed previously).
- Firms in subindustries that comprised a small portion of City of Vancouver work were not included in the surveys. Because Keen Independent calculates availability benchmarks on a dollar-weighted basis, inclusion of these firms is not important in developing overall availability results.
- The study team only purchased D&B data for firms in Portland-Vancouver metro area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts, as the study focused on types of purchases primarily made from within the relevant market area, following the court decisions that have considered this issue.
- Not all firms on the list of businesses completed surveys, even after repeated attempts to contact them.

Therefore, the availability analysis did not provide a comprehensive listing of every business that could be available for all types of City of Vancouver work and should not be used in that way.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study. The United States Department of Transportation's (USDOT's) "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.

A copy of the survey instrument for construction follows:

C. Availability Data Collection — Availability survey instrument

Availability Survey for PDF/FAX

The City of Vancouver, Washington is reaching out to companies interested in working on a wide range of construction, professional services, goods and other services contracts. The information developed in these surveys will add to its existing data on companies interested in working with the City.

Survey Instructions

When you have finished the survey, please:

1) Scan completed survey and email to surveys@cri-research.com; or

2) Fax completed survey to 512-353-3696.

If you have any questions, please contact:

Anna Vogel
Procurement Manager
Email: anna.vogel@cityofvancouver.us

(Do not return completed surveys to Anna Vogel.
See instructions above.)

Z5. What is the name of your business?

_____

X5. What would you say is the main line of your company?

_____

A1. Is your company qualified and interested in working with the City of Vancouver?

1=Yes

2=No

98=Don't know

A2. Is your company qualified and interested in working as a prime, as a subcontractor or both?

1=Yes

2=No

3= Both

98=Don't know

C. Availability Data Collection — Availability survey instrument

C1 [VERSION: Construction]. Which of the following types of work does your firm perform related to construction? — Select all that apply.

1= Public building construction

2= Road construction

3= Water and sewer line construction

4 = Plumbing and HVAC

5 = Electrical work including lighting and signals

6 =Excavation, site prep, grading and drainage

7 =Park, playground and recreational area construction

8 = Concrete flatwork (including sidewalk, curb and gutter)

9 = Roofing

10 = Inspection and testing

31 = Architecture and engineering

88=Other [Please specify]

98=(Don’t know)

Contract History

E1. In rough dollar terms, in the past ten years what was the largest contract or subcontract your company was awarded, bid on, or submitted quotes for?

1=$100,000 or less

2=More than $100,000 up to $500,000

3=More than $500,000 up to $1 million

4=More than $1 million up to $5 million

5=More than $5 million up to $10 million

6=More than $10 million

97=(Not applicable)

98=(Don’t know)

Business Ownership

F1. 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 your firm a woman-owned business?

1=Yes

2=No

98=(Don’t know)

F2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is African American, Asian American, Hispanic American, Native American or another minority group. By this definition, is your firm a minority-owned business?

1=Yes

2=No [SKIP TO G1]

98=(Don’t know) [SKIP TO G1]

F3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Hispanic American, Native American or Subcontinent Asian American?

1=African American

(This includes persons having origins in any of the Black racial groups of Africa.)

2=Asian American

(This includes persons who have origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent or the Pacific Islands.)

3=Hispanic American

(This includes 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

(This includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians.)

5=Other group (Please specify): _____

98=(Don't know)

The next questions are about the background of the business.

G1. About what year was your firm established?

_____

98=(Don't know)

G2. Is this the sole location for your business, or do you have offices in other locations?

1= Sole location

2= Have other locations

3= Don't know

G3. Is your company a subsidiary or affiliate of another firm?

1= Independent [SKIP TO G6]

2= Subsidiary or affiliate of another firm

98= Don't know [SKIP TO G6]

G4. What is the name of your parent company?

_____

98=(Don't know)

G6. About how many employees did you have working out of just your location, on average, over the past two years? (This includes employees who work at your location and those who work from your location.)

_____

98=(Don't know)

G8. Think about the annual gross revenue of your company, considering just your location. Please estimate the annual average for the past three years.

1=Up to $1 million

2=More than $1 million up to $2.25 million

3=More than $2.25 million up to $5 million

4=More than $5 million up to $9.5 million

5=More than $9.5 million up to $19 million

7=More than $25.5 million up to $34 million

8=More than $34 million up to $47 million

9=More than $47 million

98=(Don't know)

G9. [SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS] About how many employees did you have, on average, for all of your locations over the past three years?

(Number of employees at all locations should not be fewer than at just your location.)

_____

98=(Don't know)

G10. [SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS] Think about the annual gross revenue of your company, for all your locations. Please estimate the annual average for the past three years.

(Revenue at all locations should not be less than at just your location.)

1=Up to $1 million

2=More than $1 million up to $2.25 million

3=More than $2.25 million up to $5 million

4=More than $5 million up to $9.5 million

5=More than $9.5 million up to $19 million

7=More than $25.5 million up to $34 million

8=More than $34 million up to $47 million

9=More than $47 million

98=(Don't know)

Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion, or with obtaining work. Think about your experiences in the past ten years in the Portland-Vancouver metro area as you answer these questions.

H1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1b. Has your company obtained or tried to obtain a bond for a project or contract?

1=Yes

2=No [SKIP TO H1d]

97=(Does not apply) [SKIP TO H1d]

98=(Don't know) [SKIP TO H1d]

H1c. Has your company had any difficulties obtaining bonds needed for a project or contract?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1d. Have you had any difficulty in being prequalified for work?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1e. Have any insurance requirements on contracts presented a barrier to bidding?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1f. Has the large size of projects or contracts presented a barrier to bidding?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1g. Has your company experienced any difficulties learning about bid or contract opportunities with the City of Vancouver?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1h. Has your company experienced any difficulties learning about bid opportunities in the private sector?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1i. Has your company experienced any difficulties learning about subcontracting opportunities with prime contractors?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1j. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1k. Has your company experienced any difficulties receiving payment from the City of Vancouver in a timely manner?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1l. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1m. Has your company experienced any difficulties receiving payment from other customers in a timely manner?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1n. Has your company experienced any difficulties with brand name specifications or other restrictions on bidding?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1o. Has your company experienced any difficulties obtaining supply or distributorship relationships?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1p. Has your company experienced any competitive disadvantages due to the pricing you get from your suppliers?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1q. Are you familiar with the City's construction apprentice labor hour goals for its construction contracts?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H1r. Would a requirement to use apprentices for 5 percent of the construction labor hours worked for prime contractors and subcontractors present a barrier for your firm to bid or work on City construction contracts of $500,000 or more?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

H2. This is an opportunity for the City to hear directly from members of the business community, like you. What other comments would you like them to hear?

1=Yes [Please provide your thoughts in the box below.]

97=Does not apply

98=(Don't know)

H3. We would like to hear more from you about the local marketplace. Can I mark you as interested in a follow-up interview, participating in a virtual Business Advisory Group session with other business representatives, or both?

1=Follow-up interview

2=BAG discussion

3=Both

4=Neither

97=(Does not apply)

98=(Don’t know)

C. Availability Data Collection — Availability survey instrument

I1. Just a few last questions. What is your full name?

_____

I2. What is your position at the firm?

1=President

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=Receptionist

88=Other (Please specify): _____

I4. What mailing address could the City use to contact you?

_____

_____

_____

_____

I5P. What phone number could the City use to contact you?

_____

I6. What e-mail address could they use to contact you?

_____

Survey instructions

When you have finished the survey, please: 1) Scan completed survey and email to surveys@cri-research.com; or 2) Fax completed survey to 512-353-3696.

Thank you for your time. This is very helpful for the City of Vancouver.

APPENDIX D. Additional Utilization and Disparity Analyses for City of Vancouver Contracts

Appendix D provides supporting information to the utilization and disparity analyses presented in the Summary Report.

It includes results for:

- Utilization by time period;
- Utilization by size of procurement;
- Overconcentration analysis;
- Background on calculating disparity indices; and
- Statistical significance of disparities in City of Vancouver contracts.

D. Additional Utilization and Disparity Analyses — Trends during study period

Keen Independent analyzed whether overall MBE/WBE participation changed before (2015-2019) and after the COVID-19 pandemic (2020-2022).

Changes in Overall MBE/WBE Participation

MBE/WBEs obtained 8 percent of City contract dollars from 2015 through 2019. MBE/WBE utilization increased to 11 percent for the 2020 through 2022 period. Figure D-1 shows these results.

Changes in Participation by Group

The increase in MBE/WBE participation during and immediately after the COVID-19 pandemic was largely due to an increase in the participation of white woman-owned firms in City contracts. Utilization for this group was 3 percent of City of Vancouver contract dollars from 2015 through 2019. For 2020 through 2022, white woman-owned firms obtained about 7 percent of contract dollars.

Utilization of Asian American-owned firms increased 0.6 percentage points between 2015–2019 and 2020–2022.

Utilization of Hispanic American-owned firms slightly decreased from 3.3 percent for 2015–2019 to 2.7 percent for 2020–2022.

Figure D-1 presents these results as well.

D. Additional Utilization and Disparity Analyses — Trends during study period

D-1. City of Vancouver contract dollars January 2015–December 2020 and January 2020–December 2022

	2015-2019			2020-2022		
	Number of procurements	Dollars (1,000s)	Percent of dollars	Number of procurements	Dollars (1,000s)	Percent of dollars
Business ownership						
African American-owned	6	$ 144	0.04 %	4	$ 187	0.07 %
Asian American-owned	22	3,001	0.74	27	3,691	1.30
Hispanic American-owned	66	13,363	3.31	52	7,615	2.68
Native American-owned	48	1,595	0.40	23	936	0.33
Total MBE	142	$ 18,103	4.49 %	106	$ 12,429	4.37 %
WBE (white woman-owned)	244	11,955	2.96	149	18,515	6.52
Total MBE/WBE	**386**	**$ 30,058**	**7.45 %**	**255**	**$ 30,944**	**10.89 %**
Majority-owned firms	3,454	373,188	92.55	1,526	253,162	89.11
Total	**3,840**	**$ 403,246**	**100.00 %**	**1,781**	**$ 284,106**	**100.00 %**
OMWBE-certified firms						
African American-owned	0	$ 0	0.00 %	2	$ 180	0.06 %
Asian American-owned	4	378	0.09	7	2,105	0.74
Hispanic American-owned	18	10,773	2.67	12	535	0.19
Native American-owned	15	942	0.23	7	867	0.31
Total MBE	37	$ 12,093	3.00 %	28	$ 3,686	1.30 %
WBE (white woman-owned)	27	3,197	0.79	37	12,372	4.35
Total certified	**64**	**$ 15,290**	**3.79 %**	**65**	**$ 16,058**	**5.65 %**
Non-OMWBE	3,776	387,956	96.21	1,716	268,048	94.35
Total	**3,840**	**$ 403,246**	**100.00 %**	**1,781**	**$ 284,106**	**100.00 %**

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

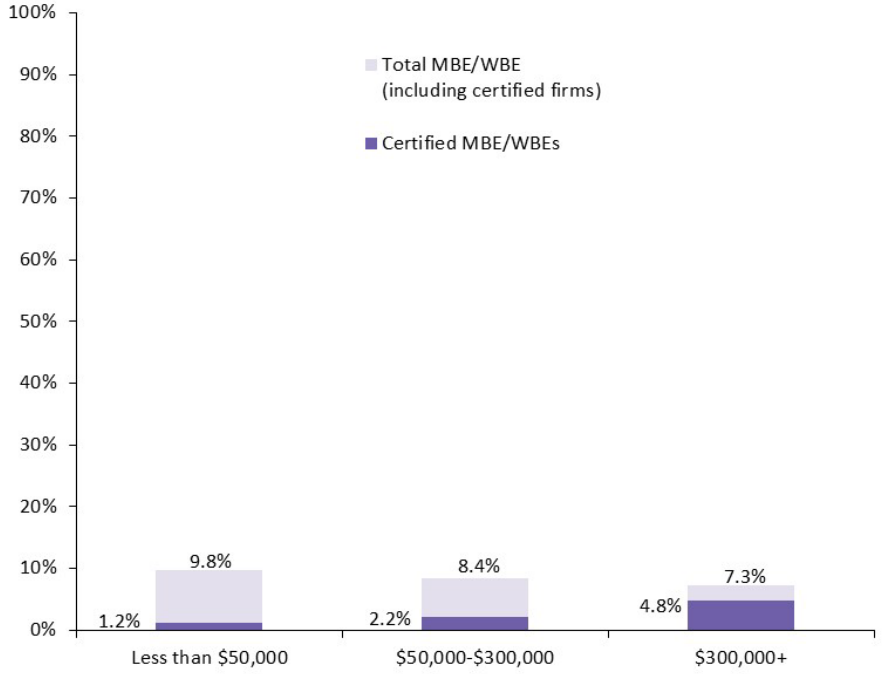
D. Additional Utilization and Disparity Analyses — Prime contracts by size of procurement

Keen Independent examined overall MBE/WBE as well as certified firm participation as prime contractors and consultants in different sizes of City of Vancouver contracts. The study team reviewed the share of City contract dollars going to MBE/WBEs for the following contract size ranges: those less than $50,000, between $50,000 and $300,000, and $300,000 and above. (These data do not include subcontracts.)

As shown in Figure D-2:

- MBE/WBE utilization was highest for contracts less than $50,000 (10%). Certified firms accounted for 1 percentage points of that 10 percent overall MBE/WBE participation.
- MBE/WBE participation as prime contractors and vendors was 8 percent for contracts between $50,000 and $300,000. Certified firms accounted for about one-fourth of total MBE/WBE utilization on these contracts.
- For purchases of $300,000 or more, MBE/WBE utilization was about 7 percent. Certified firms accounted for 5 percentage points of that participation.

D-2. MBE/WBE and certified MBE/WBE share of City of Vancouver contract dollars by contract size, 2015–2022 (not including subcontracts)



Note: Number of procurements analyzed is 2,402 for prime contracts under $50,000, 780 for contracts between $50,000 and $300,000, and 382 for procurements over $300,000.

Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

D. Additional Utilization and Disparity Analyses — Concentration analysis

Keen Independent analyzed whether MBE/WBEs were concentrated in certain areas of work. Keen Independent examined the representation of MBE/WBEs and work going to MBE/WBEs in two ways:

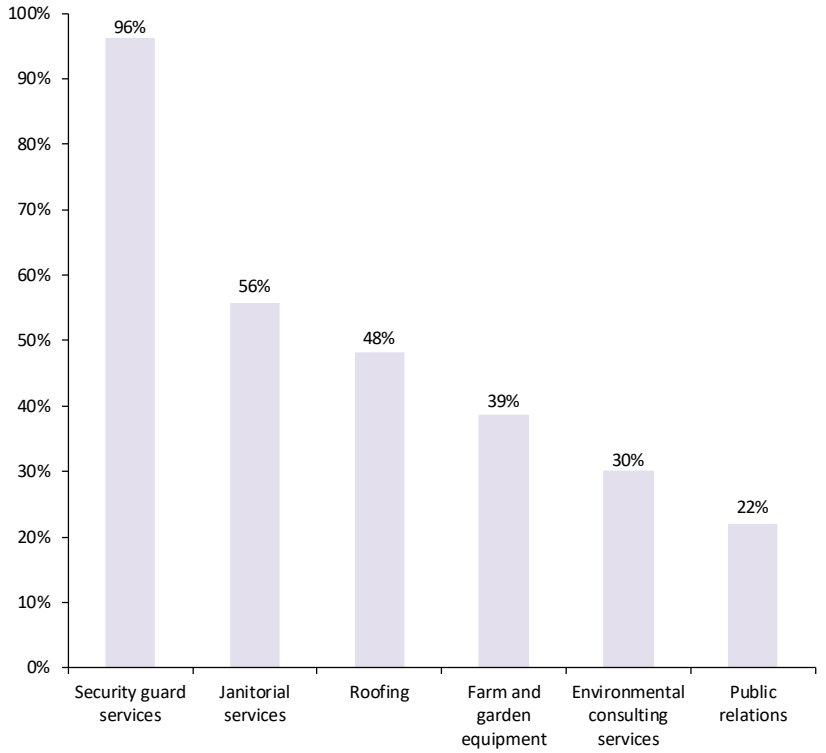
- Share of City of Vancouver contract dollars within a type of work going to MBE/WBEs; and
- Distribution of MBE/WBE dollars by work type.

Share of City of Vancouver Contract Dollars within a Type of Work Going to MBE/WBEs

For each specific type of work examined in the study, Keen Independent calculated the share of dollars going to MBE/WBEs during the study period. Figure D-3 shows that there were only six types of work where MBE/WBEs accounted for more than 20 percent of the total contract dollars.

These six types of work accounted for just 5 percent of total City contract dollars.

D-3. MBE/WBE share of total contract dollars on City of Vancouver contracts, 2015–2022.



Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).

Distribution of MBE/WBE Contract Dollars across Types of Work

Another way to examine concentration of MBE/WBEs is whether MBE/WBE participation is only found in certain types of work.

In the study period, the following types of work accounted for the most dollars going to MBE/WBEs:

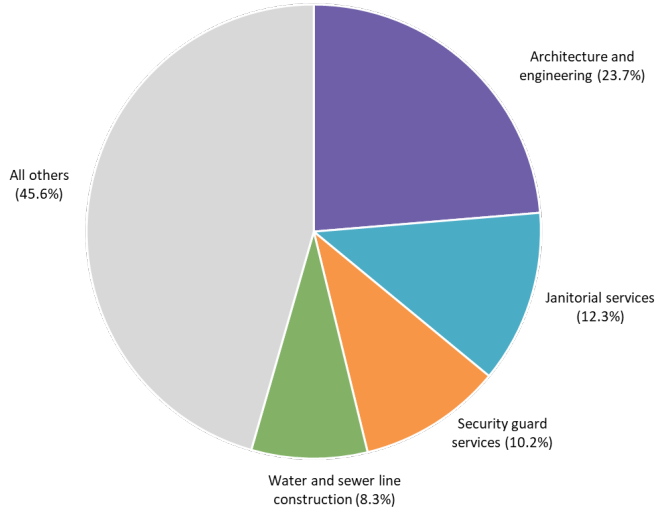
- Architecture and engineering accounted for 24 percent of total dollars going to MBE/WBEs (shown in the top pie chart in Figure D-4);
- Janitorial services accounted for 12 percent of MBE/WBE dollars;
- Security guard services was 10 percent of MBE/WBE dollars; and
- Water and sewer line construction was 8 percent of total MBE/WBE dollars.

Among all firms, MBE/WBEs received 5 percent of the total contract dollars for these four types of work of City of Vancouver contracts. Together these areas accounted for 31 percent of total City of Vancouver contract dollars (for 2015–2022).

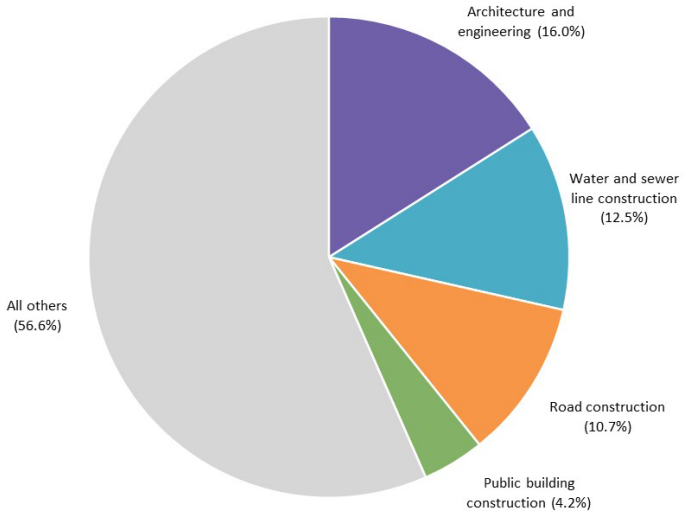
Twelve other types of work individually represented between 1 and 7 percent of MBE/WBE dollars, indicating broad participation of MBE/WBEs across types of work.

The types of work representing the highest areas of City of Vancouver spending for MBE/WBEs (top pie chart in Figure D-4) were somewhat similar to the types of work accounting for highest spending for all firms (bottom pie chart in Figure D-4).

D-4. Share of MBE/WBE contract dollars (top) and share of total contracts dollars (bottom) for particular types of work on City of Vancouver contracts, 2015–2022



Source: Keen Independent analysis of City of Vancouver procurement data (2015-2022).



D. Additional Utilization and Disparity Analyses — Disparity index

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on City of Vancouver prime contracts and subcontracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work.

Keen Independent made those comparisons for MBEs and for WBEs. The Summary Report explains how the study team developed benchmarks from the availability data.

To make utilization and availability directly comparable, results are expressed as percentages of the total dollars associated with a particular set of contracts. Keen Independent then calculated a "disparity index" to easily compare utilization and availability results among MBE/WBE groups and across different sets of contracts.

- A disparity index of "100" indicates an exact match between actual utilization and what might be expected based on MBE/WBE availability for a specific set of contracts (often referred to as "parity").
- A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 in this report are described as "substantial."[1]

Figure D-5 describes how disparity indices are calculated.

D-5. Calculation of disparity indices

The disparity index provides a straightforward way of assessing how closely actual utilization of an MBE/WBE group matches what might be expected based on its availability for a specific set of contracts. With the disparity index, one can directly compare results for one group to that of another group, and across different sets of contracts. Disparity indices are calculated using the following formula:

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

For example, if actual utilization of WBEs on a set of procurements was 1 percent and the availability of WBEs for those procurements was 2 percent, then the disparity index would be 1 percent divided by 2 percent, which would then be multiplied by 100 to equal 50. In this example, WBEs would have received 50 cents of every dollar that they might be expected to receive based on their availability for the work.

[1] Some courts deem a disparity index below 80 as being "substantial" and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, *et al.*, 713 F. 3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013).; *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). Also see Appendix B for additional discussion.

D. Disparity Analysis for City of Vancouver Contracts — Sampling

Testing for statistical significance relates to testing the degree to which a researcher can reject "random chance" as an explanation for any observed differences. Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results.

The study team attempted to reach each firm in the relevant geographic market area identified as possibly doing business within relevant subindustries, mitigating many of the concerns associated with random chance in data sampling as they may relate to Keen Independent's availability analysis.

The utilization analysis attempted to represent a complete "population" of contracts. (The study team attempted to obtain data for every contract above a minimum size, not just a sample of those contracts.)

Therefore, one might consider any disparity identified when comparing overall utilization with availability to be "statistically significant."

Figure D-6 explains the high level of statistical confidence in the utilization and availability results. As outlined on the next page, the study team also used a sophisticated statistical simulation tool to further examine statistical significance of disparity results.

D-6. Confidence intervals for availability and utilization measures

As discussed in Appendix C, Keen Independent successfully reached 5,141 business establishments in the availability telephone survey — a number of completed surveys that might be considered large enough to be treated as a "population," not a sample.

However, if the results are treated as a sample, the reported 24.4 percent representation of MBE/WBEs among available firms is accurate within about +/-1.0 percentage points. (This was MBE/WBE availability before dollar-weighting.) By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5.0 percentage points. (Keen Independent applied a 95 percent confidence level and the finite population correction factor when determining these confidence intervals.)

Keen Independent attempted to collect data for all City of Vancouver procurements during the study period and no confidence interval calculation applies for the utilization results.

D. Disparity Analysis for City of Vancouver Contracts — Monte Carlos Analysis

There were many opportunities in the sets of prime contracts and subcontracts for MBE/WBEs to be awarded work. Some contract elements involved large dollar amounts and others involved only a few thousand dollars.

Approach

Monte Carlo analysis was a useful tool for the study team to use for statistical significance testing in the disparity study because there were many individual chances at winning City of Vancouver prime contracts and subcontracts during the study period, each with a different payoff.

Keen Independent used the Monte Carlo simulation to determine whether chance in contract and subcontract awards could explain the disparities observed for minority- and woman-owned firms when examining Dallas College procurements.

Figure D-7 describes Keen Independent's use of Monte Carlo analysis.

D-7. Monte Carlo analysis

The study team conducted the Monte Carlo analysis by examining individual contract elements. For each element, Keen Independent's availability database provided information about businesses available to perform that contract element, based on type of work, contractor role and contract size.

The study team assumed that each available firm had an equal chance of "receiving" that contract element. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to "receive" that 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 MBEs for that set of contract elements.

The entire Monte Carlo simulation was then repeated 10,000 times. The combined output from all 10,000 simulations represented a probability distribution of the overall utilization of MBEs and utilization of WBEs if contracts were awarded randomly based on the availability of businesses working in the Portland-Vancouver marketplace study industries.

The output of the Monte Carlo simulations represents the number of runs out of 10,000 that produced a simulated utilization result that was equal or below the observed utilization in the actual data for each MBE/WBE group and for each set of contracts. If that number was less than or equal to 250 (i.e., 2.5% of the total number of runs), then the disparity index is considered statistically significant at the 95 percent confidence level (using a two-tailed test).

D. Disparity Analysis for City of Vancouver Contracts — Monte Carlos Analysis

Results

Keen Independent performed Monte Carlo simulations where substantial disparities were observed on all City of Vancouver contracts.

Figure D-8 presents the results from the Monte Carlo analysis as they relate to the statistical significance of disparity analysis results for African American-, Hispanic American- and Native American-owned businesses on all City of Vancouver contracts.

None of the 10,000 Monte Carlo simulations produced utilization equal to or less than the observed utilization for African American-, Hispanic American-, Native American- and woman-owned firms. Therefore, one can be confident that the disparities observed for those MBEs (as a group) and for WBEs procurements are not due to chance in contract awards.

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion in Figure D-8), and it may not be appropriate for very small populations of firms.[2]

D-8. Monte Carlo simulation results for minority- and woman-owned firms for City of Vancouver procurements, 2015–202

	MBE	WBE
Disparity index	34	29
Utilization	3.5 %	4.4 %
Number of simulations out of 10,000 less than or equal to observed utilization	0	0
Probability of observed disparity due to "chance"	0.0 %	0.0 %
Reject chance as an explanation	Yes**	Yes**

Note: Minority-owned businesses (MBE) include results for African American-, Hispanic American- and Native American-owned businesses.
** Denote statistical significance at the 95% confidence level.

Source: Keen Independent 2024 availability survey and City of Vancouver procurement data (2015-2022).

[2] Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contracts and subcontracts included in the analysis. Results can also be affected by the size distribution of contracts and subcontracts.

APPENDIX E. Entry and Advancement — Introduction

Federal courts have found that 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."[1] Congress found that discrimination had impeded the formation of qualified minority-owned businesses.

In the marketplace analyses for the City of Vancouver availability study (described in Appendix E through Appendix I), Keen Independent examines whether some of the barriers to business formation that Congress found for minority- and woman-owned businesses also appear to occur in the local marketplace.

Based on research about where firms obtaining contracts are located, Keen Independent considers the relevant geographic market area for this study to be the Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area (MSA)[2] for construction, professional services and other services contracts and the Pacific Northwest[3] area for goods contracts. (See additional detail in Appendix B.) The marketplace appendices refer to these areas as the "local marketplace," "Portland-Vancouver marketplace," (for construction, professional services and other services), or "the Pacific Northwest marketplace" (for goods) in Appendices E through H. The "study industries" are the construction industry and certain segments of the professional services, goods, and other services industries.

Potential barriers to business formation include barriers associated with entering and advancing as employees in the study industries.

Appendix E examines recent data on employment and workplace advancement that may ultimately influence business formation within City study industries.[4, 5]

[1] *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), citing *Adarand Constructors, Inc. v. Slater*, 228 F.3d (10th Cir. 2000); *Western States Paving Co., Inc. v. Washington State DOT*, 345 F.3d 964 (8th Cir. 2003).

[2] Portland-Vancouver-Hillsboro, OR-WA MSA includes Clackamas County, Columbia County, Multnomah County, Washington County and Yamhill County in Oregon and Clark County, Skamania County in Washington.

[3] The Pacific Northwest area includes Clackamas County, Columbia County, Multnomah County, Washington County and Yamhill County in Oregon and Clark County, Skamania County, Cowlitz County, Kittitas County, Pierce County, Thurston County and Lewis County in Washington.

[4] In Appendix E and other appendices that present information about local marketplace conditions, information for "professional services" refers to professional, scientific and technical services. References to "goods and other services" pertains to wholesale and retail trade, as well as other services.

[5] Several other report appendices analyze other quantitative aspects of conditions in the Vancouver marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that Keen Independent used in those appendices.

E. Entry and Advancement — Introduction

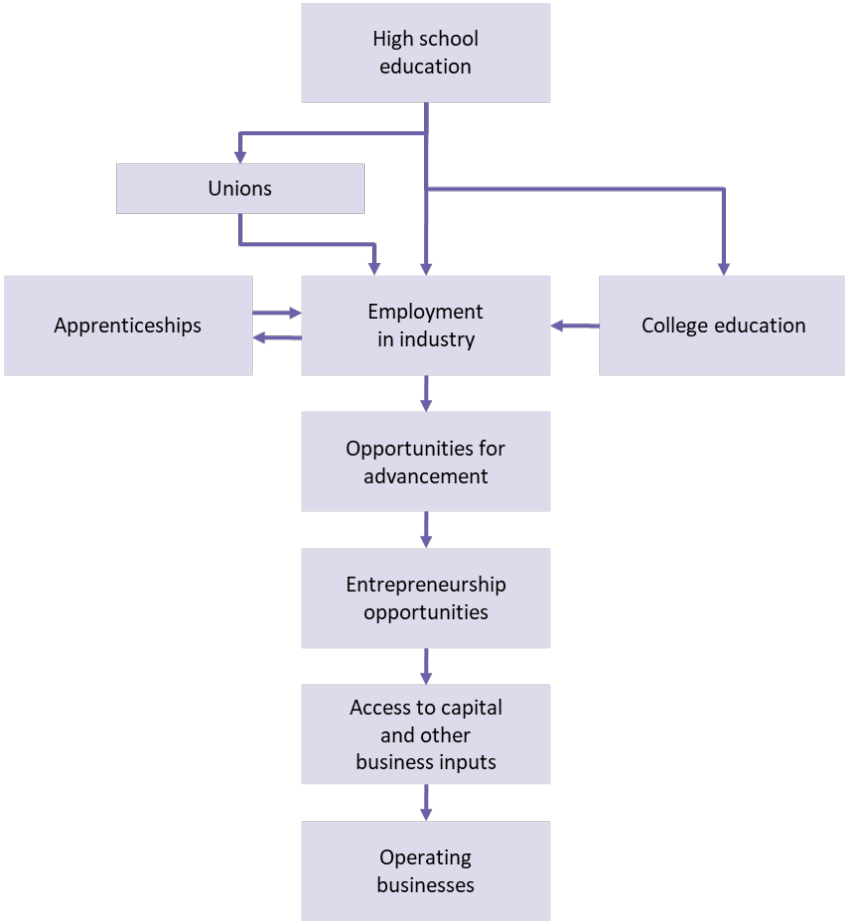
After presenting overall demographic characteristics for the study industries as a whole, Keen Independent separately examines results for each industry as the pathways into these sectors and career ladders for employees differ between industries.

Keen Independent examined whether there were barriers to the formation of businesses owned by people of color and women in the local marketplace. Business ownership typically results from an individual entering an industry as an employee and then advancing within that industry before starting a business in that sector. Within the entry and advancement process, there may be barriers that limit opportunities for some individuals. Figure E-1 presents a model of entry and advancement in the study industries.

Appendix E uses data for 2018–2022 from the U.S. Census Bureau American Community Survey (ACS) to analyze education, employment and workplace advancement — all factors that may influence whether individuals gain the work experience and qualifications to start businesses in the study industries.

Keen Independent began the analysis by examining the representation of people of color and women among business owners and workers in the Portland-Vancouver marketplace.

E-1. Model for studying entry into study industries in the Portland-Vancouver marketplace



Source: Keen Independent Research.

People of Color Among Workers and Business Owners

Figure E-2 shows the demographic distribution of business owners in the study industries, business owners in other industries (excluding the study industries) and workers in the labor force, based on 2018–2022 ACS data for the Portland-Vancouver marketplace. (Demographics of the workforce in individual study industries are presented later in Appendix E.)

As shown in Figure E-2, people of color comprised 29 percent of the workforce in the Portland-Vancouver marketplace. About 20 percent of businesses in the study industries were owned by people of color.

Analysis of the local marketplace in 2018–2022 indicated that certain groups were underrepresented based on the percentage of business owners within the study industries and the representation of groups in the overall workforce. These included:

- African Americans; and
- Asian Americans.

Keen Independent analyzed whether differences between the representation of each group among business owners and the representation of that group in the workforce were statistically significant, which means that sampling in the Census data can be rejected as a cause of the observed differences (noted with asterisks in Figure E-2). The differences for African Americans and Asian Americans were statistically significant.

Women Workers and Business Owners

Figure E-2 also examines the percentage of local marketplace business owners and workers who are women. In 2018–2022, women accounted for about 26 percent of business owners in the study industries, about 21 percentage points below women's representation in the overall workforce (47%).

E-2. Demographic distribution of business owners and the workforce in the Portland-Vancouver marketplace, 2018–2022

	Workforce in all industries	Business owners in study industries	Business owners in all other industries
Race/ethnicity			
African American	3.7 %	2.0 % **	2.7 % **
Asian American	9.2	5.7 **	8.8
Hispanic American	12.8	9.2 **	8.1 **
Native American	3.0	3.0	3.0
Total minority	**28.7 %**	**20.0 %**	**22.6 %**
Non-Hispanic white	71.3	80.0 **	77.4 **
Total	**100.0 %**	**100.0 %**	**100.0 %**
Gender			
Female	46.5 %	26.1 % **	52.2 % **
Male	53.5	73.9 **	47.8 **
Total	**100.0 %**	**100.0 %**	**100.0 %**

Note: ** Denotes that the difference in proportions between workforce in all industries and business owners in the specified industries for the given race/ethnicity/gender group is statistically significant at the 95% confidence level.

"Native American" includes Native Americans and people who identified as other races or ethnicities not listed in the table.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples. The 2018–2022 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Conditions During COVID-19 Pandemic

Keen Independent examined recent research focused on the effects of the COVID-19 pandemic on workers in the Portland-Vancouver marketplace. Businesses closed and employment rates fell after the first COVID-19 case was confirmed in the United States on January 20, 2020. By late April 2020, the unemployment rate in the Portland-Vancouver metro area had increased to 13 percent compared to just 4 percent in April 2019.[6]

Employment rates have since improved in the region. In February 2024, the U.S. Bureau of Labor Statistics (BLS) recorded Washington state as having an unemployment rate of 5 percent,[7] which is comparable to March 2020 at the beginning of the pandemic. The unemployment rate in the Portland-Vancouver metro area has also fallen to about four percent as of February 2024.[8]

Nationally, researchers have found that the economic effects of the COVID-19 pandemic have disproportionately affected women and people of color. For example, the U.S. economy lost 140,000 jobs in the month of December 2020 according to BLS data. The same analysis by gender, however, revealed that women lost 156,000 jobs while men gained 16,000 jobs. The COVID-19 pandemic has caused more women to drop out of the labor force than men, which some researchers largely attribute to gendered caretaking responsibilities.[9] Analysis found that nationally, nearly 90 percent of the women who dropped out of the labor force were mothers with young children.[10]

A different BLS survey found that in December 2020, African American women and Hispanic American women lost jobs while the number of jobs held by non-Hispanic white women increased.[11] Contributing to this disparity in job losses were differences in whether people could work from home. Prior to the pandemic, less than 20 percent of African Americans and Hispanic Americans in the United States held jobs that allowed a work-from-home option, while 30 percent of white and Asian American workers had that option.[12]

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[6] U.S. Bureau of Labor Statistics. (2024). Local area unemployment statistics: Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area. *U.S. Department of Labor.* Retrieved from https://data.bls.gov/timeseries/LAUMT413890000000004

[7] U.S. Bureau of Labor Statistics. (2024). Local area unemployment statistics: Washington. *U.S. Department of Labor.* Retrieved from https://data.bls.gov/timeseries/LASST530000000000006

[8] U.S. Bureau of Labor Statistics. (2024). Local area unemployment statistics: Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area. *U.S. Department of Labor.* Retrieved from https://data.bls.gov/timeseries/LAUMT413890000000004

[9] Edwards, K. (2020, November 24). Women are leaving the labor force in record numbers. Retrieved January 15, 2021, from https://www.rand.org/blog/2020/11/woman-are-leaving-the-labor-force-in-record-numbers.html

[10] Amuedo-Dorantes, C., et. al. (October 2020). COVID-19 School Closures and Parental Labor Supply in the United States. IZA Institute of Labor Economics. Retrieved from https://www.iza.org/publications/dp/13827/covid-19-school-closures-and-parental-labor-supply-in-the-united-states

[11] Kurtz, A. (2021, January 8). The US economy lost 140,000 jobs in December. All of them were held by women. *CNN Business*. Retrieved from https://www.cnn.com/2021/01/08/economy/woman-job-losses-pandemic/index.html

[12] Enemark, D. (2020, March 24). Potential impact of COVID-19 on employment in San Diego County. *San Diego Workforce Partnership.* Retrieved from https://workforce.org/reports/

E. Entry and Advancement — Introduction

Research also suggests that the national labor force contracted due to the COVID-19 pandemic. This contraction has been attributed to the enhanced federal and state unemployment benefits (which extended to September 2021), workers' deaths from COVID-19 and the lack of consistent childcare and schooling for working parents and caregiving services for working caretakers until the end of 2021.[13]

Economic recovery has varied across industries. As of February 2024, since the most critical period of the pandemic in April 2020, the Portland-Vancouver marketplace has gained approximately 180,000 jobs and the numbers remain above pre-pandemic employment.[14]

Employment in construction jobs in the Portland-Vancouver marketplace fell by 10 percent at the height of the pandemic in April 2020. By spring 2022, the Portland-Vancouver construction industry employment more than recovered those losses. Portland-Vancouver construction employment was about 17 percent higher at the beginning of 2022 than the beginning of 2020.[15] Nationally, employment in the construction industry fell by 10 percent at the height of the pandemic in April 2020 but has since rebounded and was 4 percentage points higher in 2022 than at the start of 2020.[16]

Research shows that COVID-19 impacted people of color more than their white counterparts and that certain industries and groups of workers have recovered quicker than others. Focusing on the construction industry, construction workers who were under the age of 35 or Hispanic were hit hardest at the start of the pandemic.[17]

[13] As of February 2024, the Centers for Disease Control and Prevention recorded 1,176,639 deaths in the United States due to COVID-19.
CDC. (2024, February 14). COVID data tracker weekly review. *Centers for Disease Control and Prevention.* Retrieved from https://covid.cdc.gov/covid-data-tracker/#datatracker-home

[14] U.S. Bureau of Labor Statistics. (2024). Local area unemployment statistics: Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area. U.S. Department of Labor. Retrieved from https://data.bls.gov/timeseries/LAUMT413890000000005

[15] U.S. Bureau of Labor Statistics. (2024). State and area employment, hours, and earnings, construction: Portland-Vancouver-Hillsboro, OR-WA Metropolitan Statistical Area. *U.S. Department of Labor.* Retrieved from https://data.bls.gov/timeseries/SMU41389002000000001

[16] Harris, W., et. al. Impact of COVID-19 on the Construction Industry: 2 Years in Review. (Data Bulletin July 2022) CPWR - The Center for Construction Research and Training. Retrieved from https://www.cpwr.com/wp-content/uploads/DataBulletin-July2022.pdf

[17] Ibid.

E. Entry and Advancement — Construction industry employment

The following pages describe employment conditions in each study industry, beginning with construction. Keen Independent examined how education, training, employment and advancement may affect the number of businesses that people of color and women own in the Portland-Vancouver marketplace construction industry (referred to as the "local construction industry").

Education of People Working in the Industry

Formal education beyond high school is not a prerequisite for most construction jobs,[18] and construction often attracts individuals who have relatively less formal education than in other industries.[19] These workers often receive on-the-job training after they are hired by construction companies to compensate for their initial lack of knowledge.[20] Based on 2018–2022 ACS data, just 17 percent of Portland-Vancouver market area of workers in the construction industry had a four-year college degree or more compared to 43 percent in all other industries combined.

Race/ethnicity. Due to the educational requirements of entry-level jobs and the limited education beyond high school for many minority groups in the marketplace, one would expect a relatively high representation of people of color in the local construction industry, especially in entry-level positions. Hispanic Americans and Native Americans or other minority groups represented a large population of workers without a post-secondary education.

However, in 2018–2022, Asian American workers age 25 and older in the local marketplace were more likely to have at least a four-year college degree than non-Hispanic whites. One might expect representation of these groups in the construction industry to be lower than in other industries.

[18] Bureau of Labor Statistics, U.S. Department of Labor. (2021, October 19). Construction and extraction occupations. *Occupational Outlook Handbook*. Retrieved from https://www.bls.gov/ooh/construction-and-extraction/home.htm

[19] CPWR - The Center for Construction Research and Training. (2013). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (5th ed.). Retrieved from https://www.cpwr.com/sites/default/files/publications/5th%20Edition%20Chart%20Book%20Final.pdf;

CPWR - The Center for Construction Research and Training. (2007). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (3rd ed.). Retrieved from https://www.cpwr.com/sites/default/files/research/CB3_FINAL.pdf

[20] Bureau of Labor Statistics, U.S. Department of Labor. (2021, October 19). Construction laborers and helpers. *Occupational Outlook Handbook*. Retrieved from https://www.bls.gov/ooh/construction-and-extraction/construction-laborers-and-helpers.htm#tab-4

E. Entry and Advancement — Construction industry employment

Gender. In 2023 women made up only 11 percent of the national construction workforce (roughly 1.3 million women). Women largely operate in administrative roles in this industry, holding a larger portion of the jobs in sales and office (66%), service (25%) and management and professional roles (18%). Only 4 percent of natural resources, construction and maintenance positions and 4 percent of production, transportation and materials moving positions were held by women.[21] Low representation of women, and especially women of color, is also found in apprenticeships.[22]

Among people with a college degree, women have been less likely to enroll in construction-related degree programs. Nationally, women have low levels of enrollment in Construction Management programs, and this may be due to (a) the prevailing notion that construction is an industry dominated by males and is unkind to females and families, and (b) secondary school career counselors' lack of discussion of women's career opportunities in the construction fields, and female students' consequent lack of knowledge of these professions.[23]

According to a 2021 report by the Institute for Women's Policy Research that surveyed 2,635 tradeswomen in the construction industry, 18 percent identified as Latina, 16 percent identified as African American, 5 percent identified as Asian American and Pacific Islander, 4 percent identified as Native American, and 54 percent identified as white.[24] Of those surveyed, one-half have children younger than 18, and more than one in five have children younger than six. Single mothers make up one in four of those with kids under 18. As already discussed, childcare duties rose dramatically for mothers during the pandemic, often causing women to miss out on promotion opportunities due to caregiving obligations.[25]

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[21] Bureau of Labor Statistics. (2023). 2023 Current Population Survey: Employed persons by industry, sex, race, and occupation. [Data file]. Retrieved from https://www.bls.gov/cps/cpsaat17.htm

[22] Jackson, Sarah. (2019, November 29). *'Not the boys' club anymore': Eight women take a swing at the construction industry.* NBC News. Retrieved from https://www.nbcnews.com/news/us-news/not-boys-club-anymore-eight-women-take-swing-construction-industry-n1091376; Graves, F. G., et al. (2014). *Women in construction: Still breaking ground* (Rep.). Retrieved from National Women's Law Center website: https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

[23] Regis, M.F., Alberte, E.P.V., Lima, D.S., & Freitas, R. (2019). Women in construction: shortcomings, difficulties, and good practices. *Engineering, Construction and Architectural Management* 26(11) 2535-2549; Sewalk, S., & Nietfeld, K. (2013). Barriers preventing women from enrolling in construction management programs. *International Journal of Construction Education and Research, 9*(4), 239-255. doi:10.1080/15578771.2013.764362

[24] Hegewisch, H. & Mefferd, E. (2021) A Future Worth Building: What Tradeswomen Say about the Change They Need in the Construction Industry. *Institute for Women's Policy Research*. Retrieved from https://iwpr.org/wp-content/uploads/2022/02/A-Future-Worth-Building_What-Tradeswomen-Say_FINAL.pdf

[25] Golding, C. (April 2022). Understanding the Economic Impact of COVID-19 on Women. *National Bureau of Economic Researc*h. Retrieved from https://www.nber.org/papers/w29974

E. Entry and Advancement — Construction industry employment

Trade schools and apprenticeship programs. Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs.[26] Entry-level jobs for workers out of high school are often as laborers, helpers or apprentices. More skilled positions may require additional training through a technical or trade school, or through an apprenticeship or other training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.[27]

However, the availability of these programs fluctuates with demand. For example, due to public health concerns, halted construction projects and the need for social distancing, many apprenticeships throughout the nation were ended or scaled back during the COVID-19 pandemic.[28] This also occurred during the Great Recession. In response to limited construction employment opportunities during the recession, apprenticeship programs limited the number of new apprenticeships[29] as well as access to knowing when and where apprenticeships occur.[30] Apprenticeship programs often refer to an "out-of-work list" when contacting apprentices; those who have been on the list the longest are given preference.

Furthermore, some research indicates that apprentices are often hired and laid off several times during their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journey workers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.[31]

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[26] Bureau of Labor Statistics, U.S. Department of Labor. (2021, October 19). Construction laborers and helpers. *Occupational Outlook Handbook*. Retrieved from https://www.bls.gov/ooh/construction-and-extraction/construction-laborers-and-helpers.htm#tab-4

[27] Apprenticeship.gov, U.S. Department of Labor. (2021, October 19). Construction. Retrieved from https://www.apprenticeship.gov/apprenticeship-industries/construction

[28] Buckley, B., & Rubin, D.K. (2020). Construction apprentice programs face new COVID-19 learning curve. *Engineering News-Record.* Retrieved from https://www.enr.com/articles/49417-construction-apprentice-programs-face-new-covid-19-learning-curve

[29] Kelly, M., Pisciotta, M., Wilkinson, L., & Williams, L. S. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum, 30*(2), 415-438. doi:10.1111/socf.12169

[30] Graves, F. G., et al. (2014). *Women in construction: Still breaking ground* (Rep.). Retrieved from https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

[31] Ibid.

Employment in the Construction Industry

The study team examined employment in the Portland-Vancouver marketplace construction industry. Figure E-3 compares the demographic composition of construction industry workers with the total workforce.

Race/ethnicity. Based on 2018–2022 ACS data, people of color were about 26 percent of those working in the local construction industry. Hispanic Americans represent a relatively large share of construction employees. There was a statistically significant underrepresentation of workers in this industry for African Americans and Asian Americans.

Historically, racial discrimination by construction unions in the United States has contributed to the low employment of African Americans in construction trades.[32] The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination has been reduced to a degree in unions).

Gender. There is a large difference between the representation of women in the construction workforce (12% of employees) and representation in all other industries (49% of employees).

E-3. Demographics of workers in construction and all other industries in the Portland-Vancouver marketplace, 2018–2022

	Construction		All other industries
Race/ethnicity			
African American	1.8 %	**	3.8 %
Asian American	3.4	**	9.6
Hispanic American	17.7	**	12.5
Native American	3.3		3.0
Total minority	**26.2 %**		**28.8 %**
Non-Hispanic white	73.8	**	71.2
Total	**100.0 %**		**100.0 %**
Gender			
Female	12.1 %	**	49.0 %
Male	87.9	**	51.0
Total	**100.0 %**		**100.0 %**

Note: ** Denotes that the difference in proportions between workforce in the construction industry and all other industries for the given race/ethnicity/gender group is statistically significant at the 95% confidence level.

"All other industries" includes all industries other than the construction industry.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

[32] Watson, T. (2021). Union construction's racial equity and inclusion charade. *Stanford Social Innovation Review.* Retrieved from https://ssir.org/articles/entry/union_constructions_racial_equity_and_inclusion_charade

E. Entry and Advancement — Academic research on construction employment

There is substantial academic literature indicating that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry.

For example, literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.[33] One study found that when African American women in construction advance into leadership roles, they often find that others unduly challenge their authority. Participants of this study also reported incidents of harassment, bullying and the assumption that they are inferior to their male peers; these instances are believed to hinder African American females' career development and overall success in the construction industry.[34] Such treatment has been found to lead to stress, decreased psychological health and early exit from the industry.[35]

In a separate study, white men were least likely to report challenges related to being assigned low-skill or repetitive tasks that did not enable them to learn new skills. Women and people of color felt that they were disproportionately performing low-skill tasks that negatively impacted the quality of their training experience.[36]

Additionally, women encounter practical issues such as difficulty in accessing personal protective equipment that fits them properly (they frequently find such employer-provided equipment to be too large). This sometimes poses a safety hazard, and even more often hinders female workers' productivity, which can impact their relationships with supervisors as well as their opportunities for growth in the industry.[37] Lack of flexible work options, childcare programs, paid pregnancy and maternity leave, and breastfeeding support create additional — often invisible — challenges that narrow women's professional opportunities in the construction industry.[38]

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[33] Bridges, Donna, Elizabeth Wulff, Larissa Bamberry, Branka Krivokapic-Skoko and Stacey Jenkins (2020). Negotiating gender in the male-dominated skilled trades: a systemic literature review. Construction Management and Economics, 38 (10), 38:10, 894-916, DOI: 10.1080/01446193.2020.1762906

[34] Hunte, R. (2016). Black women and race and gender tensions in the trades. *Peace Review, 28*(4), 436-443. doi:10.1080/10402659.2016.1237087

[35] Sunindijo, R.Y., & Kamardeen, I. (2017). Work stress is a threat to gender diversity in the construction industry. *Journal of Construction Engineering and Management, 143(10).*

[36] Kelly, M., et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum, 30*(2), 415-438. doi:10.1111/socf.12169

[37] Onyebeke, L. C., et al. (2016). Access to properly fitting personal protective equipment for female construction workers. *American Journal of Industrial Medicine, 59*(11), 1032-1040. doi:10.1002/ajim.22624

38 Pamidimukkala, A, et. al. (2022). Occupational Health and Safety Challenges in Construction Industry: A Gender-Based Analysis. Retrieved from https://www.researchgate.net/profile/Sharareh-Kermanshachi/publication/354820545_Occupational_Health_and_Safety_Challenges_in_Construction_Industry_A_Gender-Based_Analysis/links/614e1067f8c9c51a8aeed740/Occupational-Health-and-Safety-Challenges-in-Construction-Industry-A-Gender-Based-Analysis.pdf; Hegewisch, A. & Mefferd, E. (2021). A Future Worth Building: What Tradeswomen Say about the Change They Need in the Construction Industry. Institute for Women's Policy Research. Retrieved from https://iwpr.org/wp-content/uploads/2022/02/A-Future-Worth-Building_What-Tradeswomen-Say_FINAL.pdf

E. Entry and Advancement — Academic research on construction employment

Research suggests that race and gender inequalities in a workplace are often evidenced through the acceptance of the "good old boys' club" culture.[39] There may also be an attachment to the idea that "working hard" will bring success. However, the quantitative and qualitative evidence indicates that "hard work" alone does not ensure success for women and people of color.[40]

The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have concluded that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.[41] Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering the construction industry.[42]

[39] Jackson, Sarah. (2019, Nov. 29). *'Not the boys' club anymore': Eight women take a swing at the construction industry.* NBC News. Retrieved from https://www.nbcnews.com/news/us-news/not-boys-club-anymore-eight-women-take-swing-construction-industry-n1091376

[40] Kelly, M., et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum, 30*(2), 415-438. doi:10.1111/socf.12169.

[41] Watson, T. (2021). Union construction's racial equity and inclusion charade. *Stanford Social Innovation Review.* Retrieved from https://ssir.org/articles/entry/union_constructions_racial_equity_and_inclusion_charade; Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society, 19*(3), 291-323. doi:10.1177/003232929101900302

[42] Caplan, A., Aujla, A., Prosser, S., & Jackson, J. (2009). Race discrimination in the construction industry: a thematic review. *Equality and Human Rights Commission,* Research Report 23.

E. Entry and Advancement — Unions in the construction industry

Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.[43] According to the Bureau of Labor Statistics, in 2023 union membership among people employed in construction occupations was about 11 percent.[44] Union members comprise a greater share of the construction workforce than found in other industries, as national union membership within all occupations during 2023 was about 10 percent.[45] The difference in union membership rates demonstrates the importance of unions within the construction industry. In Washington state, union representation for all occupations in 2023 was about 18 percent.[46] (There were no BLS data published for the construction industry.)

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work and mitigating wage competition. The unionized sector of construction would seemingly be a path for African Americans and other underrepresented groups into the industry.

However, some researchers have identified racial discrimination by trade unions that has historically prevented minorities from obtaining employment in skilled trades.[47] Some researchers have argued that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.[48]

- Of those workers of color who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction workers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.[49]

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[43] Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

[44] Bureau of Labor Statistics, U.S. Department of Labor. (2024, January 23). *Union Members – 2023* [Press release]. Retrieved from https://www.bls.gov/news.release/pdf/union2.pdf

[45] Ibid.

[46] Ibid.

[47] Watson, T. (2021). Union construction's racial equity and inclusion charade. *Stanford Social Innovation Review.* Retrieved from https://ssir.org/articles/entry/union_constructions_racial_equity_and_inclusion_charade

[48] Ibid.; U.S. v. Iron Workers Local 86, 443 F.2d 544 (9th Cir. 1971); Sims v. Sheet Metal Workers International Association, 489 F. 2d 1023 (6th Cir. 1973); U.S. v. International Association of Bridge, Structural and Ornamental Iron Workers, 438 F.2d 679 (7th Cir. 1971).

[49] Goldberg, D.A. & Griffey, T. (2010). Black power at work: Community control, affirmative action, and the construction industry. Ithaca, NY: Cornell University Press.

E. Entry and Advancement — Unions in the construction industry

- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.[50]

- Traditionally, unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.[51]

- Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.[52]

- According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs.[53]

- Some minority workers face overt, aggressive violence that is racialized with the goal of pushing them out of the workplace. Tactics include racial slurs, physical intimidation, placement in dangerous work situations and intentional "accidents."[54]

[50] Amoah, C. & and Steyn, D. (2022). "Barriers to unethical and corrupt practices avoidance in the construction industry". International Journal of Building Pathology and Adaptation. 2398-4708. Retrieved from https://www.emerald.com/insight/content/doi/10.1108/IJBPA-01-2022-0021/full/html

[51] Goldberg, D.A. & Griffey, T. (2010). Black power at work: community control, affirmative action, and the construction industry. Ithaca, NY: Cornell University Press.

[52] Watson, T. (2021). Union construction's racial equity and inclusion charade. *Stanford Social Innovation Review.* Retrieved from https://ssir.org/articles/entry/union_constructions_racial_equity_and_inclusion_charade

[53] Goldberg, D.A. & Griffey, T. (2010). Black power at work: community control, affirmative action, and the construction industry. Ithaca, NY: Cornell University Press.

[54] Watson, T. (2021). Union construction's racial equity and inclusion charade. *Stanford Social Innovation Review.* Retrieved from https://ssir.org/articles/entry/union_constructions_racial_equity_and_inclusion_charade

E. Entry and Advancement — Unions in the construction industry

Research suggests that the relationship between people of color and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs.

Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

- Researchers analyzing apprenticeship programs in the U.S. construction industry found that joint programs had "much higher enrollments and participation of women and ethnic/racial minorities" and exhibited "markedly better performance for all groups on rates of attrition and completion" compared to employer-run programs.[55]
- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to work in highly skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.[56]
- Additional research on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.[57] Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.
- More recent analysis shows that shorter apprenticeship programs that are operated by single employers working jointly with a union are consistent with higher completion rates for all participants.[58]

[55] Glover, R. W., & Bilginsoy, C. (2005). Registered apprenticeship training in the U.S. construction industry. *Education + Training, 47*(4/5), 337-349. doi:10.1108/00400910510601913

[56] Berik, G., & Bilginsoy, C. (2006). Still a wedge in the door: Women training for the construction trades in the USA. *International Journal of Manpower, 27*(4), 321-341. doi:10.1108/01437720610679197

[57] Bilginsoy, C. (2005). How unions affect minority representation in building trades apprenticeship programs. *Journal of Labor Research, 26*(3), 451-463. doi:10.1007/s12122-005-1014-4

[58] Kuehn, D. Registered Apprenticeship and Career Advancement for Low-Wage Service Workers. (2019) Economic Development Quarterly, 33(2), 134–150. https://doi.org/10.1177/0891242419838605

Union membership data support those findings as well. For example, BLS data for 2023 showed that union membership was highest among African Americans, with African American men participating at about 13 percent and African American women at about 11 percent.[59]

In 2023, 10 percent of white workers participated in unions, while about 9 percent of Hispanic American workers and 8 percent of Asian American workers were in a union.[60] African American participation in unions was higher when focusing on specific industries: Recent research utilizing ACS data puts African American union membership in the construction industry at about 17 percent.[61]

According to recent research, union apprenticeships appear to have drawn more African Americans into the construction trades in some markets,[62] and studies have found a high percentage of minority construction apprentices.

In 2010 in New York City, for example, approximately 69 percent of first-year local construction apprentices were African American, Hispanic American, Asian American, or members of other minority groups. About 11 percent of local New York City construction apprentices were women.

However, this increase in apprenticeships may not necessarily be indicative of improved prospects for workers of color. A study in Oregon found that, though minority men's participation in construction apprenticeships was roughly proportional to their representation in the state's workforce, their representation in skilled trades apprenticeships was lower than what might be expected.[63]

[59] Bureau of Labor Statistics, U.S. Department of Labor. (2024, January 23). *Union Members – 2023* [Press release]. Retrieved from https://www.bls.gov/news.release/pdf/union2.pdf

[60] Ibid.

[61] Bucknor, C. (2016). *Black workers, unions, and inequality*. Washington D.C.: Center for Economic and Policy Research.

[62] Mishel, L. (2017). *Diversity in the New York City union and nonunion construction sectors* (Rep.). Retrieved from Economic Policy Institute website: http://www.epi.org/publication/diversity-in-the-nyc-construction-union-and-nonunion-sectors/

[63] Berik, G., Bilginsoy, C., & Williams, L. S. (2011). Gender and racial training gaps in Oregon apprenticeship programs. Labor Studies Journal, 36(2), 221-244. doi:10.1177/0160449x10396377

E. Entry and Advancement — Unions in the construction industry

Although union membership and union program participation vary based on race and ethnicity, there is no clear picture from the research about the causes of those differences and their effects on construction industry employment. Research is especially limited concerning the impact of unions on African American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in the local marketplace are different from other parts of the country. In addition, current research indicates that the effects of unions on entry into the construction industry may differ by minority group. Some unions are actively trying to provide a more inclusive environment for racial minorities and women through "insourcing" and active recruitment into apprenticeship programs.[64, 65]

To research opportunities for advancement in the local marketplace construction industry, Keen Independent examined the representation of people of color and women in construction occupations (defined by the U.S. Bureau of Labor Statistics[66]). Appendix E describes trades with large enough sample sizes in the 2018–2022 ACS for analysis.

[64] Judd, R. (2016, November 30). Seattle's building boom is good news for a new generation of workers. *The Seattle Times, Pacific NW Magazine*. Retrieved from https://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-news-for-a-new-generation-of-workers/

[65] For example, Boston's "Building Pathways" apprenticeship program is designed to recruit workers from low-income underserved communities. https://buildingpathwaysboston.org/

[66] Bureau of Labor Statistics, U.S. Department of Labor. (2001). Standard occupational classification major groups. Retrieved from http://www.bls.gov/soc/major_groups.htm

Race/Ethnicity

Figure E-4 shows workers of color as a share of all workers in select construction occupations in the local marketplace for 2018–2022, including lower-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians) and supervisory roles.

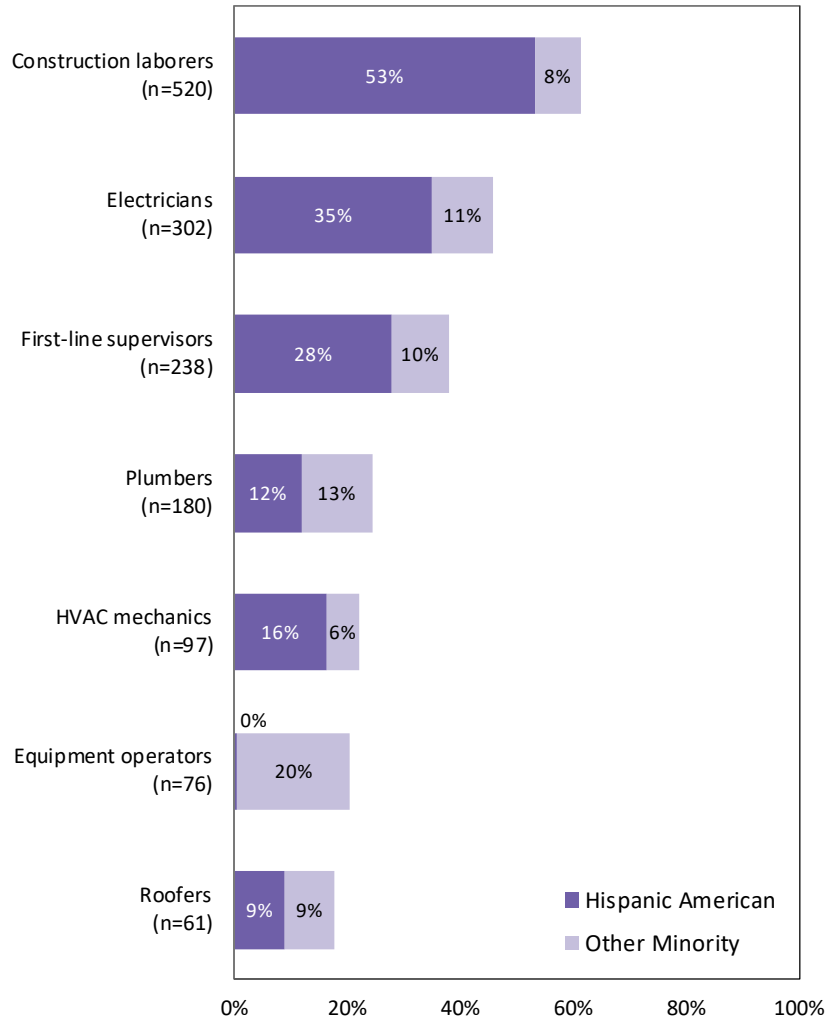
Based on 2018–2022 ACS data, there are large differences in the racial and ethnic makeup of workers in various construction trades in the local marketplace. The representation of workers of color was greater among certain trades such as:

- Construction laborers;
- Electricians; and
- First-line supervisors.

However, minority representation in the following occupations was relatively low:

- Plumbers;
- HVAC mechanics and installers;
- Equipment operators; and
- Roofers.

E-4. People of color as a percentage of workers in selected construction occupations in the Portland-Vancouver marketplace, 2018–2022



Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

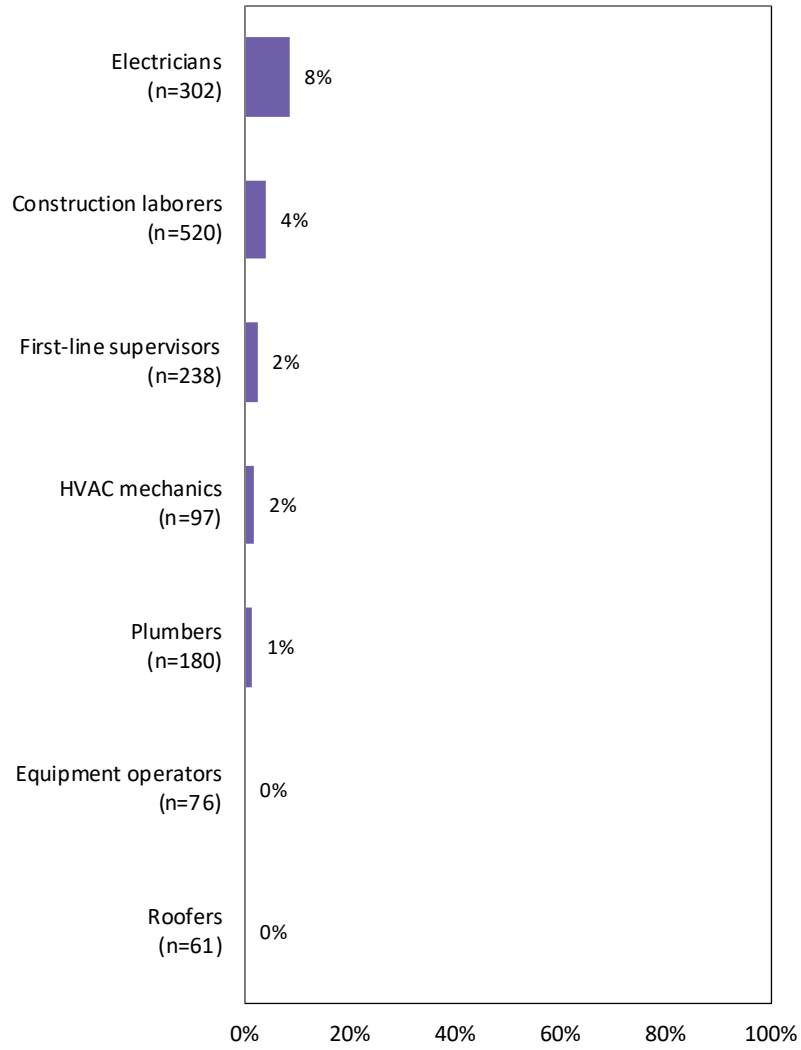
Gender

Keen Independent also analyzed the proportion of workers who are women in construction-related occupations. Figure E-5 summarizes the representation of women in select construction-related occupations in the local marketplace for 2018–2022.

In the local marketplace from 2018–2022, women accounted for 4 percent or fewer of those working in most of the large construction trades. There were no women in the ACS sample data for:

- Equipment operators; and
- Roofers.

E-5. Women as a percentage of workers in selected construction occupations in the Portland-Vancouver marketplace, 2018–2022



Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

Percentage of People of Color who are Managers

To further assess advancement opportunities in the Portland-Vancouver construction industry, Keen Independent examined the proportion of employees in the construction industry who reported being managers.[67]

Figure E-6 presents the percentage of employees in the construction industry who reported working as managers in 2018–2022 within the local marketplace by racial/ethnic and gender group. In 2018–2022, there was underrepresentation of people of color among workers in the construction industry who worked as managers. The likelihood of working as a manager was lower for:

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

These differences were statistically significant (see Figure E-6).

Percentage of Women who are Managers

In the Portland-Vancouver construction industry, about 7 percent of women construction employees were managers, lower than the 12 percent of male workers who were managers in 2018-2022. This difference was statistically significant.

E-6. Percentage of construction industry employees who worked as a manager in the Portland-Vancouver marketplace, 2018–2022

	2018-2022	
Race/ethnicity		
African American	9.2 %	
Asian American	8.2	*
Hispanic American	6.9	**
Native American	7.6	*
Non-Hispanic white	12.7	
Gender		
Female	6.7 %	**
Male	12.0	
All individuals	**11.3 %**	

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or between females and males) for the given Census/ACS year is statistically significant at the 90% and 95% confidence level, respectively.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

[67] Managers include general and operations managers and construction managers.

As in construction, any underrepresentation in employment in the professional services industry can affect the number of businesses owned by people of color and women.

Education of People Working in the Professional Services Industry

Many professional services occupations require at least a four-year college degree and some require licensure. According to the 2018–2022 ACS, 74 percent of individuals working in the Portland-Vancouver professional services industry had at least a four-year college degree and 6 percent had a two-year degree.

Barriers to college education can restrict employment opportunities, advancement opportunities and, consequently, business ownership in the professional services industries. Low numbers of business owners in professional services may in part reflect the lack of higher education for particular racial and ethnic groups.[68] Keen Independent explores this issue below.

Race/ethnicity. Figure E-7 presents the percentage of workers age 25 and older with at least a four-year college degree in the local marketplace (across all industries). Except for Asian Americans, relatively fewer people of color) had college degrees than non-Hispanic whites. This gap in educational achievement affects employment opportunities for those groups in the professional services industry.

Gender. Figure E-7 also presents the results by gender. According to 2018–2022 data for workers in the local marketplace, 48 percent of women age 25 and older had at least a four-year college degree, higher than the 42 percent found for men.

E-7. Percentage of all workers 25 and older with at least a four-year college degree in the Portland-Vancouver marketplace, 2018–2022

	2018-2022	
Race/ethnicity		
African American	38.6 %	**
Asian American	56.7	**
Hispanic American	25.3	**
Native American	41.7	**
Non-Hispanic white	46.9	
Gender		
Female	48.0 %	**
Male	42.1	
All individuals	**44.8 %**	

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or between females and males) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

[68] Dickson, P. H., Solomon, G. T., & Weaver, K. M. (2008). Entrepreneurial selection and success: Does education matter? *Journal of Small Business and Enterprise Development, 15*(2), 239-258. doi:10.1108/14626000810871655; Bates, T., Bradford, W., & Seamans, R. (2018). Minority entrepreneurship in twenty-first century America. *Small Business Economics 50* 415-427; Macionis, J. J. (2018). *Sociology* (16th ed.). Harlow, England: Pearson.

Employment in the Professional Services Industry

Figure E-8 compares the demographic composition of professional services workers (in subindustries related to the study) to that of workers in all other industries who are 25 years or older and have a college degree.

In 2018–2022, the representation of African Americans and Hispanic Americans in the Portland-Vancouver professional services industry was lower than their representation among workers of similar education across all other industries (statistically significant differences). Figure E-8 provides these results.

Women were also underrepresented in the local professional services industry (among people with a college degree). This difference is statistically significant.

E-8. Demographic distribution of professional service workers and workers age 25 and older with a four-year college degree in all other industries in the Portland-Vancouver marketplace, 2018–2022

	Professional services		All other industries	
Race/ethnicity				
African American	1.6 %	**	3.1 %	
Asian American	13.3	*	11.4	
Hispanic American	5.4	**	6.7	
Native American	2.4		2.8	
Total minority	**22.6 %**		**24.0 %**	
Non-Hispanic white	77.4		76.0	
Total	**100.0 %**		**100.0 %**	
Gender				
Female	34.5 %	**	51.0 %	
Male	65.5	**	49.0	
Total	**100.0 %**		**100.0 %**	

Note: *, ** Denotes that the difference in proportions between workers in the specified industry and all other industries for the given race definition and Census/ACS year is statistically significant at the 90% and 95% confidence level, respectively.

"All other industries" includes all industries other than the professional services industries.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

E. Entry and Advancement — Academic research on professional services employment

Many studies have examined the factors that contribute to low minority and female participation in the STEM fields.[69] Some factors that may play a role include isolation within work environments,[70] negative bias toward females in the engineering fields,[71] the perception that STEM fields are non-communal,[72] low anticipated power in male-dominated domains such as the STEM fields[73] and inadequate secondary-school preparation for college-level STEM courses.[74]

Researchers have also found that some minority groups, including African Americans, Hispanic Americans and Native Americans, continue to have disproportionately low representation among recipients of science and engineering bachelor's and doctorate degrees. The study found that those same groups were also underrepresented among employees in science and engineering occupations.[75]

Organizations in the Portland-Vancouver marketplace have been created to address and combat this disparate representation in STEM fields. Examples include Girls Inc. of the Pacific Northwest,[76] ChickTech[77] and Building Blocks 2 Success.[78]

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[69] See, e.g., Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences, 109*(41), 16474-16479. doi:10.1073/pnas.1211286109

[70] Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies, 39*(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039; Wagner, S. H. (2017). Perceptions of support for diversity and turnover intentions of managers with solo-minority status. *Journal of Organizational Psychology, 17*(5), 28-36. Retrieved from http://www.na-businesspress.com/JOP/WagnerSH_17_5_.pdf

[71] Banchefsky, S., Westfall, J., Park, B., & Judd, C. M. (2016). But you don't look like a scientist! Women scientists with feminine appearance are deemed less likely to be scientists. *Sex Roles, 75*(3/4), 95-109. doi:10.1007/s11199-016-0586-1; Colwell, R., Bear, A., & Helman, A. (2020). *Promising practices for addressing the underrepresentation of women in science, engineering, and medicine: opening doors.* Washington D.C.: The National Academies Press.

[72] Stout, J. G., Grunberg, V. A., & Ito, T. A. (2016). Gender roles and stereotypes about science careers help explain women and men's science pursuits. *Sex Roles, 75*(9/10), 490-499. doi:10.1007/s11199-016-0647-5

[73] Smith, K., & Gayles, J. (2018). "Girl power": gendered academic and workplace experiences of college women in engineering. *Social Sciences, 7(1);* Chen, J. M., & Moons, W. G. (2014). They won't listen to me: Anticipated power and women's disinterest in male-dominated domains. *Group Processes & Intergroup Relations, 18*(1), 116-128. doi:10.1177/1368430214550340

[74] Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies, 39*(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039

[75] National Center for Science and Engineering Statistics. (2017, January 31). NCSES publishes latest Women, Minorities, and Persons with Disabilities in Science and Engineering report. *National Science Foundation: Where Discoveries Begin.* Retrieved from https://www.nsf.gov/news/news_summ.jsp?cntn_id=190946

[76] Girls Inc. of the Pacific Northwest (2024). https://girlsincpnw.org/

[77] ChickTech (2024). https://chicktech.org/

[78] Building Blocks 2 Success (2024). https://www.bb2s.org/

E. Entry and Advancement — Employment in the goods industry

Keen Independent also examined the demographic composition of the segments of the local goods industry workforce. Figure E-9 presents these results.

In 2018–2022, people of color represented about 27 percent of the workforce in the Pacific Northwest goods industry. African Americans and Asian Americans were underrepresented as employees in that industry. These differences were statistically significant.

About 23 percent of workers in the goods sector were women in 2018–2022, which is less than the representation of women in other industries (47%). This difference was statistically significant.

E-9. Demographic distribution of workers in the goods industry in the Pacific Northwest marketplace, 2018–2022

	Goods		All other industries
Race/ethnicity			
African American	3.7 %	**	4.9 %
Asian American	5.7	**	9.0
Hispanic American	13.6		14.4
Native American	3.6		3.3
Total minority	**26.6 %**		**31.6 %**
Non-Hispanic white	73.4	**	68.4
Total	**100.0 %**		**100.0 %**
Gender			
Female	23.2 %	**	47.2 %
Male	76.8	**	52.8
Total	**100.0 %**		**100.0 %**

Note: ** Denotes that the difference in proportions between workers in the goods and other services industry and all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

E. Entry and Advancement — Employment in the other services industry

Keen Independent also examined the demographic composition of workers in the "other services" industry (services other than professional services). Keen Independent defined the other services industry in this study as a wide range of sectors, such as landscaping services and waste collection. Figure E-10 presents results.

People of color represented about 38 percent of the workforce in the local other services industry in 2018–2022, about 10 percentage points higher than in all other industries in the local area (28%). Asian Americans were underrepresented as employees in that industry. This difference was statistically significant.

About 30 percent of workers in the industry were women in 2018–2022, which is less than the representation of women in other industries (47%). This difference was statistically significant.

E-10. Demographic distribution of workers in other services industry in the Portland-Vancouver marketplace, 2018–2022

	Other services		All other industries
Race/ethnicity			
African American	3.8 %		3.7 %
Asian American	5.2	**	9.3
Hispanic American	25.4	**	12.3
Native American	3.2		3.0
Total minority	**37.7 %**		**28.3 %**
Non-Hispanic white	62.3	**	71.7
Total	**100.0 %**		**100.0 %**
Gender			
Female	30.3 %	**	47.2 %
Male	69.7	**	52.8
Total	**100.0 %**		**100.0 %**

Note: ** Denotes that the difference in proportions between workers in the goods and all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

E. Entry and Advancement — Summary of results

People of color were about 29 percent of the Portland-Vancouver marketplace workforce between 2018 and 2022. Women accounted for about 47 percent of all workers. Analysis of the Portland-Vancouver workforce in the study industries indicates that there could be barriers to employment for some minority groups and for women in certain industries, as summarized below.

- Among construction industry employees, African Americans, Asian Americans and women were underrepresented compared to representation among workers in all other industries. These differences were statistically significant.

  In the marketplace, representation of workers of color was relatively low in construction trades such as equipment operators, HVAC mechanics, plumbers and roofers.

  There was also low representation in construction trades for women.

- Relatively few Asian Americans, Hispanic Americans, Native Americans and women working in the construction industry were managers.

- After controlling for educational attainment, African Americans, Hispanic Americans and women constituted a smaller portion of the local professional services workforce when compared to representation among workers in all other industries. These differences were all statistically significant.

- In the goods industry, African Americans, Asian Americans and women represented a smaller portion of workers than would be expected based on representation among workers in all other industries. These differences were statistically significant.

- In the other services industry, Asian Americans and women represented a smaller portion of workers than would be expected based on representation among workers in all other industries. These differences were statistically significant.

Any barriers to entry or advancement in the study industries might affect the relative number of businesses owned by people of color and women in these industries in the local area. Appendix F, which follows, examines rates of business ownership among individuals working in the study industries.

F. Business Ownership in the Portland–Vancouver Study Industries — Introduction

Appendix F discussed the composition of the workforce for the study industries related to City of Vancouver contracting in the Portland-Vancouver marketplace.[1] People who start businesses in the study industries tend to have experience working in that industry. Especially in construction, many people counted as working in the local study industry are business owners, as described below:

- Approximately one in five people working in the construction industry in the Portland-Vancouver marketplace was a self-employed business owner in 2018–2022.
- Approximately 18 percent of those working in the local professional services industry were self-employed business owners.
- About 6 percent of those working in the local goods industry and about 20 percent of those working in the other services industry were self-employed.

Focusing on these study industries, Keen Independent examined business ownership for different groups of workers in the Portland-Vancouver marketplace using Public Use Microdata Samples (PUMS) from the 2018–2022 American Community Survey (ACS).

Keen Independent assessed whether the rates of business ownership within each industry differed for people of color and women compared with other workers in those industries.

Appendix F also provides information on how the COVID-19 pandemic, the Great Recession and other major events have impacted business ownership at the national and regional level.

[1] Keen Independent considers the relevant geographic market area for this study to be the [1] Portland-Vancouver-Hillsboro, OR-WA MSA area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts.

F. Business Ownership — Business ownership rates in construction industry

Many studies have explored differences between minority and non-minority business ownership at the national level.[2] Although self-employment rates have increased for people of color and women over time, several studies indicate that race, ethnicity and gender continue to affect opportunities for business ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and regions.[3,4,5]

Keen Independent classified workers as self-employed if they reported that they worked in their own unincorporated or incorporated business in the ACS data.

In this section, the study team compares business ownership rates among the following groups by study industry (construction, professional services, goods and other services).

- People of color compared to non-Hispanic whites; and
- Women compared to men.

[2] See, e.g., Bates, T., & Robb, A.M. (2016). Impacts of owner race and geographic context on access to small-business financing. *Economic Development Quarterly*, *30*(2), 159-170; Fairlie, R. (2018). Racial inequality in business ownership and income. *Oxford Review of Economic Policy, 34(4)* 597-614; Fairlie, R. W., Robb, A. M., & Robinson, D.T. (2020). Black and white: Access to capital among minority-owned startups. *National Bureau of Economic Research*, *Working Paper (28154)*; Vallejo, J.A., & Canizales, S. (2016). Latino/a professionals as entrepreneurs. *Ethnic and Racial Studies, 39 (9)* 1637-1656; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics, 32*(3), 507-561.

[3] Lofstrom, M., Bates, T., & Parker, S. C. (2014). Why are some people more likely to become small-business owners than others: Entrepreneurship entry and industry-specific barriers. *Journal of Business Venturing, 29*(2), 232-251.

[4] Bento, A., & Brown, T. (2020). Belief in systemic racism and self-employment among working Blacks. *Ethnic and Racial Studies 44(1),* 21-38.

[5] Struckell, E.M., Patel, P.C., Ojha, D., Oghazi, P. (2022). Financial literacy and self employment–The moderating effect of gender and race. *Journal of Business Research 139*, 639-653.

F. Business Ownership — Business ownership rates in construction industry

In 2018–2022, about 19 percent of workers in the Portland-Vancouver marketplace construction industry were self-employed.

Figure F-1 shows that the business ownership rates for African American, Hispanic American and Native American construction employees were less than the 21 percent rate for non-Hispanic white workers. However, only the difference in ownership rates for Hispanic Americans working in the industry was statistically significant.

The business ownership rate for women working in the industry was about 4 percentage points below the business ownership rate among men. This difference was statistically significant.

F-1. Percentage of employees in the Portland-Vancouver marketplace construction industry who were self-employed, 2018–2022

Demographic group	2018-2022	
Race/ethnicity		
African American	14.5 %	
Asian American	25.3	
Hispanic American	9.5	**
Native American	19.6	
Non-Hispanic white	20.5	
Gender		
Female	15.0 %	*
Male	19.1	
All individuals	**18.6 %**	

Note: *,** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% and 95% confidence levels, respectively.

"Native American" includes Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples. The 2018–2022 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

F. Business Ownership — Business ownership rates in professional services industry

Figure F-2 presents the percentage of workers in the Portland-Vancouver marketplace professional services industry who were self-employed based on ACS data for 2018–2022.

According to these data, African Americans, Asian Americans and Hispanic Americans had a lower business ownership rate than non-Hispanic white men. These differences were statistically significant for Asian Americans and Hispanic Americans.

About 21 percent of women working in this industry were business owners, compared to about 16 percent of men.

F-2. Percentage of workers in the Portland-Vancouver marketplace professional services industry who were self-employed, 2018–2022

Demographic group	2018-2022	
Race/ethnicity		
African American	15.3 %	
Asian American	11.6	**
Hispanic American	11.1	**
Native American	22.8	
Non-Hispanic white	19.2	
Gender		
Female	20.8 %	**
Male	16.2	
All individuals	**17.8 %**	

Note: ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence levels.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

F. Business Ownership — Business ownership rates in goods industry

Figure F-3 presents the percentage of workers in the local goods industry who were self-employed based on ACS data for 2018–2022.

According to these data, African Americans, Hispanic Americans and Native Americans had considerably lower business ownership rates than non-Hispanic whites working in the Pacific Northwest goods industry. These differences were statistically significant for Native Americans.

About the same share of female and male workers in this industry owned businesses.

F-3. Percentage of workers in the Pacific Northwest goods industry who were self-employed, 2018–2022

Demographic group	2018-2022	
Race/ethnicity		
African American	3.5 %	
Asian American	4.7	
Hispanic American	3.3	
Native American	2.6	*
Non-Hispanic white	5.0	
Gender		
Female	4.7 %	
Male	4.6	
All individuals	**4.6 %**	

Note: ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

"Native American" includes Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

F. Business Ownership — Business ownership rates in other services industry

Figure F-4 presents the percentage of workers in the other services industry who were self-employed based on ACS data for 2018–2022.

Asian Americans in the local other services industry were less likely to be self-employed than non-Hispanic whites. This difference was statistically significant.

Among workers in this industry, women were about 2 percentage points more likely than men to be self-employed, but this difference was not statistically significant.

F-4. Percentage of workers in the Portland-Vancouver other services industry who were self-employed, 2018–2022

Demographic group	2018-2022	
Race/ethnicity		
African American	19.3 %	
Asian American	10.5	**
Hispanic American	18.1	
Native American	17.5	
Non-Hispanic white	21.2	
Gender		
Female	21.5 %	
Male	19.1	
All individuals	**19.9 %**	

Note: ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

"Native American" includes Native Americans and people who identified as other races or ethnicities not listed in the table.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

F. Business Ownership — Research on potential causes of differences in ownership rates

National Context

Nationally, researchers have examined whether racial and gender differences in business ownership rates persist after considering personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such factors.

- **Financial capital.** Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found correlation between startup capital and business formation, expansion and survival.[6] Additionally, studies suggest that housing appreciation has a positive effect on small business formation and employment.[7] However, unexplained racial and ethnic differences in financial capital remain after statistically controlling for those factors.[8] Studies have found that minorities (particularly African Americans and Hispanic Americans) experience greater barriers to accessing credit and face further credit constraints at business startup and throughout business ownership than non-Hispanic whites.[9] Access to capital is discussed in more detail in Appendix G.

- **Education.** Education has a positive effect on the probability of business ownership in most industries. Research confirms a significant relationship between education and ability to obtain startup capital.[10] However, results of multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.[11]

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[6] See, e.g., Fairlie, R. W., Robb, A. M., & Robinson, D.T. (2020). Black and white: Access to capital among minority-owned startups*. National Bureau of Economic Research*, *Working Paper (28154);* Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics,* 32(3), 507-561; Vallejo, J.A., & Canizales, S. (2016). Latino/a professionals as entrepreneurs. *Ethnic and Racial Studies, 39 (9)* 1637-1656.

[7] Kerr, S.P., Kerr, W.R., & Nanda, R. (2022). House prices, home equity and entrepreneurship: Evidence from U.S. Census micro data. *Journal of Monetary Economics 130*, 103-119. Retrieved from https://doi.org/10.1016/j.jmoneco.2022.06.002; Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity constraints, household wealth, and entrepreneurship revisited. *Review of Income and Wealth, 58,* 279-306. Retrieved from https://doi.org/10.1111/j.1475-4991.2011.00491.

[8] Lofstrom, M., & Chunbei, W. (2006). Hispanic self-employment: A dynamic analysis of business ownership*. Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R. W., Robb, A. M., & Robinson, D.T. (2020). Black and white: Access to capital among minority-owned startups*. National Bureau of Economic Research*, *Working Paper (28154)*

[9] Kim, M.J., Lee, K.M., Brown, J.D., & Earle, J.S. (2021). Black Entrepreneurs, Job Creation, and Financial Constraints. *IZA Discussion Paper No. 14403*. Retrieved from http://dx.doi.org/10.2139/ssrn.3855967; Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, discouragement and inequity in small business lending* (Rep.). Retrieved from National Community Reinvestment Coalition website: https://ncrc.org/disinvestment/; Dua, A., Mahajan, D., Millan, I., & Stewart, S. (2020). COVID-19's effect on minority-owned small businesses in the United States. *McKinsey & Company.*

[10] Bates, T., Bradford, W.D., & Seamans, R. (2018). Minority entrepreneurship in the twenty-first century America. *Small Business Economics,* 50, 415-427*;* Robb, A. M., Fairlie, R. W., & Robinson, D. T. (2009). *Financial capital injections among new black and white business ventures: Evidence from the Kauffman firm survey.* Retrieved from https://researchbank.swinburne.edu.au/file/aada046e-13eb-46e1-9b85-14bded636232/1/PDF%20(Published%20version).pdf

[11] See, e.g., Bates, T., Bradford, W.D., & Seamans, R. (2018). Minority entrepreneurship in the twenty-first century America. *Small Business Economics, 50* 415-427; Fairlie, R. W., & Meyer, B. D. (1996). Ethnic and racial self-employment differences and possible explanations*. The Journal of Human Resources*, *31*(4), 757-793.

F. Business Ownership — Research on potential causes of differences in ownership rates

- **Experience.** Managerial experience and prior-self-employment are important indicators of re-entering or entering business ownership, respectively.[12] However, people of color and women have been found to be less likely than white men to hold managerial positions.[13] Additionally, unexplained differences in self-employment between minorities and non-minorities still exist after accounting for business experience.[14]

- **Intergenerational links.** Intergenerational links affect one's likelihood of self-employment.[15] In fact, having an entrepreneurial parent can increase the likelihood of their offspring choosing to be self-employed by up to 200 percent.[16] One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.[17]

Additionally, business owners with personal experience and/or family with managerial experience have been found to accumulate resources that result in greater business success, and thus continuation in the chosen industry.[18] However, research has found that on average, minorities have fewer intergenerational links to business ownership, which can impact the ability to start and operate a firm.[19]

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[12] Staniewski, M.W., (2016). The contribution of business experience and knowledge to successful entrepreneurship. *Journal of Business Research, 69(11)* 5147-5152; Kim, P., Aldrich, H., & Keister, H. (2006). Access (not) denied: The impact of financial, human, and cultural capital on entrepreneurial entry in the United States. *Small Business Economics*, *27*(1), 5-22.

[13] Bloch, K.R., Taylor, T., Church, J., & Buck, A. (2021). An intersectional approach to the glass ceiling: Gender, race and share of middle and senior management in U.S. workplaces. *Sex Roles 84*, 312-325. Retrieved from https://doi.org/10.1007/s11199-020-01168-4

[14] Fairlie, R., & Meyer, B. (2000). Trends in self-employment among white and black men during the twentieth century. *The Journal of Human Resources, 35*(4), 643-669. doi:10.2307/146366

[15] Andersson, L., & Hammarstedt, M. (2010). Intergenerational transmissions in immigrant self-employment: Evidence from three generations. *Small Business Economics*, *34*(3), 261–276.

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[17] Fairlie, R. W., & Robb, A. M. (2006). Race, families and success in small business: A comparison of African-American-, Asian-, and white-owned businesses. *Russell Sage Foundation*; Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, *25*(2), 289-323.

[18] Staniewski, M.W., (2016). The contribution of business experience and knowledge to successful entrepreneurship. *Journal of Business Research, 69(11)* 5147-5152.

[19] Hout, M. & Rosen, H. (2000). Self-employment, family background, and race. *Journal of Human Resources, 35(4)* 670-692.

F. Business Ownership — Research on potential causes of differences in ownership rates

Impact of COVID-19 on Business Ownership

Major societal events, such as the COVID-19 pandemic and the Great Recession, have impacted business ownership across the country. Research has found that COVID-19 resulted in a loss of 3.3 million active business owners (a 22% decrease from 15 million owners) at the height of the pandemic. This was far greater than what occurred during the Great Recession, where 5 percent of businesses closed.[20] Recovery has been inconsistent across industries, with some business owners rebounding and others continuing to feel the economic effects of the pandemic.

Research shows that COVID-19-induced losses to business earnings were disproportionally felt by minority-owned businesses.[21] Based on representative Current Population (CPS) microdata, average business earnings decreased as follows:

- 15 percent for Asian business owners;
- 11 percent for African American business owners;
- 7 percent for Hispanic business owners; and
- 2 percent for white business owners.[22]

In addition to race, factors including industry, geographic region, education level and gender impacted how business owners experienced the economic effects of COVID-19. The largest losses in business earnings in the pandemic were in leisure and hospitality, wholesale and retail trade.[23] Regions including the West and the South, as well as central cities areas, saw the greatest impact.[24] Business owners with a bachelor's degree were more immune to economic losses.[25]

An estimated 25 percent of woman-owned businesses had closed during the height of the pandemic.[26] Business closure rates were higher for women of color and higher still for women of color who did not have a bachelor's degree.[27]

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[20] Fairlie, R. (2020). *COVID-19, small business owners, and racial inequality.* Retrieved from https://www.nber.org/reporter/2020number4/covid-19-small-business-owners-and-racial-inequality?force_isolation=true

[21] Fairlie, R. (2022). The Impacts pf COVID-19 on Racial Disparities in Small Business Earnings. U.S. Small Business Administration Office of Advocacy. Retrieved from https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/16104005/Report_COVID-and-Racial-Disparities_508c.pdf

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Mills, C., & Battisto, J. (2020). Double jeopardy: COVID-19's concentrated health and wealth effects in black communities. *Federal Reserve Bank of New York*; Fairlie, R. (2020). *COVID-19, small business owners, and racial inequality.* Retrieved from https://www.nber.org/reporter/2020number4/covid-19-small-business-owners-and-racial-inequality?force_isolation=true

[27] Mills, C., & Battisto, J. (2020). Double jeopardy: COVID-19's concentrated health and wealth effects in black communities. *Federal Reserve Bank of New* York

F. Business Ownership — Research on potential causes of differences in ownership rates

Major reasons behind such a disproportionate impact on minority-owned businesses include the following:

- Minority-owned businesses were facing structural and social issues prior to the pandemic that negatively affected ownership and success, such as discrimination and lack of access to capital. Consequently, these firms were more likely to be at risk during and after the pandemic, particularly African American- and Hispanic American-owned businesses.[28]

- Minority-owned businesses were concentrated in fields hit heavily by COVID-19, such as leisure and hospitality, wholesale and retail trade.[29]

- Minority-owned businesses had limited access to funding during the pandemic, such as the Paycheck Protection Program (PPP), due primarily to a lack of existing relationships with financial intermediaries (e.g., Small Business Administration lenders).

Findings from the Small Business Credit Survey indicate that minority business owners were less likely than their white counterparts to receive PPP funding. White business owners received some or all of the funding requested 91 percent of the time, compared to 76 percent of Hispanic American business owners and 66 percent of African American business owners.[30] Challenges accessing PPP loans included disparities in encouragement to apply, lack of information about the program, lack of information regarding alternatives and differences in access to guidelines and outcomes of the program.[31]

An additional factor that impacted all business ownership, regardless of race, gender or business size, were supply chain disruptions experienced by most industries, which limited access to goods and limited productivity.[32]

Intergenerational small businesses were challenged by the COVID-19 pandemic as well. Deaths of older family members (as well as the fear of death) hastened succession, led some to reevaluate business ownership and led others to consider business sale or closure.[33]

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[28] Dua, A., Mahajan, D., Millan, I., & Stewart, S. (2020). COVID-19's effect on minority-owned small businesses in the United States. *McKinsey & Company.*

[29] Fairlie, R. (2022). The Impacts pf COVID-19 on Racial Disparities in Small Business Earnings. *U.S. Small Business Administration Office of Advocacy*. Retrieved from https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/16104005/Report_COVID-and-Racial-Disparities_508c.pdf

[30] The Federal Reserve Bank. (2022). Small business credit survey: 2022 report on firms owned by people of color. *Federal Reserve Bank.* Retrieved from https://www.fedsmallbusiness.org/survey/2022/2022-report-on-firms-owned-by-people-of-color.

[31] Lederer, A., Oros, S., Bone, S., Christensen, G., & Williams, J. (15 July 2020). Lending discrimination within the Paycheck Protection Program. *National Community Reinvestment Coalition.* Retrieved from https://www.ncrc.org/lending-discrimination-within-the-paycheck-protection-program/.

[32] Van Hoek, R. (2020). Responding to COVID-19 supply chain risks—insights from supply chain change management, total cost of ownership and supplier segmentation theory. *Logistics, 4(4)* 23.

[33] De Massis, A. & Rondi, E. (2020). COVID-19 and the future of family business research. *Journal of Management Studies.* Retrieved from https://bia.unibz.it/view/delivery/39UBZ_INST/12236541630001241/13236541620001241

F. Business Ownership — Construction industry regression analyses

Regression Analyses

As discussed above, race, ethnicity and gender can affect opportunities for business ownership, even when accounting for personal characteristics such as education, age and family status.

To further examine business ownership, Keen Independent developed multivariate regression models for each study industry. Those models estimate the effect of race, ethnicity and gender on the probability of business ownership while statistically controlling for certain personal and family characteristics of the worker.

An extensive body of literature examines whether personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) explain differences in business ownership. That subject has also been examined in other disparity studies that have been favorably reviewed in court.[34] For example, studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and A&E industries persist after statistically controlling for race- and gender-neutral personal characteristics.[35,36] Those studies developed probit econometric models (a particular type of regression model) based on Census data, which were included in the materials that agencies submitted to courts in subsequent litigation concerning implementation of the Federal DBE Program.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or "explanatory" variables, such as:

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, marital status, disability, number of children in the household and number of elderly people in the household;
- Educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Race, ethnicity and gender.[37]

[34] For example, National Economic Research Associates, Inc. (2012). *The state of minority- and woman-owned business enterprise in construction: Evidence from Houston* (Rep.). Retrieved from City of Houston website: http://www.houstontx.gov/obo/disparitystudyfinalreport.pdf; Mason Tillman Associates. (2011). *Illinois Department of Transportation/Illinois Tollway disadvantaged business enterprises disparity study (Vols. 2)* (Rep.). Retrieved from Illinois Department of Transportation website: http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Reports/OBWD/DBE/DBEDisparityStudy.pdf.

[35] National Economic Research Associates, Inc. (2000). *Disadvantaged Business Enterprise availability study* (Rep.). Prepared for the Minnesota Department of Transportation.

[36] National Economic Research Associates, Inc. (2004). *Disadvantaged Business Enterprise availability study* (Rep.). Prepared for the Illinois Department of Transportation.

[37] Probit models estimate the effects of multiple independent or "predictor" variables in terms of a single, dichotomous dependent or "outcome" variable — in this case, business ownership. The dependent variable is binary, coded as "1" for individuals in a particular industry who are self-employed and "0" for individuals who are not self-employed. The model enables estimation of the probability that workers in each sample are self-employed, based on their individual characteristics. Keen Independent excluded observations where the Census Bureau had imputed values for the dependent variable (business ownership).

F. Business Ownership — Construction industry regression analyses

The effect of an explanatory variable such as race or gender on business ownership can be determined based on the "coefficient" for that variable determined through the multivariate regression analysis.

Figure F-5 presents the coefficients for the probit model for individuals working in the local construction industry in 2018–2022.

Age and marriage status were positively associated with the likelihood of owning a construction business. These variables were statistically significant.

After statistically controlling for race- and gender-neutral factors, there remained a statistically significant disparity in business ownership rates for Hispanic Americans working in the local construction industry. Compared with non-Hispanic white men, Hispanic Americans working in the construction industry were less likely to own businesses.

F-5. Business ownership model for the Portland-Vancouver marketplace construction industry, 2018–2022

Variable	Coefficient
Constant	-0.1205 *
Age	0.0082 **
Age-squared	0.0000
Married	0.0312 **
Speaks English well	-0.0123
Number of people over 65 in household	0.0133
Owns home	0.0309
Monthly mortgage payment ($1,000s)	0.0159
Interest and dividend income ($1,000s)	0.0005
Income of spouse or partner ($1,000s)	0.0000
Four-year degree	-0.0151
Advanced degree	-0.0285
African American	-0.0257
Asian American	0.0661
Hispanic American	-0.0716 **
Native American	-0.0186
White woman	-0.0394

Note: *,** Denote statistical significance at the 90% and 95% confidence levels, respectively.
"Native American" includes Native Americans and people who identified as other races or ethnicities not listed in the table.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

F. Business Ownership — Construction industry regression analyses

Actual and Projected Business Ownership Rates

Probit regression modeling allows for further analysis of the disparities identified in business ownership rates for people of color and white women. Keen Independent modeled business ownership rates for these groups as if they had the same probability of business ownership as similarly situated non-Hispanic white males and compared those results with what was observed.

We begin by examining business ownership rates in the construction industry.

1. Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white male workers in the construction industry in the dataset.[38]

2. After obtaining the results from the non-Hispanic white male regression model, the study team used coefficients from that model along with the mean personal, financial and educational characteristics of African Americans, Asian Americans, Hispanic Americans, Native Americans or other minorities, and non-Hispanic white women working in the local construction industry (i.e., indicators of educational attainment as well as indicators of financial resources and constraints) to estimate the probability of business ownership of each group if they were treated the same as non-Hispanic white men. Similar simulation approaches have been used in other disparity studies that courts have reviewed.

Figure F-6 presents the simulated business ownership rate (i.e., "benchmark" rate) for Hispanic Americans, and compares them to the actual, observed mean probabilities of business ownership for those groups.

The disparity index was calculated by dividing the actual business ownership rate for each group (the first column of results in Figure F-5) by that group's benchmark rate (the second column), and then multiplying the result by 100.[39] The third column of results in Figure F-5 provides the disparity index for business ownership for white women working in the local construction industry. An index of "100" indicates parity between actual and simulated rates and an index less than 100 indicates a disparity.

As shown in Figure F-6, there was a substantial disparity in business ownership for Hispanic Americans (disparity index of 58).

F-6. Comparison of actual business ownership rates to simulated rates for workers in the construction industry in the Portland-Vancouver marketplace, 2018–2022

Demographic group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
Hispanic American	9.5 %	16.4 %	58

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

[38] That version of the model excluded the race, ethnicity and gender indicator variables, because the value of all those variables would be the same (i.e., 0).

[39] Note that the "actual" self-employment rates are derived from the dataset used for these regression analyses and do not always exactly match results from the entire 2018–2022 data.

F. Business Ownership — Professional services industry regression analyses

Keen Independent also developed a business ownership regression model for people working in the local professional services industry. Figure F-7 presents the coefficients for that probit model.

For this industry, the effect of age (age-squared) was associated with a higher probability of owning a business. This estimate was statistically significant.

After controlling for race- and gender-neutral factors, no disparities persisted in ownership rates for minority and white woman business owners compared to non-Hispanic white male business owners.

F-7. Business ownership model for the Portland-Vancouver marketplace professional services industry, 2018–2022

Variable	Coefficient
Constant	0.1450
Age	-0.0045
Age-squared	0.0001 **
Married	0.0077
Speaks English well	-0.0672
Number of people over 65 in household	0.0403
Owns home	-0.0382
Monthly mortgage payment ($1,000s)	-0.0010
Interest and dividend income ($1,000s)	0.0005
Income of spouse or partner ($1,000s)	0.0003
Four-year degree	0.0032
Advanced degree	0.0198
African American	-0.0417
Asian American	-0.0320
Hispanic American	-0.0087
Native American	0.0024
White woman	0.0240

Note: ** Denote statistical significance at the 95% confidence level.

"Native American" includes Native Americans and people who identified as other races or ethnicities not listed in the table.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

E. Business Ownership — Goods industry regression analyses

Figure F-8 presents the coefficients for the business ownership probit model for people working in the local goods industry.

For this industry, speaking English well was one of the personal characteristics positively associated with a higher probability of owning a business. This estimate was statistically significant.

After controlling for race- and gender-neutral factors, no disparities persisted in ownership rates for minority and white woman business owners compared to non-Hispanic white male business owners.

F-8. Business ownership model for the Pacific Northwest goods industry, 2018–2022

Variable	Coefficient
Constant	-0.0419
Age	-0.0002
Age-squared	0.0000
Married	0.0141
Speaks English well	0.0417 **
Number of people over 65 in household	0.0165
Owns home	0.0021
Monthly mortgage payment ($1,000s)	0.0113 *
Interest and dividend income ($1,000s)	0.0012 **
Income of spouse or partner ($1,000s)	0.0000
Four-year degree	0.0114
Advanced degree	-0.0116
African American	-0.0036
Asian American	0.0045
Hispanic American	0.0017
Native American	-0.0121
White woman	-0.0046

Note: ** Denotes statistical significance at the 95% confidence level.

"Native American" includes Native Americans and people who identified as other races or ethnicities not listed in the table.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

F. Business Ownership — Other services industry regression analyses

Figure F-9 presents the coefficients for the business ownership probit model for people working in the Portland-Vancouver other services industry.

Age and being married were positively associated with business ownership in the local other services industry. Workers with an advanced degree were less likely than others to own a business.

After controlling for race- and gender-neutral factors, there remained statistically significant disparities in business ownership rates for Asian Americans working in the local other services industry. Compared with non-Hispanic white men, Asian Americans working in the other services industry were less likely to own businesses than others in the industry with similar personal characteristics.

Non-Hispanic white women were somewhat more likely than non-Hispanic white men working in the other services industry to be a business owner after controlling for race- and gender-neutral factors.

F-9. Business ownership model for the Portland-Vancouver other services industry, 2018–2022

Variable	Coefficient
Constant	-0.0365
Age	0.0078 **
Age-squared	0.0000
Married	0.0585 **
Speaks English well	-0.0366
Number of people over 65 in household	0.0144
Owns home	-0.0388
Monthly mortgage payment ($1,000s)	0.0141
Interest and dividend income ($1,000s)	0.0004
Income of spouse or partner ($1,000s)	-0.0003
Four-year degree	-0.0016
Advanced degree	-0.0662 *
African American	0.0316
Asian American	-0.0724 **
Hispanic American	-0.0002
Native American	-0.0024
White woman	0.0655 **

Note: *,** Denotes statistical significance at the 90% and 95% confidence levels, respectively.
"Native American" includes Native Americans and people who identified as other races or ethnicities not listed in the table.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

F. Business Ownership — Other services industry regression analyses

Actual and Projected Business Ownership Rates

Figure F-10 compares the actual and simulated ("benchmark") business ownership rates for Asian Americans working in the Portland-Vancouver other services industry.

The actual business ownership rate for Asian Americans in the other services industry was less than the benchmark rate. This disparity was substantial.

In this case, the actual business ownership rate among non-Hispanic white women was higher than the benchmark rate that one would expect. These results indicate no negative outcomes regarding business ownership rates for white women working in the Portland-Vancouver other services industry.

F-10. Comparison of actual business ownership rates to simulated rates for workers in the other services industry in the Portland-Vancouver marketplace, 2018–2022

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian American	10.5 %	17.7 %	59
White woman	24.0	16.4	146

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-4.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

F. Business Ownership — Summary of results

Summary of Results

Keen Independent examined whether there were differences in business ownership rates for workers in local construction, professional services, goods and other services industries related to race, ethnicity and gender.

- Construction. Hispanic Americans and women working in the local construction industry were less likely than non-Hispanic whites and males, respectively to own a business.

  After statistically controlling for factors including age and number of elderly people at home, a statistically significant difference in the business ownership rate persisted for Hispanic Americans. This disparity was substantial.

- Professional services. In the local professional services industry, Asian Americans and Hispanic Americans were less likely than non-Hispanic whites to own a business.

  After statistically controlling for factors such as home ownership and having an advanced degree, there were no statistically significant differences in the business ownership rates for any group.

- Goods. In the Pacific Northwest goods industry, Native Americans working in the industry were less likely than non-Hispanic whites to own a business.

  After controlling for personal characteristics, there was not a statistically significant difference for this group.

- Other services. In the Portland-Vancouver other services industry, Asian Americans were less likely than non-Hispanic whites to own a business.

  After controlling for personal characteristics, statistically significant differences persisted for Asian Americans. This disparity was substantial.

  Business ownership rates for Non-Hispanic white women working in this industry exceeded those for non-Hispanic white men.

These disparities suggest that there are fewer Hispanic American-owned construction firms and fewer Asian American-owned other services firms in the local marketplace than there would be if there were a level playing field for all groups to form and sustain businesses.

APPENDIX G. Access to Capital — Introduction

Access to capital is key to formation and long-term success of businesses. Discrimination in capital markets hinders people of color and women from acquiring the capital necessary to start, operate or expand businesses.[1] Courts have applied such evidence when approving programs to assist minority- and woman-owned businesses.[2]

The amount of start-up capital can affect business success. MBE/WBEs have, on average, less start-up capital than other businesses.[3] According to a 2012 national U.S. Census Bureau survey:

- About 25 percent of white-owned firms indicated that they had start-up capital of $25,000 or more compared with only 12 percent of African American-owned businesses. There were disparities for other minority groups except Asian Americans.
- About 15 percent of woman-owned businesses reported start-up capital of $25,000 or more compared with 27 percent of male-owned businesses (not including businesses that were equally owned by men and women).[4]

Racial or gender discrimination affecting the availability of start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have been formed.[5]

Discrimination in the traditional means of obtaining start-up capital (e.g., the ability to obtain a business loan and having equity in a home and the ability to borrow against that equity) also impacts business survival and success. Lack of access to business credit, housing market discrimination and discrimination in mortgage lending have lasting effects for current or potential business owners.

Appendix G presents information about start-up capital and business credit markets nationally and in the region. It also examines the relationship between business success and mortgage lending, as home equity is often a vital source of capital to start and expand businesses.

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[1] Fairlie, R. (2018). Racial inequality in business ownership and income. *Oxford Review of Economic Policy, 34(4)* 597-614; Fairlie, R. W., Robb, A. M., & Robinson, D.T. (2020). Black and white: Access to capital among minority-owned startups*. National Bureau of Economic Research*, *Working Paper (28154);* Federal Reserve Bank of Atlanta. (2019, December). Report on minority-owned firms: small business credit survey. Retrieved from https://www.fedsmallbusiness.org/survey/2019/report-on-minority-owned-firms

[2] In *Concrete Works v. City and County of Denver*, Denver presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study. The study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." *Concrete Works*, 321 F.3d at 976, 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. The Tenth Circuit in *Concrete Works* concluded that discriminatory motive can be inferred from the results shown in disparity studies. The Court noted that in *Adarand VII* it took "judicial notice 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.

[3] Fairlie, R. W., & Robb, A. (2010). Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States. Cambridge, MA: The MIT Press.

[4] United States Census Bureau. (2012). *2012 Survey of Business Owners* [Data file]. Retrieved from: https://www.census.gov/library/publications/2012/econ/2012-sbo.html

[5] Fairlie, R. W., Robb, A. M., & Robinson, D.T. (2020). Black and white: Access to capital among minority-owned startups*. National Bureau of Economic Research*, *Working Paper (28154);* Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

G. Access to Capital — Sources of start-up capital

The study team analyzed financing patterns, with a focus on sources of start-up capital, to explore any differences in access to capital for people of color and women.

The most common sources of capital used to start or acquire a business according to the U.S. Census Bureau are:

- Personal or family savings of owner(s);
- Personal or family assets other than savings of owner(s);
- Personal or family home equity loan;
- Personal credit card(s) carrying balances;
- Business credit card(s) carrying balances;
- Business loan from federal, state or local government;
- Government-guaranteed business loan from a bank or financial institution;
- Business loan from a bank or financial institution;
- Business loan or investment from family or friends;
- Investment by venture capitalist(s); and
- Grants.

According to the U.S. Census Bureau's Annual Business Survey (ABS) and the Federal Reserve Bank's 2023 Small Business Credit Survey (SBCS), the primary source of capital used to start or acquire a business in 2017 was personal and/or family savings.[6] Research finds that the amount of personal savings a business owner has accrued is influenced by race, ethnicity and gender.

[6] Federal Reserve Bank (2023, March). Report on minority-owned firms: small business credit survey. Retrieved fromhttps://www.fedsmallbusiness.org/survey/2023/report-on-employer-firms ; The Annual Business Survey provides economic and demographic data for nonfarm employer businesses that file the 941, 944 or 1120 tax forms by ethnicity, race and gender. This differs from the U.S. Census Bureau's Survey of Business Owners which collects data on employer businesses and non-employer businesses with receipts of $1,000 or more. ABS data released in 2018 and referencing 2017 are the most recent data available.

G. Access to Capital — Sources of start-up capital

A 2023 Survey of Consumer Finances by the Federal Reserve System found that the median net worth of African American households was 16 percent of that for white households and that the median net worth of Hispanic American households was 22 percent of white households.[7]

The gap between the median net worth of male- and female-headed households is also substantial. A 2021 study found, on average, a woman-headed household's net worth is 71 percent that of her male counterpart.[8] Research shows that while the gender income gap has narrowed, the gender wealth gap has widened steadily since the mid-1990s.[9]

[7] Federal Reserve Bank. Survey of Consumer Finances. Retrieved from: https://www.federalreserve.gov/econres/scf/dataviz/scf/table/#series:Net_Worth;demographic:racecl4;population:all;units:median

[8] Kent, A.H., & Ricketts, L. (2021, January 12). Gender wealth gap: families headed by women have lower wealth. *Federal Reserve Bank of St. Louis.* Retrieved from https://www.stlouisfed.org/en/publications/in-the-balance/2021/gender-wealth-gap-families-women-lower-wealth

[9] Lee, A. (2022) The gender wealth gap in the United States. *Social Science Research* (107). Retrieved from https://www.sciencedirect.com/science/article/abs/pii/S0049089X22000515 Women's median wealth as a percentage of men's median wealth dropped from 90% in the mid-1990s to 60% in the mid-2010s. The widening of the gender wealth gap has occurred across the wealth distribution and in almost every subgroup by marital status, race, education, and age.

G. Access to Capital — Sources of start-up capital

Use of Personal Savings

ABS has also found that the degree to which personal savings are used differs by race, ethnicity and gender. Employer businesses (those with paid employees other than the owner) included in the 2017 ABS data revealed the following national patterns:

- African American-, Asian American- and Hispanic American-owned businesses were most likely to use personal/family savings as a source of start-up capital (72%). American Indian- and Alaska Native-owned businesses (69%) were also likely to rely on personal or family savings for start-up capital.
- Non-Hispanic white-owned businesses were less likely to use personal/family savings for start-up capital (66%).
- Woman-owned firms were slightly more likely than male-owned businesses to report using personal and family savings for start-up capital (67% and 65%, respectively).

Use of Personal Credit Cards

Some business owners also use personal credit scores to obtain capital. Similar to personal funds, SBCS findings show that reliance on this method differs by race and ethnicity. African American- (52%) and Hispanic American-owned (51%) businesses were more likely to utilize personal credit scores compared to majority- (45%) and Asian American-owned (43%) firms. This finding is confounded by the fact that African Americans and Hispanic Americans, on average, have lower credit scores than their white and Asian American counterparts. This may increase the difficulty and limit the actual acquirement of capital for African American and Hispanic American business owners.[10]

The Federal Reserve found that African Americans and Hispanic Americans accessed credit at different rates. In 2022, 87 percent of non-Hispanic whites had credit cards, while 73 percent of Hispanic Americans and 71 percent of African Americans did.

Hispanic Americans and African Americans were also less likely to be approved for credit or an approval for less than credit requested than non-Hispanic whites. Of those that had credit cards, just 42 percent of non-Hispanic whites carried a balance, whereas 62 percent of Hispanic Americans and78 percent of African Americans carried a balance, indicating fewer resources to pay off credit cards in a timely manner.[11]

[10] Federal Reserve Bank of Atlanta. (2019, December). Report on minority-owned firms: small business credit survey. Retrieved from https://www.fedsmallbusiness.org/survey/2019/report-on-minority-owned-firms

[11] The Federal Reserve. (27 May 2023). Economic Well-Being of U.S. Households (SHED). Retrieved from: https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf

G. Access to Capital — Sources of start-up capital

Nationally, businesses owned by non-Hispanic whites, Asian Americans and men in general reported lower reliance on the use of credit cards as a source of start-up capital than other people of color and women. The following ABS results pertain to employer businesses in 2017:

- About 15 percent of African American-owned businesses used personal credit cards as a source of start-up capital, followed by Native Hawaiians and other Pacific Islander-owned firms (14%), American Indian and Alaska Native-owned business (13%) and Hispanic American-owned firms (12%).

- Only 9 percent of Asian American- and non-Hispanic white-owned businesses reported using personal credit cards as a source of start-up capital.

- Female-owned businesses (10%) were somewhat more likely to use personal credit cards as a source of start-up capital compared with male-owned businesses (8%).

Credit card financing of debt is more expensive than business loans through financial institutions.[12] Reliance on this more expensive method of financing presents additional challenges to business success, which disproportionately affects women and most minority groups.

[12] Robb, A. (2018). *Financing patterns and credit market experiences: A comparison by race and ethnicity for U.S. employer firms* (Rep. No. SBAHQ-16-M-0175). Retrieved from U.S. Small Business Administration, Office of Advocacy website: https://www.sba.gov/sites/default/files/Financing_Patterns_and_Credit_Market_Experiences_report.pdf

G. Access to Capital — Start-up capital

Wealth

Since personal and family savings were the most common source of start-up capital used to start or acquire a business, the study team examined data on wealth-holding to further explore implications for people of color and women.

As mentioned earlier, in 2022, white households had, on average, greater income and net worth than minority households, more specifically, more than six times as much wealth as African American families and five times as much as Hispanic American households.[13] White households were less likely to have zero or negative net worth and had more assets than African American and Hispanic American households.[14] White households also had greater mean net housing wealth than African American and Hispanic American households.[15] And, white householders were more likely to participate in retirement accounts and plans, behavior that has been found to build wealth and financial security.[16]

Figure G-1 provides household financial data by race and ethnicity for 2022, gathered by the Survey of Consumer Finances.

Given the heavy dependence upon personal and family savings of the owner as the main source of start-up capital, lower levels of wealth among African Americans, Hispanic Americans and other people of color may result in greater difficulty acquiring the capital necessary to start, operate or expand businesses.

G-1. U.S. household financial data by race/ethnicity, 2022

	White	African American	Hispanic American	Other minority
Income				
Median	$ 81,070	$ 46,480	$ 46,480	$ 68,100
Mean	164,550	70,950	71,550	134,680
Net worth				
Median	$ 284,310	$ 44,100	$ 62,120	$ 132,200
Mean	1,361,810	211,600	227,540	844,130
Assets (percent of families with ...)				
Homeownership	73 %	46 %	51 %	57 %
Retirement accounts	62	35	28	53
Business equity	16	11	10	14

Note: "Other minority" includes Asian Americans, Native Americans and individuals of multiple races.

Source: Survey of Consumer Finances, 2022.

[13] 2022 Survey of Consumer Finances. Retrieved from https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/

[14] Ibid.

[15] Ibid.

[16] Ibid.

G. Access to Capital — Business credit

Many businesses rely on banks for start-up and expansion capital.[17] The study team analyzed data on business loans to identify any differences in business lending to minority-, female- and white male-owned companies.

Successful Acquisition of Business Loans

Keen Independent's analysis began by examining success in receiving business loans.

Small business credit survey on loan approval. Data for employer businesses that secured business loans and other financing are found in the Small Business Credit Survey (SBCS).

Although data by race, ethnicity and gender are not reported for individual states, results by race and gender are available at the national level. These data give insight into the larger socio-economic context for firms owned by people of color in the local marketplace.

Nationally, 40 percent of employer firms applied for a business loan in 2022. Of those that applied, minority-owned businesses were less likely than non-Hispanic white-owned firms to report securing a business loan. For example, 45 percent of African American-owned businesses (that had employees) applied for loans in 2022. Of those applications, 37 percent were approved. A smaller percent of non-Hispanic white-owned businesses applied for loans in that year (33%). More than two-thirds of applications from white-owned businesses were approved (69%).

Figure G-2 displays the national approval rate for business loans by race and ethnicity, according to 2022 SBCS data. These results are consistent with recent research indicating that minority-owned businesses were less likely than white-owned businesses to receive the amount of requested credit from lending institutions.[18]

The figure indicates that among applicants, minority-owned businesses were considerably less likely than majority-owned businesses to obtain business loans.

G-2. Business loan application and approval rate, U.S. employer firms, 2022

Race/ethnicity	Applied	Approval rate
African American	45 %	37 %
Asian American	30	53
Hispanic American	42	62
Non-Hispanic white	33	69

Note: The sample size for Native Americans was too small for publication. "Approval rate" includes businesses that received some or all financing.

Source: Federal Reserve Bank. (2023). 2022 Small Business Credit Survey [Data file]. Retrieved from https://www.fedsmallbusiness.org/survey.

[17] Robb, A. & Robinson, D. T. (2017). Testing for racial bias in business credit scores. *Small Business Economics, 50*(3), 429-443.

[18] Schweitzer, Mark E. and Brent Meyer. (2022). Access to Credit for Small and Minority-Owned Businesses. *Federal Reserve Bank of Cleveland*. Retrieved from https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2022-economic-commentaries/ec-202204-access-to-credit-for-small-and-minority-owned-businesses.aspx

G. Access to Capital — Business credit

Annual Survey of Entrepreneurs data. Lack of access to capital affects business profitability and long-term success. The 2016 Annual Survey of Entrepreneurs (ASE) indicates that business owners of color were far more likely than non-Hispanic whites and men to cite access to capital as an issue negatively affecting the profitability of their company. Figure G-3 provides national results by race, ethnicity and gender of the owners of employer firms.

In sum, minority- and woman-owned employer businesses were less likely to secure business loans from a bank or financial institution, less likely to apply for additional financing due to fear of denial and more likely to cite the issue of access to financial capital as having a negative impact on profitability. These indicators of credit market conditions demonstrate that some barriers to business success disproportionately affect women and people of color.

National Community Reinvestment Coalition analyses. The ASE data related to business lending are consistent with the findings of other research. In 2019, the National Community Reinvestment Coalition studied lending practices in seven U.S. cities and found that more significant barriers to accessing capital through the traditional banking market exist for African American and Hispanic American small business owners.

For example, African American and Hispanic American applicants for small business loans are asked to provide more documentation and are given less information about the loans than their non-Hispanic white counterparts.[19]

G-3. Percentage of U.S. employer businesses that cited access to financial capital as negatively impacting the profitability of their business, 2016

Demographic group	Percent of respondents
Race	
African American	22.3 %
American Indian and Alaska Native	17.0
Asian American	13.3
Native Hawaiian and other Pacific Islander	19.6
White	8.9
Ethnicity	
Hispanic American	15.1 %
Non-Hispanic	9.3
Gender	
Female	10.0 %
Male	9.6
All individuals	**9.5 %**

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

[19] Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, discouragement and inequity in small business lending* (Rep.). Retrieved from National Community Reinvestment Coalition website: https://ncrc.org/disinvestment/

G. Access to Capital — Business credit

Trends in Access to Credit

Overall trends in small business lending are also important when considering credit market conditions.

Pre-COVID-19 trends. Even before the COVID-19 pandemic, small business lending was slow to recover from the Great Recession.[20] Among large banks, lending disproportionately went to large businesses, with bank lending to small businesses decreasing by nearly $100 billion from 2008 to 2016.[21]

Impact of COVID-19. Financial conditions of small businesses were negatively impacted by the COVID-19 pandemic. The 2022 SBCS by the Federal Reserve Bank found that in fall 2022, 57 percent of surveyed firms with employees ("employer firms") reported a "fair" or "poor" financial condition. An even larger share of firms without employees reported "fair" or "poor" status.[22]

As shown in Figure G-4, relatively more firms owned by people of color reported poor or fair financial conditions than companies with white owners. This was evident for all firms and nonemployer firms.

G-4. Financial condition of U.S. firms, fall 2022

Race/ethnicity	Poor/fair	Good/very good	Excellent	Total
All firms				
African American	75 %	25 %	1 %	101 %
Asian American	83	17	1	101
Hispanic American	67	31	2	100
Native American	72	24	4	100
Non-Hispanic white	52	41	7	100
Nonemployer firms				
African American	86 %	13 %	1 %	100 %
Asian American	86	13	1	100
Hispanic American	83	17	1	101
Native American	80	19	1	100
Non-Hispanic white	67	30	3	100

Note: Totals may not sum to 100 due to rounding.

Source: Federal Reserve Bank. (2022). 2022 Small Business Credit Survey [Data file]. Retrieved from https://www.fedsmallbusiness.org/survey.

[20] Cole, R. (2018). *How did bank lending to small business in the United States fare after the financial crisis?* (Rep. No. SBAHQ-15-M-0144). Retrieved from U.S. Small Business Administration, Office of Advocacy website: https://www.sba.gov/sites/default/files/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf

[21] Ibid.

[22] The Federal Reserve Bank. (2023). Small business credit survey: 2022 report on employer firms. *Federal Reserve Bank.* Retrieved from https://www.fedsmallbusiness.org/survey/2022/report-on-employer-firms

G. Access to Capital — Business credit

Paycheck Protection Program. The SBCS also asked firms about financial challenges they experienced in the previous 12 months. Among employer firms, relatively few businesses owned by non-Hispanic whites reported difficulties accessing credit (27%) compared to African American (50%), Hispanic Americans (37%) and Native Americans (54%).[23] Similar patterns were seen among nonemployer firms.[24]

As a result, over 90 percent of SBCS respondents in 2020 and 77 percent of respondents in 2021 sought out emergency funding, primarily from the Paycheck Protection Program (PPP).[25] Influx of federal funding for the PPP led to an increase in the number of lenders providing SBA business loans (from 1,810 in 2018 to 5,460 in 2020). Despite this growing access to loans, however, the pandemic substantially limited small business access to credit.[26]

One study in spring 2021 found that only 29 percent of the 3.6 million federal PPP loans were granted to minority-owned businesses, nationally.[27] The Center for Responsible Lending evaluated the lending criteria of the PPP and found that about 95 percent of African American-owned businesses and 91 percent of Hispanic American-owned businesses would not qualify for federal assistance from this program due to the lack of a prior relationship with a mainstream lending institution.[28] By 2021 majority Black neighborhoods were less likely to have a bank branch than non-majority Black neighborhoods. This lack of banking relationships in Black communities may explain the disparity in PPP loan coverage.[29]

Of employer firms that were approved for PPP loans, business owners located in majority African American zip codes received loans an average of seven days later than business owners located in majority white zip codes.[30] Businesses owned by African Americans also received loans that were approximately 50 percent less than loans to white owned businesses with similar characteristics.[31]

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[23] Federal Reserve Bank. (2022). 2022 Small Business Credit Survey [Data file]. Retrieved from https://www.fedsmallbusiness.org/survey

[24] The Federal Reserve Bank. (2022). Small business credit survey: 2022 report on employer firms. *Federal Reserve Bank.* Retrieved from https://www.fedsmallbusiness.org/survey/2022/report-on-employer-firms

[25] Ibid.

[26] Misera, L. (2020). An uphill battle: COVID-19's outsized toll on minority-owned firms. *Federal Reserve Bank of Cleveland.* Retrieved from https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20201008-misera-report.aspx?utm_source=cfd&utm_medium=email&utm_campaign=ClevelandFedDigest

[27] Cowley, S. (2021, April 4). Minority entrepreneurs struggled to get small-business relief loans. The New York Times. Retrieved from https://www.nytimes.com/2021/04/04/business/ppp-loans-minority-businesses.html

[28] Center for Responsible Lending. (2020, April 6). The Paycheck Protection Program continues to be disadvantageous to smaller businesses, especially businesses owned by people of color and the self-employed. Retrieved July 7, 2020, from https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-cares-act2-smallbusiness-apr2020.pdf?mod=article_inline

[29] Broady, et. al, (2021, November 2). Brookings Institute. An Analysis of financial institutions in Black-majority communities. *Brookings*, Retrieved from: https://www.brookings.edu/articles/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/.

[30] Liu, S. & Parilla, J. (17 September 2020). New data shows small businesses in communities of color had unequal access to federal COVID-19 relief. *Brookings*. Retrieved from https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief/.

[31] Atkins, R., Cook, L., & Seamans, R. (2021). Discrimination in lending? Evidence from the Paycheck Protection Program. *Small Business Economics 58*: 843-865.

G. Access to Capital — Business credit

A consequence of limited access to financial help during the COVID-19 pandemic is that pre-COVID-19 economic distress has been exacerbated. A 2020 survey of minority businesses by the JPMorgan Chase Institute found almost 80 percent of African American- and Asian American-owned small businesses reported being in "weak" financial shape, compared to 54 percent of white-owned small businesses.[32] Supply chain issues further weakened the financial state of these firms.[33]

Additionally, research has found that more restricted access to PPP loans affected the ability for firms to hire (or rehire) employees to regain financial footing.[34]

[32] Cowley, S. (2021, April 4). Minority entrepreneurs struggled to get small-business relief loans. *The New York Times*. Retrieved from https://www.nytimes.com/2021/04/04/business/ppp-loans-minority-businesses.html

[33] Sorkin, A.D. (2021, September 26). The supply chain mystery. *New Yorker.* Retrieved from https://www.newyorker.com/magazine/2021/10/04/the-supply-chain-mystery

[34] The Federal Reserve Bank. (2021). Small business credit survey: 2021 report on employer firms. *Federal Reserve Bank.* Retrieved from https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report

G. Access to Capital — Business credit

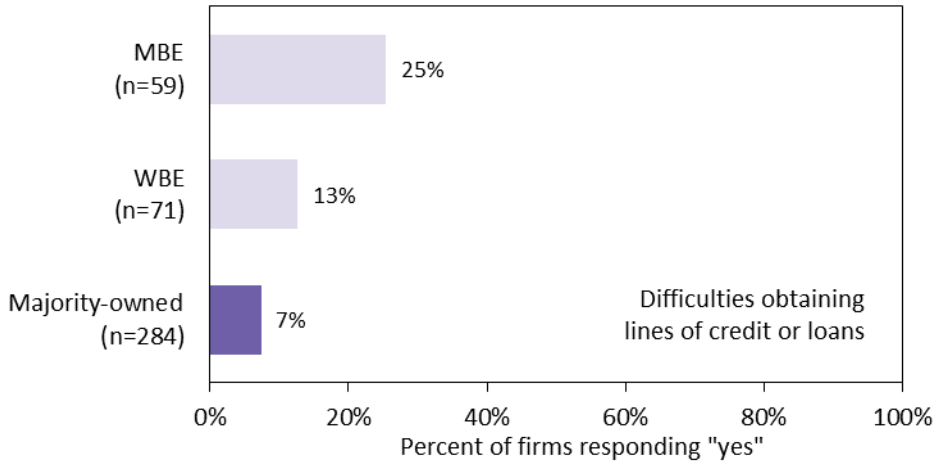
Results from 2024 Availability Surveys

In the Keen Independent 2024 availability surveys in the Portland-Vancouver marketplace, the study team asked respondents a battery of questions regarding potential barriers or difficulties firms might have experienced in the local marketplace.

The series of questions was introduced with the following statement: "Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion, or with obtaining work. Think about your experiences within the past ten years in the Portland-Vancouver metro area as you answer these questions." Respondents were then asked about specific potential barriers or difficulties. Responses to questions about access to capital were combined for all industries.

Figure G-5 presents results for questions related to access to capital and bonding. The first question asks, "Has your company experienced any difficulties in obtaining lines of credit or loans?" As shown in Figure G-6, a higher percentage of MBEs (25%) and WBEs (13%) reported having difficulties obtaining lines of credit or loans when compared to majority-owned firms (7%).

G-5. Responses to availability survey question concerning loans



Source: Keen Independent Research from 2024 availability survey.

G. Access to Capital — Bonding

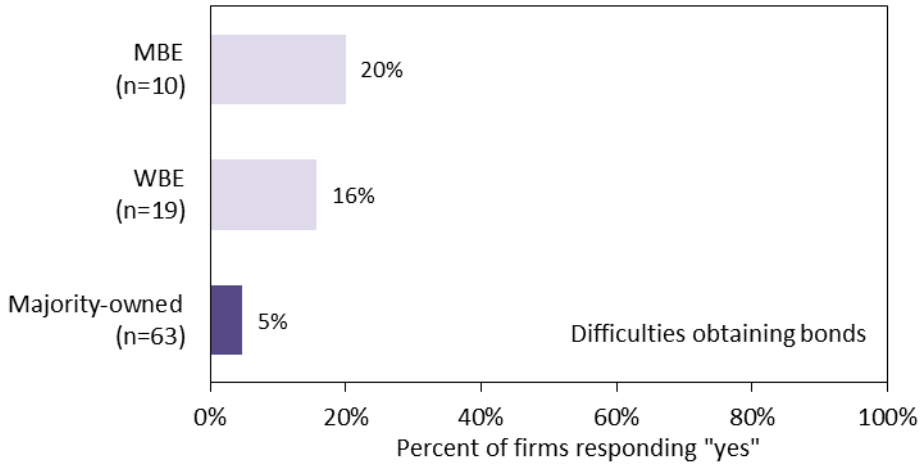
Obtaining bonds needed to bid on public sector construction contracts is related to access to capital.

The 2024 availability survey asked construction firms if they had tried to obtain bonding for a project or contract. About 63 percent of MBEs, 79 percent of WBEs and 60 percent of majority-owned construction firms indicated that they had tried to obtain bonding.

Firms that indicated that they had tried to obtain a bond were then asked, “Has your company had any difficulties obtaining bonds needed for a project or contract?” Of those that had tried to obtain a bond, 20 percent of MBEs and 16 percent of WBEs reported difficulties obtaining a bond, compared to just 5 percent of majority-owned firms.

Figure G-6 presents these results.

G-6. Responses to availability interview questions concerning bonding



Source: Keen Independent Research from 2024 availability survey.

G. Access to Capital — Homeownership

The study team also analyzed homeownership and the mortgage lending market to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Relationship of Home Equity to Business Ownership

There is a strong relationship between the likelihood of starting a new business and the potential entrepreneur's home equity.[35] Wealth created through homeownership can be an important source of capital to start or expand a business.[36] Research has shown:

- Homeownership is a tool for building wealth;[37]
- More personal wealth provides additional options for financing because higher wealth enables both self-financing and wealth leveraging via borrowing from the equity in one's home;[38]
- Business owners tend to use home equity to finance business investments, confirming that home equity is an efficient means of business financing;[39,40]
- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses;[41]
- Race and gender wealth inequality contributes to lower rates of homeownership among women and minorities; and
- The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.[42]

[35] Corradin, S., & Popov, A. (2015). House prices, home equity borrowing, and entrepreneurship. *The Review of Financial Studies, 28*(8), 2399-2428.

[36] The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Keen Independent discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.

[37] McCabe, B. J. (2018). Why buy a home? Race, ethnicity, and homeownership preferences in the United States. *Sociology of Race and Ethnicity*, *4*(4), 452-472.

[38] Bates, T., Bradford, W., & Jackson, W. E. (2018). Are minority-owned businesses underserved by financial markets? Evidence from the private-equity industry. *Small Business Economics, (50)*3, 445-461.

[39] Corradin, S., & Popov, A. (2015). House prices, home equity borrowing, and entrepreneurship. *The Review of Financial Studies, 28*(8), 2399-2428.

[40] Goodman, L., (2021). Housing finance at a glance: A monthly chartbook: August 2021 *Urban Institute*.

[41] Brown, G., Kenyon, S., & Robinson, D. (2020, February). Filling the U.S. small business funding gap. *Frank Hawkins Kenan Institute of Private Enterprise Report.*

[42] Baradaran, M. (2017). *The color of money: Black banks and the racial wealth gap.* London, England: The Belknap Press of Harvard University Press.

G. Access to Capital — Homeownership

Low interest rates during the COVID-19 pandemic resulted in a near-record increase in homebuying. From 2020 to 2021, Pew Research found the number of homeowners nationally increased by 2.1 million (2.5%), the largest growth since the 2003-2004 housing boom.[43] Relatedly, housing prices jumped 45 percent from the beginning of 2020 to the end of 2022.[44] This can be seen in Vancouver, where the median sales price of a home in Clark County grew from $374,900 at the end of 2019[45] to $503,400 at the end of 2022,[46] an increase of about 34 percent.

Partly due to rising costs, certain socioeconomic groups have not seen increases in homeownership. Nationally, homeownership among white households increased 0.8 percent, while that of minority households remained the same.[47]

Barriers to homeownership and creation of home equity for certain groups can impact business opportunities. Similarly, barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. People of color tend to be held back from homeownership by several barriers, including being adequately informed on homeownership and available home stock, as well as other issues, such as redlining and mortgage discrimination, which will be discussed in this section.[48]

Research confirms the influence that homeownership has on the likelihood of starting a business, even when examined separately from recent work history. A study focusing on people of color and women found a strong relationship between increases in home equity and entry into self-employment for both groups.[49]

The study team analyzed homeownership rates, home values and the home mortgage market in the local area from 2018–2022.

[43] Fry, R. (2021). Amid a pandemic and a recession, Americans go on a near-record homebuying spree. *Pew Research Center.* Retrieved from https://www.pewresearch.org/fact-tank/2021/03/08/amid-a-pandemic-and-a-recession-americans-go-on-a-near-record-homebuying-spree/

[44] St. Louis Federal Reserve Bank. (2023). Median sales price of houses sold for the United States. *Federal Reserve Bank*. Retrieved from https://fred.stlouisfed.org/series/MSPUS.

[45] Washington Center for Real estate Research. (2024). Housing Market Snapshot: State of Washington and Counties, Fourth Quarter 2019. *University of Washington*. Retrieved from https://re.be.uw.edu/wp-content/uploads/sites/9/2020/03/2019Q4WSHMRSnapshot.pdf

[46] Washington Center for Real estate Research. (2024). Housing Market Snapshot: State of Washington and Counties, Fourth Quarter 2022. *University of Washington*. Retrieved from https://wcrer.be.uw.edu/wp-content/uploads/sites/60/2023/02/HMR-4Q2022-snapshot.pdf

[47] Fry, R. (2021). Amid a pandemic and a recession, Americans go on a near-record homebuying spree. *Pew Research Center.* Retrieved from https://www.pewresearch.org/fact-tank/2021/03/08/amid-a-pandemic-and-a-recession-americans-go-on-a-near-record-homebuying-spree/

[48] Turner, M. A., Santos, R., Levy, D.K., Wissoker, D., Aranda, C., & Pitingolo, R., (2013, June). Housing discrimination against racial and ethnic minorities 2012. *U.S. Department of Housing and Urban Development.* Retrieved from https://www.huduser.gov/portal/publications/fairhsg/hsg_discrimination_2012.html

[49] Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity constraints, household wealth and entrepreneurship revisited. *Review of Income and Wealth*, *58*(2), 279-306. Retrieved from https://doi.org/10.1111/j.1475-4991.2011.00491.x

G. Access to Capital — Homeownership

Homeownership Rates

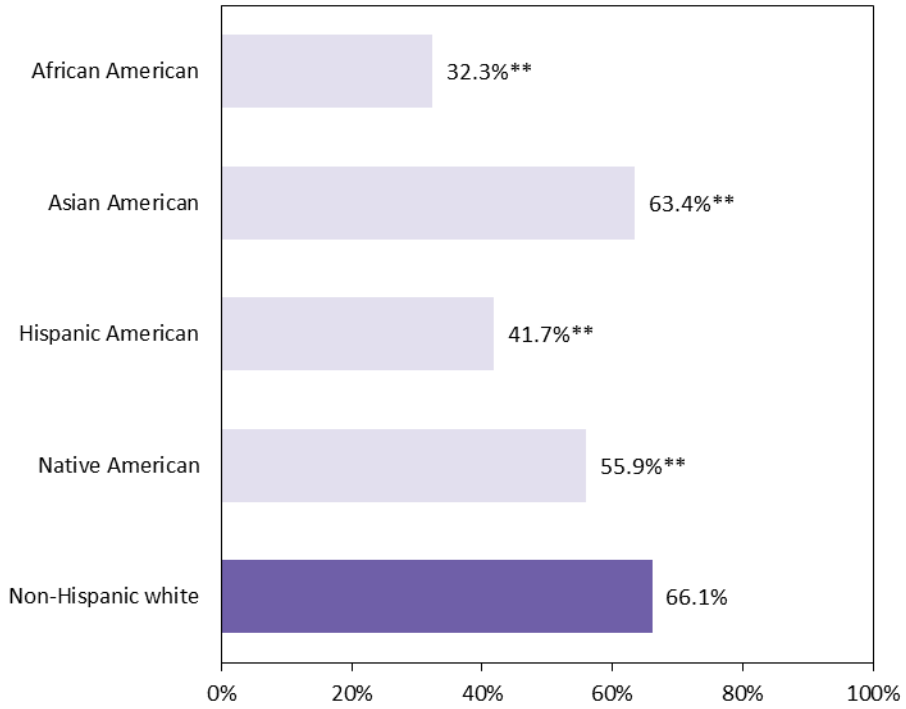
The study team used 2018–2022 American Community Survey (ACS) data to examine homeownership rates in the Portland-Vancouver marketplace.

In this area, 66 percent of nonminority heads of households owned homes. As shown in Figure G-7, homeownership rates for all minority groups are lower than for non-Hispanic whites. For example, just 32 percent of African American heads of households in the Portland-Vancouver marketplace were homeowners during that time period. Differences were found for each minority group compared with non-Hispanic whites (statistically significant for each group).

Lower rates of homeownership may reflect lower incomes and wealth for people of color, as well as lower educational attainment.[50] That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. For example, the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.[51]

While African Americans narrowed the homeownership gap in the 1990s, the first half of the following decade brought little change and the second half of the decade brought significant losses (which included the Great Recession), resulting in a widening of the gap between African Americans and non-Hispanic whites.[52]

G-7. Percentage of Portland-Vancouver marketplace households that are homeowners, 2018–2022



Note: ** Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata sample. The 2018–2022 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[50] Choi, J.H., McCargo, A., Neal, M., Goodman, L., & Young, C. (2019, November). Explaining the Black-White Homeownership Gap. *Housing Finance Policy Center.*

[51] Board of Governors of the Federal Reserve System. (2017). Residential mortgage lending in 2016: Evidence from the Home Mortgage Disclosure Act. *Federal Reserve Bulletin, 103*(6).

[52] Choi, J.H., McCargo, A., Neal, M., Goodman, L., & Young, C. (2019, November). Explaining the Black-White Homeownership Gap. *Housing Finance Policy Center;* Rosenbaum, E. (2012). *Home ownership's wild ride, 2001-2011* (Rep.). New York, NY: Russell Sage Foundation.

G. Access to Capital — Homeownership

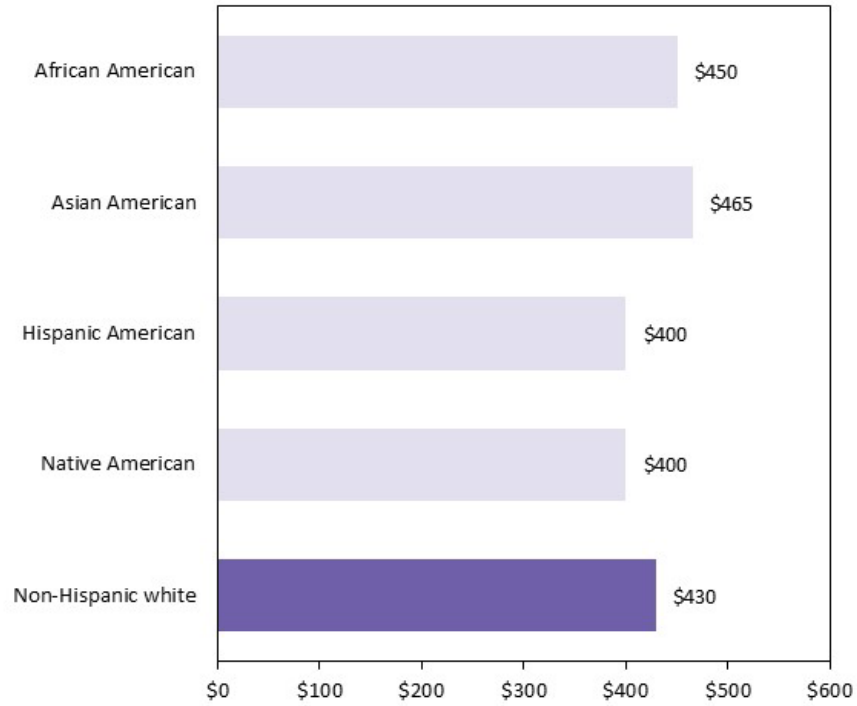
Home Values

Research has shown that increases in home equity encourage business ownership.[53] Using 2018 through 2022 ACS data, the study team compared median home values by race/ethnicity group.

Figure G-8 presents median home values by group in the Portland-Vancouver marketplace for 2018 to 2022. Hispanic Americans and Native Americans who owned homes had lower median home values than non-Hispanic whites. The median value of African American and Asian American homeowners' homes exceeded that of non-Hispanic whites.

It is important to note that these data regarding homeownership are for 2018 through 2022. Home values have grown since then.[54]

G-8. Median home values in the Portland-Vancouver marketplace, 2018–2022, thousands



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

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata sample.

[53] Harding, J., & Rosenthal, S. S. (2017). Homeownership, housing capital gains and self-employment. *Journal of Urban Economics, 99,* 120-135.

[54] Fry, R. (2021). Amid a pandemic and a recession, Americans go on a near-record homebuying spree. *Pew Research Center.* Retrieved from https://www.pewresearch.org/fact-tank/2021/03/08/amid-a-pandemic-and-a-recession-americans-go-on-a-near-record-homebuying-spree/

G. Access to Capital — Review of additional research on mortgage lending

People of color may be denied opportunities to own homes, to purchase more expensive homes or to access equity in their homes if they are discriminated against when applying for home mortgages.

Research shows this happens frequently. For example, a study has found persistent racial discrimination in national rates of loan acceptance/denial and mortgage costs from late 1970s to 2016, which have impacted the ability of minority groups to purchase homes.[55]

The best available source of information concerning mortgage lending by region is Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive.[56] Those data include information about loans and the race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchases, loan refinances and home improvement loans. The most recent year of HMDA data available are from 2022.

The study team examined annual HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2018 through 2022. There were 5,683 lending institutions included in the 2018 data and 5,508 in 2019.[57, 58] The number of lending institutions decreased to 4,475 in 2020, then to 4,338 by 2021 and increased to 4,460 by 2022.[59, 60, 61].

[55] Quillian, L., Lee, J.J., & Honore, B. (2020). Racial discrimination in the U.S. housing and mortgage lending markets: a quantitative review of trends, 1976-2016. *Race and Social Problems 12* 13-18.

[56] Depository institutions were required to report 2017 HMDA data if they had assets of more than $44 million on the preceding December 31 ($42 million for 2013), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan obligations originations in the past year or b.) exceeding $25 million, had a home or branch office located in an MSA (or receive applications for, purchase or originated five or more home purchase loans mortgages in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

[57] Consumer Financial Protection Bureau. (2019). FFIEC announces availability of 2018 data on mortgage lending. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2018-data-mortgage-lending/

[58] Consumer Financial Protection Bureau. (2020). FFIEC announces availability of 2019 data on mortgage lending. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2019-data-mortgage-lending/

[59] Consumer Financial Protection Bureau. (2021). FFIEC announces availability of 2020 data on mortgage lending. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-of-2020-data-on-mortgage-lending/

[60] Consumer Financial Protection Bureau. (2022). FFIEC announces availability of 2021 data on mortgage lending. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-of-2021-data-on-mortgage-lending/

[61] Consumer Financial Protection Bureau. (2023). FFIEC announces availability of 2022 data on mortgage lending. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-of-2022-data-on-mortgage-lending/

G. Access to Capital — Review of additional research on mortgage lending

Mortgage Denials

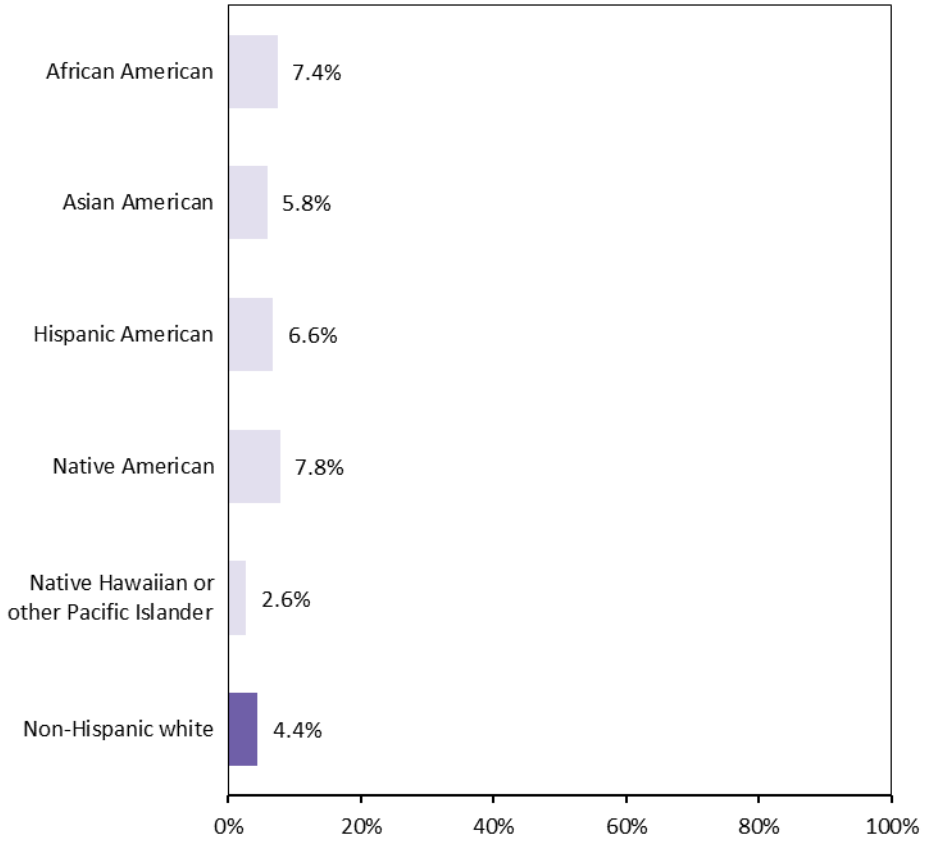
The study team examined mortgage denial rates on conventional loan applications made by high-income households.

- Conventional loans are loans that are not insured by a government program.
- High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.[62,]
- Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.[63]

Figure G-9 presents loan denial rates for high-income households in the Portland-Vancouver marketplace from 2018 through 2022.

For people with high incomes, the loan denial rate was higher for people of color than for non-Hispanic white applicants (except for Native Hawaiians and other Pacific Islanders). For example, 8 percent of high-income Native American applicants had their loans denied compared with 4 percent of high-income non-Hispanic white applicants.

G-9. Denial rates of conventional purchase loans to high-income households in the Portland-Vancouver marketplace, 2018–2022



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

Source: FFIEC HMDA 2018 through 2022.

[62] For example, median family income for Clark County was about $91,149 in 2022. Retrieved from https://fred.stlouisfed.org/series/MHIWA53011A052NCEN

[63] For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

G. Access to Capital — Review of additional research on mortgage lending

Subprime Lending

Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Subprime lending grew rapidly in the late 1990s and early 2000s and accounted for large growth in the home mortgage industry. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for $330 billion of U.S. mortgages in 2003, up from $35 billion a decade earlier.[64] In 2007, subprime loans represented about 28 percent of all mortgages in the United States.[65] However, due in large part to regulations implemented following the Great Recession, by 2020 subprime mortgages made up only 19 percent of all loans.[66]

With interest rates higher than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans were made available to home buyers without requirements for such as a down payment or proof of income and assets; subprime loans were also made available for home buyers purchasing property at a cost above that for which they would qualify from a prime lender.[67]

Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure. Fair-lending enforcement mechanisms have historically tended to overlook disparate impact and treatment and shielded some lenders with discriminating practices from investigations.[68]

The COVID-19 pandemic has further complicated the subprime lending world, as heightened unemployment and financial distress made it difficult for lenders to collect on loans and for lenders to denote who should and should not be deemed "creditworthy."[69]

Although there is no standard definition of a subprime loan, there are several commonly used approaches to examining rates of subprime lending. The study team used a "rate-spread method" — in which subprime loans are identified as those loans with substantially above-average interest rates — to measure rates of subprime lending in 2018 through 2022.[70] Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans.

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[64] Avery, B., Brevoort, K. P., & Canner, G. B. (2007). The 2006 HMDA data. *Federal Reserve Bulletin, 93,* A73–A109.

[65] Rosen, S. (2020). What is a subprime mortgage and who should get one? *Time.com.* Retrieved from https://time.com/nextadvisor/mortgages/what-is-a-subprime-mortgage/

[66] Ibid.

[67] Gerardi, K., Shapiro, A. H., & Willen, P. S. (2007). *Subprime outcomes: Risky mortgages, homeownership experiences, and foreclosures* (Working Paper No. 07–15). Boston, MA: Federal Reserve Bank of Boston. Retrieved from Federal Reserve Bank of Boston website: https://www.bostonfed.org/publications/research-department-working-paper/2007/subprime-outcomes-risky-mortgages-homeownership-experiences-and-foreclosures.aspx

[68] Quillian, L. et. al. (2020). Racial Discrimination in the U.S. Housing and Mortgage Lending Markets: A Quantitative Review of Trends, 1976-2016. *Race and Social Problems*(12). 13-28. Retrieved from https://doi.org/10.1007/s12552-019-09276-x

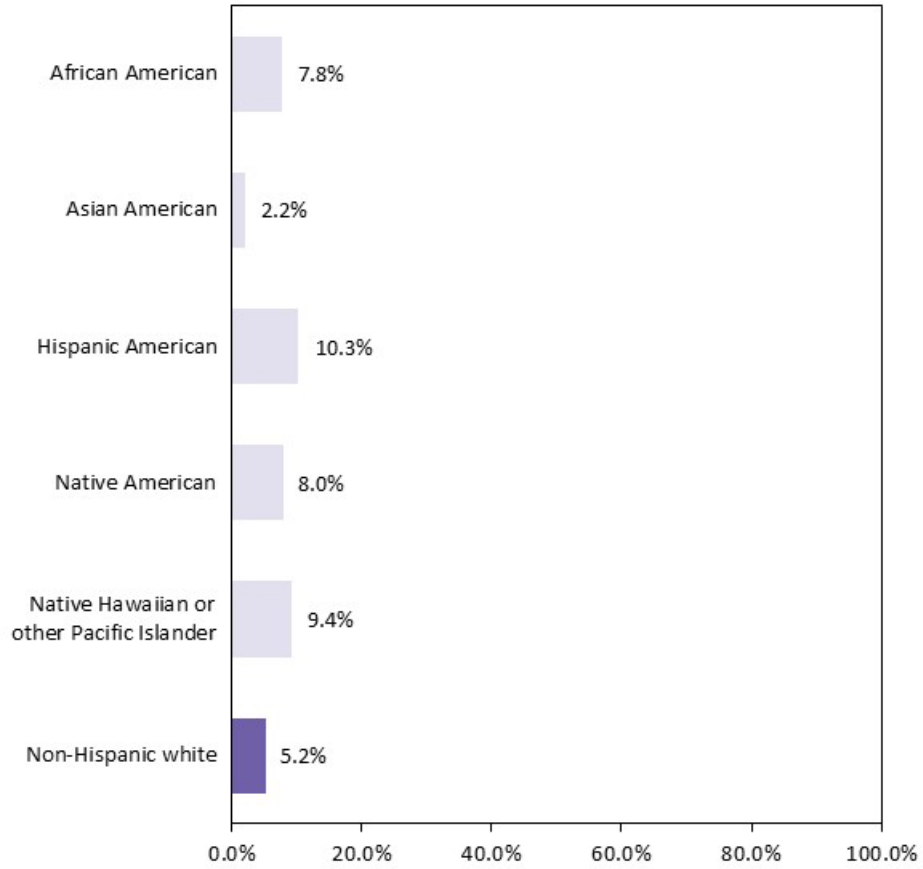
[69] Li, H. (2021). The influence of COVID-19 on subprime in the U.S. *E3S Web Conferences, 235.*

[70] Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury

Subprime conventional home purchase loans. Figure G-10 shows the percent of conventional home purchase loans that were subprime in the Portland-Vancouver marketplace based on HMDA data from 2018 through 2022. A higher percentage of borrowers receiving subprime loans may indicate predatory lending.

- Hispanic American borrowers in this period were nearly twice as likely to receive subprime home purchase loans when compared to non-Hispanic white borrowers.
- African Americans, Native Americans and Native Hawaiians or other Pacific Islanders receiving home purchase loans were also more likely to be issued subprime loans than non-Hispanic whites.
- Asian Americans were less likely than non-Hispanic whites to be issued subprime loans.

G-10. Percent of conventional home purchase loans in the Portland-Vancouver marketplace that were subprime, 2018–2022



Note: Subprime rates are calculated as the percentage of originated loans that were subprime.

Source: FFIEC HMDA data 2018 through 2022.

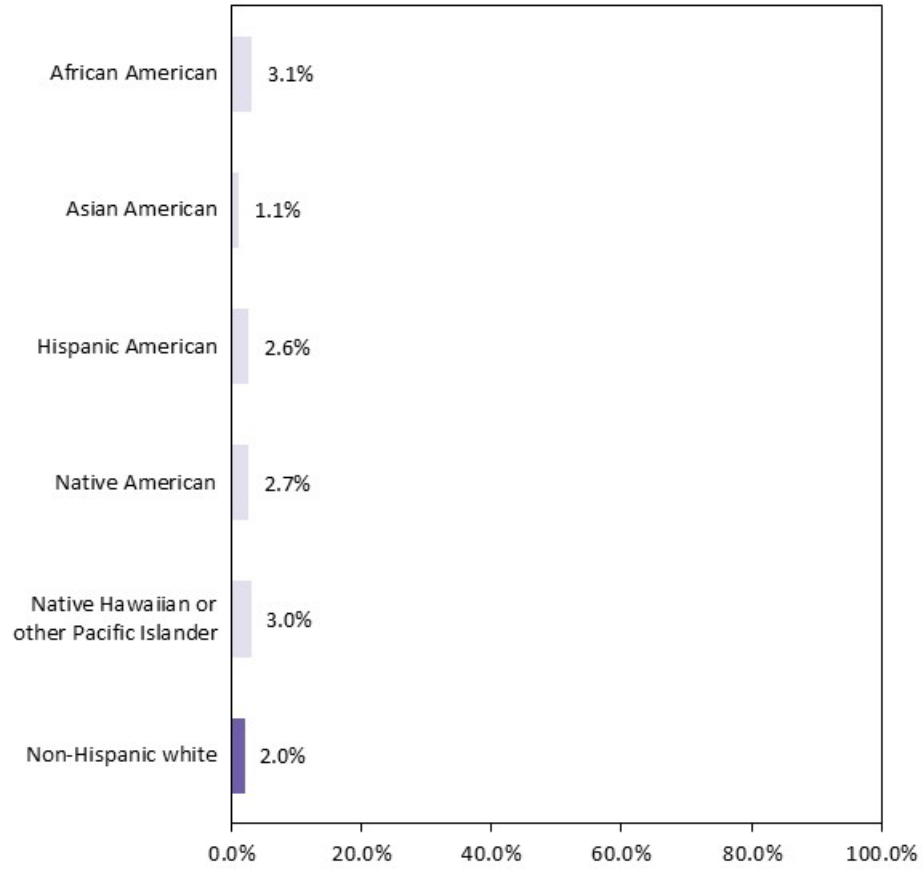
security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. The study team identified subprime loans according to those measures in the corresponding time periods.

G. Access to Capital — Review of additional research on mortgage lending

Subprime conventional home refinance loans. Figure G-11 examines the percentage of conventional home refinance loans that were subprime in the local marketplace between 2018 and 2022.

Very few conventional refinance loans were subprime for any group. Even so, people of color (except for Asian Americans) were more likely than non-Hispanic whites to receive those loans.

G-11. Percent of conventional refinance loans in the Portland-Vancouver marketplace that were subprime, 2018–2022



Note: Subprime rates are calculated as the percentage of originated loans that were subprime.

Source: FFIEC HMDA data 2018 through 2022.

G. Access to Capital — Review of additional research on mortgage lending

Other research. Studies across the country have examined barriers to homeownership for people of color. For example:

- A study of more than two million home sale transactions over the course of 18 years in four major metropolitan areas — Chicago, Baltimore/Maryland, Los Angeles and San Francisco — showed that African American and Hispanic American buyers pay more for the price of their house than their white counterparts in almost every purchase scenario.[71]

- Between 1999 and 2011, socioeconomic and demographic factors could only partially explain the homeownership gap for African Americans homeowners, and that discrimination in the mortgage process was a likely explanation.[72]

- Results of a mystery-shopping field study conducted at several national banks in a major metropolitan U.S. city showed that minority loan applicants were provided less comprehensive information about financing options, required to provide more information to apply for a loan and received less encouragement and assistance compared to white potential loan applicants.[73]

- An analysis of U.S. Survey of Consumer Finance data shows that African American borrowers on average pay about 29 basis points more in interest on mortgage loans than comparable white borrowers.[74]

There is evidence that some lenders seek out and offer subprime loans to individuals who often are not be able to pay off the loan, a form of "predatory lending."[75] Other research has found that many recipients of subprime loans could have qualified for prime loans.[76]

Studies of subprime lending suggest that predatory lenders have targeted minorities.[77] A 2018 study of seven metropolitan areas across the country and found that African American borrowers were 103 percent more likely and Hispanic American borrowers were 78 percent more likely than white borrowers to receive a high-cost loan for home purchases. Disparities were found for both low- and high-risk borrowers, regardless of age.[78]

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[71] Bayer, C., Casey, M., Ferreira, F., & McMillan F. (2017). Racial and ethnic price differentials in the housing market. *Journal of Urban Economics, 102*, 91–105.

[72] Fuller, C. (2015). *Race and homeownership: How much of the differences are explainable by economics alone?* Retrieved from Zillow Research website: https://www.zillow.com/research/racial-homeownership-differences-10155/

[73] Bone, S. A., Christensen, G. L., & Williams, J. D. (2014). Rejected, shackled, and alone: The impact of systemic restricted choice on minority consumers' construction of self. *Journal of Consumer Research, 41*(2), 451-474.

[74] Cheng, P., Lin, Z., & Liu, Y. (2015). Racial discrepancy in mortgage interest rates. *Journal of Real Estate Finance and Economics, 51*(1), 101-120.

[75] See, e.g., Hull, N.R. (2017). Crossing the line: Prime, subprime, and predatory lending. *Maine Law Review, 61*(1), 288-318; Morgan, D. P. (2007). *Defining and detecting predatory lending* (Staff rep. No. 273). New York, NY: Federal Reserve Bank of New York.

[76] Faber, J. W. (2013). Racial dynamics of subprime mortgage lending at the peak. *Housing Policy Debate, 23*(2), 328-349.

[77] Ibid; Steil, J.P., Albright, L., Rugh, J., & Massey, D. (2018). The social structure of mortgage discrimination. *Housing Studies, 33(5)* 759-776.

[78] Bayer, P., Ferreira, F., & Ross, S. (2018). What drives racial and ethnic differences in high-cost mortgages? The role of high-risk lenders. *Review of Financial Studies, 31*(1), 175-205.

G. Access to Capital — Review of additional research on mortgage lending

Lasting Implications of the Mortgage Lending Crisis During the Great Recession

The ramifications of the mortgage lending crisis in the Great Recession not only continued to substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses but also created a nationwide retreat in dynamism in nearly every measurable respect.[79] (Dynamism is the rate and scale at which the economy's resources are reallocated across firms and industries according to their most productive use.)

- On July 19, 2017, Karen Kerrigan, President and CEO of the Small Business and Entrepreneurship (SBE) Council, testified before the U.S. House of Representatives Committee on Small Business that there has been a continuing dearth of entrepreneurial activity and substantial decline over the past ten years due to the financial crises, Great Recession and a weak economic recovery that continued to negatively influence the American psyche.[80]
- According to research conducted by economists for the U.S. Federal Reserve System, loan origination activity remained well below pre-Great Recession levels.[81]
- Because of the Great Recession, firm deaths exceeded births for the first time in more than 40 years.[82]
- Small firms suffer more during financial crises due to dependence on bank capital to fund growth.[83]
- Major surveys identified access to credit as a problem and top growth concern for small firms during the recovery, including surveys conducted by the National Federation of Independent Businesses (NFIB) and the Federal Reserve.[84]
- Commercial and residential real estate — which represents two-thirds of the assets of small business owners and are frequently used as collateral for loans — were hit hard during the financial crisis, making small business borrowers less creditworthy for many years.[85]

[79] Economic Innovation Group. (2017). *Dynamism in retreat: Consequences for regions, markets, and workers*. Retrieved from the Economic Innovation Group website: http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf

[80] *Reversing the Entrepreneurship Decline: Hearing before the Committee on Small Business*, House of Representatives, 115th cong. Page 3 (2017) (testimony of Ms. Karen Kerrigan).

[81] Dore, T., & Mach, T. (2018). *Recent trends in small business lending and the Community Reinvestment Act*. Retrieved from the Board of Governors of the Federal Reserve System website: https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-small-business-lending-and-the-community-reinvestment-act-20180102.htm

[82] Economic Innovation Group. (2017). *Dynamism in retreat: Consequences for regions, markets, and workers*. Retrieved from the Economic Innovation Group website: http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf

[83] Mills, K.G., & McCarthy, B. (2016). *The state of small business lending: Innovation and technology and the implications for regulation* (Working Paper 17-042). Cambridge, MA. Retrieved from Harvard Business School website: http://www.hbs.edu/faculty/Publication%20Files/17-042_30393d52-3c61-41cb-a78a-ebbe3e040e55.pdf

[84] Ibid.

[85] Ibid.

G. Access to Capital — Review of additional research on mortgage lending

The mortgage-lending crisis and the Great Recession have had lasting effects as they limited opportunities for homeowners with little home equity to obtain business capital through home mortgages. Furthermore, the historically higher rates of default and foreclosure for homeowners with subprime loans impacted the ability of those individuals to access capital. Those consequences have disproportionately impacted people of color.

Impact of COVID-19

It is still unclear if the COVID-19 pandemic will widen these disparities. Immediate data show that homeowners facing financial pressures were given relief from making mortgage payments through federal and state suspensions of foreclosures, payment deferral programs and lowered interest rates (which could be accessed through loan refinance).[86] However at the time of the writing of this report, it remains too soon to understand the scope of which homeowners sought out these options, as well as the race, ethnicity and gender of said owners on a national level.

In March 2023, about 0.6 percent of Portland-Vancouver area households were between 30-89 days past due on mortgage payments, down from the high in March 2020 (0.7%).[87]About 0.2 percent of Portland-Vancouver area households were over 90 days past due on mortgage payment, also down from the high in March 2020 (0.3%).[88] Nationally, 1.3 percent of households were 30-89 days past due on their mortgage payments and 0.5 percent of households were over 90 days past due in March 2023, down from March 2020 (1.8% and 0.8%, respectively).[89][90] There was no information available by race, ethnicity or gender.

[86] Smith, K.A., & Henricks, M. (2020). Mortgage payments interrupted by COVID-19? The federal and state response. *Forbes.com*. Retrieved from https://www.forbes.com/sites/advisor/2020/04/20/mortgage-payments-interrupted-by-covid-19-the-federal-and-state-response/?sh=1485259b4a08

[87] Consumer Financial Protection Bureau. (2024). Mortgages 30-89 days delinquent, Portland-Vancouver-Hillsboro, OR-WA. https://www.consumerfinance.gov/data-research/mortgage-performance-trends/mortgages-30-89-days-delinquent/

[88] Consumer Financial Protection Bureau. (2024). Mortgages 90 or more days delinquent, Portland-Vancouver-Hillsboro, OR-WA. Consumer Financial Protection Bureau. https://www.consumerfinance.gov/data-research/mortgage-performance-trends/mortgages-90-or-more-days-delinquent/

[89] Consumer Financial Protection Bureau. (2022). Mortgages 30-89 days delinquent, National. Consumer Financial Protection Bureau. https://www.consumerfinance.gov/data-research/mortgage-performance-trends/mortgages-30-89-days-delinquent/

[90] Consumer Financial Protection Bureau. (2022). Mortgages 90 or more days delinquent, National. Consumer Financial Protection Bureau. https://www.consumerfinance.gov/data-research/mortgage-performance-trends/mortgages-90-or-more-days-delinquent/

G. Access to Capital — Review of additional research on mortgage lending

Redlining

Historically, redlining referred to mortgage lending discrimination against geographic areas based on racial or ethnic characteristics of a neighborhood.[91] Presently, the concept of redlining includes an examination of the availability of and access to credit in predominantly minority neighborhoods, and the credit terms offered within a lender's assessment area.[92]

Studies have found clear evidence of redlining throughout the history of Vancouver. The effects of that redlining are still felt today as a study found that people of color living in Vancouver are more likely to die from air pollution-related causes than white counterparts. This is due to redlining policies from previous decades that disallowed people of color from purchasing homes in more desirable areas and instead drove them to purchase home closer to sources of pollution. One report found that, although people of color make up about 33 percent of Washington state's population, they make up over 50 percent of the population in areas with higher exposure to pollution, including in Vancouver.[93]

The practice of reverse redlining consists of extending high-cost credit. This discriminatory practice involves charging minority borrowers higher mortgage fee costs compared to white borrowers and was the subject of multiple lawsuits brought by the U.S. Department of Justice from the late 1990s through the early 2000s.[94] As a result of reverse redlining, some researchers argue that mortgage discrimination has shifted from being an access to credit issue to being a discretionary pricing issue.[95]

[91] Burnison, T. R., & Boccia, B. (2017). Redlining everything old is new again. *ABA Banking Journal, 109*(2).

[92] Ibid.

[93] Williams, K. (2024, January 4.) Vancouver residents suffer disproportionate health problems due to air pollution, according to state report. *KGW8*. Retrieved from https://www.kgw.com/article/tech/science/environment/vancouver-washington-residents-disproportionate-health-problems-air-pollution/283-bde73b6b-a11e-451c-94c6-cc5870572c98

[94] Brescia, R. H. (2009). Subprime communities: Reverse redlining, the Fair Housing Act and emerging issues in litigation regarding the subprime mortgage crisis. *Albany Government Law Review*, *2*(1), 164-216.

[95] Ibid.

G. Access to Capital — Review of additional research on mortgage lending

As evidenced by settlements in court cases in the past 10 years, redlining continues against minority mortgage applicants.

- In 2015, New York Attorney General Eric Schneiderman settled with Evans Bank for $0.8 million after learning that Evans Bank erased African American neighborhoods from maps used to determine mortgage lending.[96]
- In 2015, the U.S. Department of Housing and Urban Development reached a $200 million settlement with Associated Bank for denying mortgage loans to African American and Hispanic American applicants in Chicago and Milwaukee.[97]
- In 2015, Eagle Bank and Trust Company settled a lawsuit with the DOJ concerning allegations of redlining in predominantly African American neighborhoods in and around St. Louis.[98]
- In a reverse redlining case tried in federal court in 2016, a federal jury found that Emigrant Savings Bank and Emigrant Mortgage Company violated the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law by aggressively promoting toxic mortgages to African American and Hispanic American applicants with poor credit.[99]
- In November 2016, Hudson City Savings Bank was subject to a record redlining settlement due to disparities suffered by African American and Hispanic American loan applicants.[100] According to the Consumer Financial Protection Bureau (CFPB) and the U.S. Department of Justice (DOJ), Hudson City Savings Bank avoided locating branches and loan officers, and using mortgage brokers in majority African American and Hispanic communities.[101] Hudson City Savings Bank also excluded majority-African American and Hispanic communities from its marketing strategy and credit assessment areas.[102]

[96] Mock, B. (2015, September 28). Redlining is alive and well—and evolving. *City Lab.* Retrieved from https://www.citylab.com/equity/2015/09/redlining-is-alive-and-welland-evolving/407497//

[97] Ibid.

[98] Department of Justice, Office of Public Affairs. (2015, September 29). Justice Department Reaches Settlement with Eagle Bank and Trust Company to Resolve Allegations of Lending Discrimination in St. Louis [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-reaches-settlement-eagle-bank-and-trust-company-resolve-allegations

[99] Lane, B. (2016, June 30). Groundbreaking ruling? Federal jury finds Emigrant Bank liable for predatory lending. *Housingwire*. Retrieved from https://www.housingwire.com/articles/37419-groundbreaking-ruling-federal-jury-finds-emigrant-bank-liable-for-predatory-lending

[100] Burnison, T. R., & Boccia, B. (2017). Redlining everything old is new again. *ABA Banking Journal, 109*(2).

[101] Consumer Financial Protection Bureau. (2015, September 24). CFPB and DOJ order Hudson City Savings Bank to pay $27 million to increase mortgage credit access in communities illegally redlined [Press release]. Retrieved November 3, 2020, from https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined/

[102] Ibid.

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- In a different 2016 redlining legal action, the CFPB and DOJ ordered BancorpSouth Bank to pay millions to harmed minorities for illegally denying them access to credit in minority neighborhoods and denying African Americans applicants certain mortgage loans and over charging them, among other things.[103]

- The DOJ and several Ohio banks reached a settlement in a 2016 redlining case that affected lenders in Ohio and Indiana. Union Savings Bank and Guardian Savings Bank, both based in Ohio, avoided providing credit services to majority-Black neighborhoods in and around Cincinnati, Columbus, Dayton and Indianapolis between 2010 and 2014.[104]

- In 2017, the DOJ filed a lawsuit against KleinBank for redlining minority neighborhoods in Minnesota. According to the DOJ, KleinBank structured its residential mortgage lending business in a manner that excluded the credit needs of minority neighborhoods.[105]

- In 2019, First Merchants Bank settled a lawsuit with the DOJ concerning redlining in Indianapolis, Indiana. The suit alleged that the bank intentionally avoided lending in predominantly African American neighborhoods between 2011 and 2017.[106]

- In 2021, the DOJ, CFBP and the Office of the Comptroller of the Currency (OCC) announced a settlement with Trustmark National Bank. Trustmark avoided marketing in majority-Black and Hispanic neighborhoods in Memphis.[107]

- In 2021, the DOJ and OCC announced a settlement with Cadence Bank. Between 2013 and 2017, Cadence Bank avoided lending, outreach and marketing in predominantly Black and Hispanic neighborhoods in Houston.[108]

[103] Dodd-Ramirez, D., & Ficklin, P. (2016, June 29). Redlining: CFPB and DOJ action requires BancorpSouth Bank to pay millions to harmed consumers [Web log post]. Retrieved from https://www.consumerfinance.gov/about-us/blog/redlining-cfpb-and-doj-action-requires-bancorpsouth-bank-pay-millions-harmed-consumers/ /

[104] Department of Justice, Office of Public Affairs. (2016, December 28). *Justice Department Reaches Settlement with Ohio-Based Banks to Resolve Allegations of Lending Discrimination.* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-reaches-settlement-ohio-based-banks-resolve-allegations-lending

[105] Department of Justice, Office of Public Affairs. (2017, January 13). *Justice Department sues KleinBank for redlining minority neighborhoods in Minnesota* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-sues-kleinbank-redlining-minority-neighborhoods-minnesota

[106] Department of Justice, Office of Public Affairs. (2019, June 13). *Justice Department Settles Suit Against Indiana Bank to Resolve Lending Discrimination Claims* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-settles-suit-against-indiana-bank-resolve-lending-discrimination-claims

[107] Department of Justice, Office of Public Affairs. (2021, October 22). *DOJ, CFPB and OCC Announce Resolution of Lending Discrimination Claims Against Trustmark National Bank* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining

[108] Department of Justice, Office of Public Affairs. (2021, August 30). Justice Department and Office of the Comptroller of the Currency Announce Actions to Resolve Lending Discrimination Claims Against Cadence Bank. [Press release]. Retrieved from https://www.justice.gov/usao-ndga/pr/justice-department-and-office-comptroller-currency-announce-actions-resolve-lending

- In 2022, Trident Mortgage Company settled a $20 million lawsuit with the DOJ. The complaint alleged that Trident Mortgage Company focused lending efforts in majority white neighborhoods in Pennsylvania, New Jersey and Delaware.[109]

- Lakeland Bank settled a lawsuit with the DOJ in 2022 regarding redlining practices in the Newark, New Jersey metropolitan area. The suit alleged that from 2015 to 2021, Lakeland Bank did not provide credit services to majority-Black and Hispanic neighborhoods in the Newark area, with branches only operating in majority-white areas.[110]

Since 2023, DOJ announced the settlement agreements against banks engagement in redlining:

- From 2017 through 2020, City National Bank discouraged residents in majority-Black and Hispanic neighborhoods in Los Angeles from obtaining mortgage loans.[111]

- Park National Bank's branches were concentrated in majority-white neighborhood and failed to provide mortgage services in majority-Black and Hispanic neighborhoods in the Columbus, Ohio metropolitan area.[112]

- ESSA Bank and Trust agreed to pay millions to increase access to credit for home mortgage in majority-Black and Hispanic neighborhoods in Philadelphia.[113]

- American Bank of Oklahoma excluded majority-Black and Hispanic neighborhoods in the Tulsa metropolitan area from mortgage lending services.[114]

[109] Rabinowitz, H. (2022, July 27). DOJ reaches redlining settlement with mortgage lender accused of discriminating against communities of color. *CNN Business*. Retrieved from https://www.cnn.com/2022/07/27/business/doj-reaches-redlining-settlement-with-mortgage-lender-reaj/index.html

[110] Department of Justice, Office of Public Affairs. (2022, September 28). *Justice Department Secures Agreement with Lakeland Bank to Address Discriminatory Redlining.* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-secures-agreement-lakeland-bank-address-discriminatory-redlining

[111] Department of Justice, Office of Public Affairs. (2023, January 12). Largest Redlining Settlement Agreement in Department History; Department's Combating Redlining Initiative Secured Over $75 Million for Neighborhoods of Color to Date [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-secures-over-31-million-city-national-bank-address-lending-discrimination

[112] Department of Justice, Office of Public Affairs. (2023, February 28). *Justice Department Secures $9 Million from Park National Bank to Address Lending Discrimination Allegations.* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-secures-9-million-park-national-bank-address-lending-discrimination

[113] Department of Justice, Office of Public Affairs. (2023, May 31). *Justice Department Secures over $3 Million Redlining Settlement Involving ESSA Bank & Trust in Philadelphia.* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-secures-over-3-million-redlining-settlement-involving-essa-bank-trust

[114] Department of Justice, Office of Public Affairs. (2023, August 28). *Justice Department Secures Agreement with American Bank of Oklahoma to Resolve Lending Discrimination Claims*. [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-secures-agreement-american-bank-oklahoma-resolve-lending-discrimination

G. Access to Capital — Review of additional research on mortgage lending

- Washington Trust Company failed to provide mortgage lending services to majority-Black and Hispanic neighborhoods. Washington Trust has never opened and branch in majority-Black and Hispanic neighborhoods in Rhode Island.[115]

- Ameris Bank avoided providing mortgage services and discouraged residents from obtaining home loans in Jacksonville, Florida.[116]

- First National Bank (FNB) settled a lawsuit with the DOJ concerning redlining in the Charlotte and Winston-Salem, North Carolina lending markets. According to the DOJ, FNB and the former Yadkin Bank, which FNB bought in 2017, avoided providing home loans and other mortgage services in majority African and Hispanic American neighborhoods between 2017 and 2021.[117]

- From 2015 to 2020, Patriot Bank avoided providing credit services to majority Hispanic and African American neighborhoods in Memphis, Tennessee. Additionally, the few loan applications that came from these areas were disproportionately from white applicants.[118]

As of February 2024, the DOJ has open investigations into redlining in twelve states, including Texas, Washington, New York, and Florida.[119]

[115] Department of Justice, Office of Public Affairs. (2023, September 27). *Justice Department Secures $9 Million Agreement with Washington Trust Company to Resolve Redlining Claims in Rhode Island*. [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-secures-9-million-agreement-washington-trust-company-resolve-redlining

[116] Department of Justice, Office of Public Affairs. (2023, October 19). *Justice Department Reaches Significant Milestone in Combating Redlining Initiative After Securing Over $107 Million in Relief for Communities of Color Nationwide*. [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-reaches-significant-milestone-combating-redlining-initiative-after

[117] Stempel, J. (2024, February 5). Pennsylvania lender FNB settles US redlining case in North Carolina. *Reuters.* Retrieved from https://www.reuters.com/business/finance/us-accuses-pennsylvania-lender-fnb-redlining-north-carolina-2024-02-05/

[118] Department of Justice, Office of Public Affairs. (2024, January 17). Justice Department Secures Agreement with Patriot Bank to Resolve Lending Discrimination Claims. [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-secures-agreement-patriot-bank-resolve-lending-discrimination-claims

[119] Department of Justice, Civil Rights Division. (n.d.). *Combating Redlining Initiative*. Retrieved from https://www.justice.gov/crt/page/file/1580441/dl

Steering by Real Estate Agents and Others

The illegal act of steering can be defined as actions by real estate agents that differentially direct customers to certain neighborhoods and away from others based on race or ethnicity.[120] Mortgage loan originators can also engage in steering. Prior to the mortgage loan crisis, mortgage loan originators engaged in steering to generate higher profits for themselves by directing minority loan applicants to less desirable and toxic loan instruments.[121] Such steering can affect minority borrowers' perception of the availability of mortgage loans. Additionally, explicit steering can drive racially/ethnically housing prices and result in segregation.[122]

It is difficult to pursue cases involving steering; however, several steering cases have been prosecuted by federal and state agencies over the past decade:

- In 2011, the U.S. Department of Justice (DOJ) reached a $335 million settlement with Countrywide Financial Corporation for steering thousands of African American and Hispanic American borrowers into subprime mortgages when white borrowers with comparable credit received prime loans.[123]
- In 2012, the DOJ reached a $184 million settlement with Wells Fargo for steering African American and Hispanic American borrowers into subprime mortgages and charging higher fees and rates than white borrowers with comparable credit profiles.[124]
- In 2015, M&T Bank agreed to pay $485,000 to plaintiffs in a settlement for a case involving racial discrimination and steering.[125]

[120] Krone, E. (2018) The new housing discrimination: realtor minority steering. *Chicago Policy Review.* Retrieved from https://chicagopolicyreview.org/2018/10/19/the-new-housing-discrimination-realtor-minority-steering/

[121] Consumer Financial Protection Bureau. (2013, January 18). *CFPB issuing rules to prevent loan originators from steering consumers into risky mortgages* [Press release]. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rules-to-prevent-loan-originators-from-steering-consumers-into-risky-mortgages/

[122] Besbris, M., & Faber, J.W. (2017). Investigating the relationship between real estate agents, segregation, and house prices: Steering and upselling in New York State. *Sociological Forum, 32*(4), 850-873. Retrieved from https://doi.org/10.1111/socf.12378

[123] Department of Justice, Office of Public Affairs. (2011, December 21). *Justice Department reaches $335 Million settlement to resolve allegations of lending discrimination by Countrywide Financial Corporation* [Press release]. Retrieved November 3, 2020, from https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination

[124] Department of Justice, Office of Public Affairs. (2012, July 12). *Justice Department reaches settlement with Wells Fargo resulting in more than $175 Million in relief for homeowners to resolve fair lending claims* [Press release]. Retrieved November 3, 2020, from https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief

[125] Stempel, J. (2015, August 31). M&T Bank settles lawsuit claiming New York City lending bias. *Reuters.* Retrieved from https://www.reuters.com/article/us-usa-guns-dicks-sporting/walmart-joins-dicks-sporting-goods-in-raising-age-to-buy-guns-idUSKCN1GC1R1

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- In 2015, the City of Oakland, California sued Wells Fargo for steering minorities into costly mortgage loans that supposedly led to foreclosures, abandoned properties and blight.[126] The City of Philadelphia filed a lawsuit with similar allegations against Wells Fargo in 2017.[127]

- In 2017, the U.S. Attorney settled a federal civil rights lawsuit against JP Morgan Chase Bank for $53 million for steering and discrimination based on race and national origin after it was discovered that African Americans and Hispanic Americans paid higher mortgage loan rates compared with whites with comparable credit profiles.[128]

- In a 2022 lawsuit filed by the DOJ, Evolve Bank & Trust, with headquarters in Tennessee, agreed to pay $1.3 million in a settlement regarding discriminatory lending practices to Black, Hispanic and female borrowers. The suit found that, from 2014 through 2019, Evolve Bank had charged Black, Hispanic and female borrowers higher rates than white or male borrowers for "discretionary pricing" components of home loans regardless of credit status.[129]

- In 2023, the DOJ sued Colony Ridge, a Texas-based developer and lender, for targeting Hispanic borrowers on predatory loans that end in foreclosure.[130]

[126] Aubin, D. (2015, September 22). Oakland lawsuit accuses Wells Fargo of mortgage discrimination. *Reuters.* Retrieved from https://www.reuters.com/article/us-wellsfargo-discrimination/oakland-lawsuit-accuses-wells-fargo-of-mortgage-discrimination-idUSKCN0RM28L20150922

[127] City of Philadelphia, Office of the Mayor. (2015, May 15). *City files lawsuit against Wells Fargo* [Press release]. Retrieved from https://beta.phila.gov/press-releases/mayor/city-files-lawsuit-against-wells-fargo/

[128] Department of Justice, U.S. Attorney's Office, Southern District of New York. (2017, January 20). *Manhattan U.S. Attorney settles lending discrimination suit against JPMorgan Chase for $53 Million* [Press release]. Retrieved November 3, 2020, from https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-settles-lending-discrimination-suit-against-jpmorgan-chase-53

[129] Department of Justice, Office of Public Affairs. (2022, September 29). *Justice Department Announces Actions to Resolve Lending Discrimination Claims Against Evolve Bank and Trust.* [Press release]. Retrieved https://www.justice.gov/opa/pr/justice-department-announces-actions-resolve-lending-discrimination-claims-against-evolve

[130] Department of Justice, Office of Public Affairs. (2023, December 20). Justice Department and Consumer Financial Protection Bureau Sue Texas-Based Developer and Lender Colony Ridge for Bait-and-Switch Land Sales ad Predatory Financing. [Press release]. Retrieved https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-sue-texas-based-developer-and

G. Access to Capital — Review of additional research on mortgage lending

Additional Information about Barriers for Women

Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets.

Studies and lawsuits indicate unequal access to mortgage loans for women. For example, a 2013 study by the Woodstock Institute found that women within the six-county Chicago area were far less likely to be approved for mortgage loans than men, and even male-female joint applications were less likely to be originated if the female applicant was listed first. This disparity persisted for mortgage refinancing.[131]

Research has confirmed that on average, women are better than men at paying their mortgages; however, women on average pay more for mortgages relative to their risk, and women of color pay the most.[132] Although disparities in mortgage interest rates are prevalent between African American and white borrowers, African American women are the most likely to experience this type of mortgage loan discrimination.[133]

[131] Woodstock Institute. (2013). *Unequal opportunity: Disparate mortgage origination patterns for women in the Chicago area* [Fact sheet]. Retrieved from https://woodstockinst.org/wp-content/uploads/2013/05/unequalopportunity_factsheet_march2013_0.pdf

[132] Goodman, L., Zhu, J., & Bai, B. (2016). *Women are better than men at paying their mortgages* (Rep.). Retrieved from Urban Institute website: https://www.urban.org/sites/default/files/publication/84206/2000930-Women-Are-Better-Than-Men-At-Paying-Their-Mortgages.pdf

[133] Cheng, P., Lin, Z., & Liu, Y. (2015). Racial discrepancy in mortgage interest rates. *Journal of Real Estate Finance and Economics, 51*(1), 101-120.

G. Access to Capital — Review of additional research on mortgage lending

Lawsuits and studies suggest that gender-based lending discrimination continues:

- In 2022, Philadelphia's Police and Fire Federal Credit Union (PFFCU) settled a lawsuit for allegedly denying a home renovation loan because a prospective borrower was on maternity leave.[134]
- In 2017, Bellco Credit Union settled a lawsuit for alleged discrimination against women on maternity leave.[135]
- In 2014 the U.S. Department of Housing & Urban Development (HUD) settled a lawsuit against Mountain America Credit Union over allegations of discrimination against prospective borrowers on maternity leave.[136]
- In 2011, HUD engaged in litigation against a company that revoked a pregnant woman's mortgage insurance once the company learned that the woman was on leave from work.[137]
- In 2010, Dr. Budde, an oncologist from Washington State, was initially granted a mortgage loan and later denied once her lender learned she was on maternity leave.[138]

[134] Relman Colfax, Retrieved from https://www.relmanlaw.com/assets/htmldocuments/Settlement%20Agreement%201.pdf

[135] Strozniak, P. (2017, October 17). Bellco CU settles alleged discriminatory housing lawsuit. *Credit Union Times.* Retrieved November 3, 2020, from https://www.cutimes.com/2017/10/17/bellco-cu-settles-alleged-discriminatory-housing-l

[136] National Mortgage Professional Magazine. (2014, June 25). HUD hits Mountain America Credit Union with $25,000 fine. *National Mortgage Professional Magazine.* Retrieved November 3, 2020, from https://nationalmortgageprofessional.com/news/41558/hud-hits-mountain-america-credit-union-25000-fine

[137] Hanson, K. (2016). Disparate impact discrimination in residential lending and mortgage servicing based on sex: Insidious evil. *Florida Coastal Law Review, 17*(3), 421-447.

[138] Siegel Bernard, T. (2010, July 19). Need a mortgage? Don't get pregnant. *New York Times.* Retrieved November 3, 2020, from http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html

G. Access to Capital — Summary

Business start-up and long-term business success depend on access to capital. Discrimination at any link in that chain may produce cascading effects that result in racial and gender disparities in business formation and success.

The information presented here indicates that people of color and women continued to face disadvantages in accessing capital that is necessary to start, operate and expand businesses as of 2023.

Capital is required to start companies, so barriers to accessing capital can affect the number of people of color and women who are able to start businesses. In addition, minority and female entrepreneurs start their businesses with less capital (based on national data). Several studies have demonstrated that lower start-up capital adversely affects prospects for those businesses. Key results include:

- Nationally, minority- and woman-owned employer businesses (except Asian American-owned businesses) were more likely to use personal credit cards as a source of start-up capital, which is a more expensive form of debt than business loans from financial institutions.
- Personal and family savings of the owner was the main source of capital for startups among many U.S. businesses, but African American and Hispanic American households had considerably lower amounts of wealth than non-Hispanic white households.
- Among firms across the country, female- and minority-owned companies were less likely than non-Hispanic white male-owned companies to secure business loans from a bank or financial institution as a source of start-up capital.
- Nationally, minority- and woman-owned firms were more likely to not apply for additional financing because firm owners believed that they would not be approved by a lender. These firms were also more likely to indicate that access to financial capital negatively impacted firm profitability.
- Availability survey results for Portland-Vancouver metro area businesses indicate that MBEs and WBEs were more likely than majority-owned firms to report difficulties obtaining lines of credit or loans.
- Among local area construction firms indicating in the availability survey that indicated they had tried to obtain a bond, MBEs and WBEs were more likely to likely to report difficulties obtaining bonding compared to majority-owned firms.

G. Access to Capital — Summary

Any discrimination against people of color in the home purchase and mortgage markets can negatively affect formation of firms by minorities in the local area and the success and growth of those companies.

- Home equity is an important source of funds for business start-up and growth. Fewer people of color in the Portland-Vancouver marketplace own homes compared with non-Hispanic whites. People of color also tended to have lower home values than non-Hispanic white homeowners.

- High-income minority households applying for conventional home mortgages in the Portland-Vancouver metro area were more likely to have their applications denied than high-income non-Hispanic whites. This may indicate discrimination in mortgage lending and may affect access to capital for businesses.

- Some minority groups were also more likely to have subprime loans than non-Hispanic whites. This may be evidence of predatory lending practices affecting people of color.

APPENDIX H. Analysis of Business Success — Introduction

The study team examined the success of businesses owned by people of color and women in the Portland-Vancouver[1] construction, professional services, goods and other services industries (the "study industries") and assessed whether outcomes for business owned by these individuals differ from business outcomes for other groups. The study team examined outcomes in terms of:

- Business closures, expansions and contractions;
- Business receipts and earnings;
- Bid capacity; and
- Potential barriers to starting or expanding businesses.

Because most of these analyses are based on secondary data, Keen Independent was limited to the business owner characteristics reported in those data. Certain data sources do not provide information for Native American-owned firms or consolidate results for all minority-owned businesses.

Most of the research based on secondary data reflects marketplace outcomes before the COVID-19 pandemic.

[1] Keen Independent considers the relevant geographic market area for this study to be the Portland-Vancouver-Hillsboro, OR-WA MSA area for construction, professional services and other services contracts and the Pacific Northwest area for goods contracts.

H. Business Success — Business closures

The study team used Small Business Administration (SBA) data to examine business outcomes — including closures, expansions and contractions — for minority-owned businesses nationally and statewide. The SBA analyses compare business outcomes for minority-owned businesses (by demographic group) to business outcomes for all businesses.

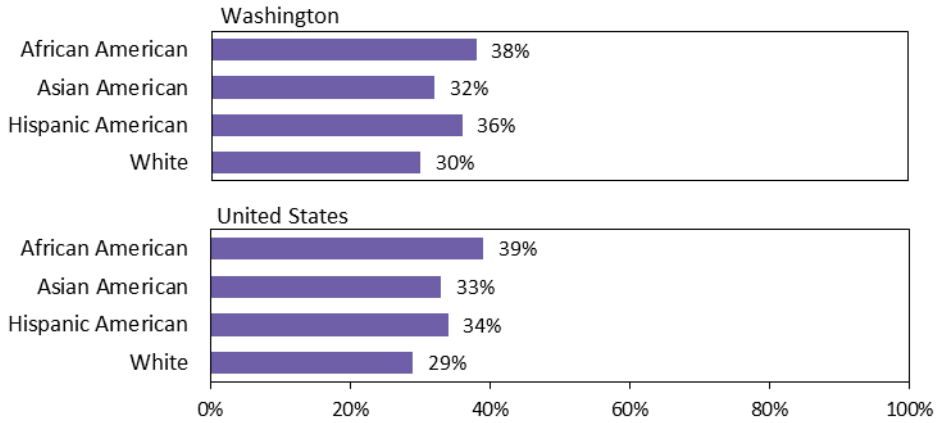
Overall Rates of Business Closures

A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau's 1989–2006 Business Information Tracking Series, the SBA reported on business closure rates between 2002 and 2006 across different sectors of the economy.[2,3] The SBA report examined patterns in each state. (These are the most recent SBA analyses available at the time of this report.)

Figure H-1 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for white-owned businesses. The rate of business closure among minority-owned businesses in Washington state in 2002 through 2006 exceeded the closure rate of majority-owned businesses by as much as 8 percentage points. About 38 percent of African American-owned businesses operating in 2002 had closed by the end of 2006 compared with 30 percent of businesses owned by whites.

The rate of business closure among Hispanic American- and Asian American-owned firms also exceeded that of majority-owned businesses in Washington state.

H-1. Rates of business closure, 2002 through 2006, Washington and the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

The following pages discuss more results from the 2010 SBA study. Note that the 2010 study has not been replicated at the state level based on more recent data. There have been analyses of the effect of the COVID-19 pandemic, which also show disparities in closure rates. Those results are presented after fully discussing results of the 2010 SBA study.

[2] Lowrey, Y. (2010) *Race/ethnicity and establishment dynamics, 2002–2006* (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

[3] Businesses classifiable by race/ethnicity exclude publicly traded companies. The study team did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.

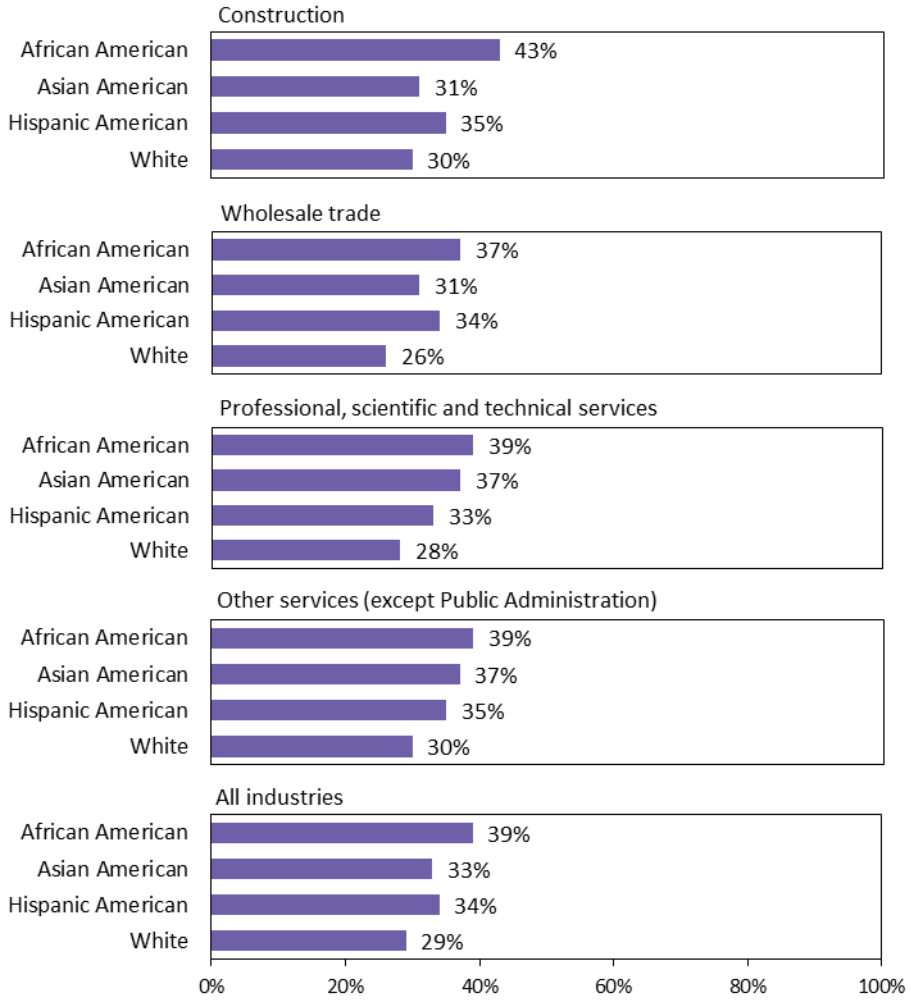
Rates of Business Closures by Industry

The SBA report also examined national business closure rates by race/ethnicity for 21 different industry classifications (these data are not reported by state). Figure H-2 compares rates of firm closure for construction; wholesale trade; professional, scientific and technical services; and other services. Figure H-2 also presents closure rates for all industries by race/ethnicity.

- Across different industries, minority-owned businesses that were operating in 2002 had higher rates of closure from 2002 to 2006 relative to white-owned businesses.
- African American-owned businesses had the highest rate of closure among all racial/ethnic groups. For all industries, 39 percent of African American-owned firms in business in 2002 had closed by 2006 compared with 29 percent of business owned by whites.

The study team could not examine whether those differences also existed in the state of Washington because the SBA analysis by industry was not available for individual states.

H-2. Rates of business closure, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

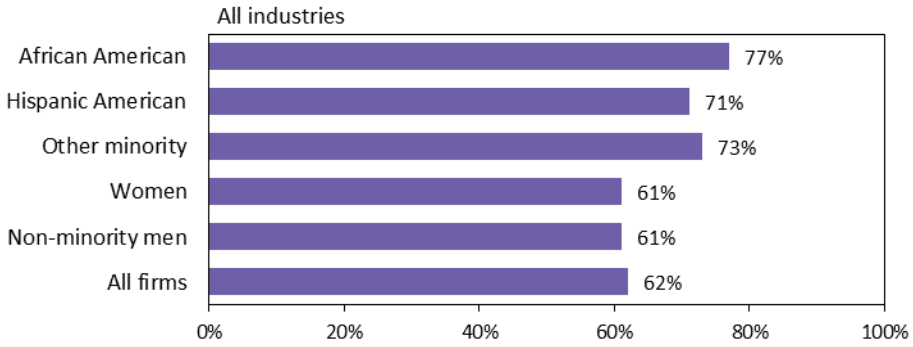
Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

Unsuccessful Closures

Not all business closures can be interpreted as "unsuccessful closures." Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent "successful closures." The most recent data on this issue come from the 1992 Characteristics of Business Owners (CBO) Survey[4] The 1992 CBO combines data from the 1992 Economic Census and a survey of business owners conducted in 1996. The survey portion of the 1992 CBO asked owners of businesses that had closed between 1992 and 1995, "Which item below describes the status of this business at the time the decision was made to cease operations?" Only the responses "successful" and "unsuccessful" were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Figure H-3 presents CBO data on the proportion of businesses that closed due to failure between 1992 and 1995.[5,6] African American-owned businesses were the most likely to report being "unsuccessful" at the time at which their businesses closed. About 77 percent of African American-owned business closures were reported to be unsuccessful between 1992 and 1995, compared with 61 percent of non-Hispanic white male-owned business closures. Unsuccessful closure rates were also relatively high for other minority groups. These data are valuable as they suggest that high closure rates for MBEs might not be explained by "successful closures." There were no differences in closure rates for WBEs compared with non-minority male-owned companies.

H-3. Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S., all industries



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

[4] CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

[5] All CBO data should be interpreted with caution as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. For further explanation, see Holmes, T.J., & Schmitz, J. A. (1996). Nonresponse Bias and Business Turnover Rates: The case of the Characteristics of Business Owners Survey. *Journal of Business & Economic Statistics, 14*(2), 231–241; Headd, B. (2001). *Business success: Factors leading to surviving and closing successfully* (Working Paper No. 01-01. Center for Economic Studies, U.S. Census Bureau. Retrieved from the U.S. Census Bureau website: https://www.census.gov/library/working-papers/2001/adrm/ces-wp-01-01.html

[6] Data for firms operating in the management of companies and enterprises and administrative, support, waste management and remediation industries were not available in the CBO survey.

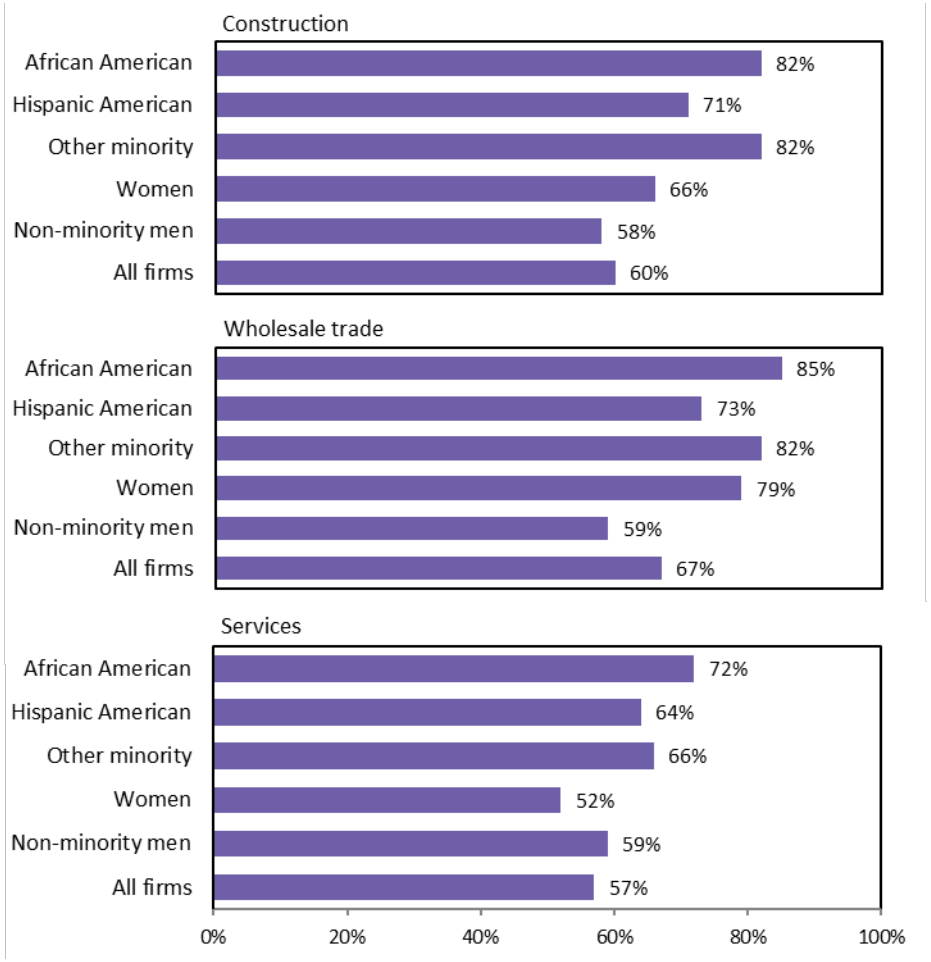
H. Business Success — Business closures

The CBO data also provide data on unsuccessful business closures by industry.

- In the construction industry, minority- and woman-owned businesses were more likely to report unsuccessful business closures (82% and 66%, respectively) than non-Hispanic white male-owned businesses (58%).
- Those patterns were similar in the wholesale trade and services industries with one exception — woman-owned businesses in the services industry (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

Figure H-4 presents these results.

H -4. Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S., by industry



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

H. Business Success — Business expansion

Researchers have offered explanations for higher rates of unsuccessful closures among minority- and woman-owned businesses:

- Regression analyses have identified initial capitalization as a factor in determining firm viability.[7] Because minority-owned businesses secure smaller amounts of debt equity in the form of loans, they may be more likely to fail.[8]
- Prior work experience in a family member's business or similar experiences are determinants of business viability.[9] Because minority business owners are much less likely to have such experience, their businesses are less likely to survive.[10] Similar gaps exist in the likelihood of business survival among woman-owned firms.[11]
- An owner's education level is a strong determinant of business survival. Educational attainment explains a substantial portion of the gap in business closure rates between African American-owned and nonminority-owned businesses.[12]
- White business owners have broader business opportunities, increasing their likelihood of closing successful businesses to pursue more profitable alternatives. Minority owners, especially those who do not speak English, have limited employment options, are less likely to close a successful business and more likely to face low business income.[13]
- Possession of greater initial capital and generally higher levels of education among Asian Americans are related to a higher rate of survival of Asian American-owned businesses compared to other minority-owned businesses.[14]

[7] See, e.g., Bates, T., & Robb, A.M. (2016). Impacts of owner race and geographic context on access to small-business financing. *Economic Development Quarterly*, *30*(2), 159-170; Fairlie, R. (2018). Racial inequality in business ownership and income. *Oxford Review of Economic Policy, 34(4)* 597-614; Fairlie, R. W., Robb, A. M., & Robinson, D.T. (2020). Black and white: Access to capital among minority-owned startups. *National Bureau of Economic Research*, *Working Paper (28154)*

[8] Bates, T., & Robb, A. (2013). Greater access to capital is needed to unleash the local economic development potential of minority-owned businesses. *Economic Development Quarterly, 27(3)* 250-259; Blanchflower, D. (2008). *Minority self-employment in the United States and the impact of affirmative action programs* (Working paper No. 12972). NBER Working Paper Series. Cambridge, MA: National Bureau of Economic Research. Retrieved from https://www.nber.org/papers/w13972

[9] Staniewski, M.W., (2016). The contribution of business experience and knowledge to successful entrepreneurship. *Journal of Business Research, 69(11)* 5147-5152; Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

[10] Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, *25*(2), 289-323.

[11] Sriram, V., & Mersha, T. (2017). Entrepreneurial drivers and performance: an exploratory study of urban minority and women entrepreneurs. *International Journal of Entrepreneurship and Small Business, 31(4)*; Fairlie, R. W., & Robb, A. M. (2009). Gender differences in business performance: Evidence from the Characteristics of Business Owners survey. *Small Business Economics, 33*(4), 375–395.

[12] Fairlie, R. (2022). The Impacts of COVID-19 on Racial Disparities in Small Business Earnings. U.S. Small Business Office of Advocacy. Retrieved from https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/16104005/Report_COVID-and-Racial-Disparities_508c.pdf

[13] Fairlie, R. (2018). Latino business ownership: contributions and barriers for U.S.-born and immigrant Latino entrepreneurs. Office of Advocacy, U.S. Small Business Administration; Bates, T. (2005). Analysis of young, small firms that have closed: Delineating successful from unsuccessful closures. *Journal of Business Venturing, 20*(3), 343–358.

[14] Robb, A. M., & Fairlie, R. W. (2009). Determinants of business success: An examination of Asian-owned businesses in the USA. *Journal of Population Economics, 22*(4), 827–858; Fairlie, R. W., Zissimopoulos, J., & Krashinsky, H. (2010). The international Asian business success story? A comparison of Chinese, Indian and other Asian businesses in the United States, Canada and United Kingdom. In *International Differences in Entrepreneurship* (pp.

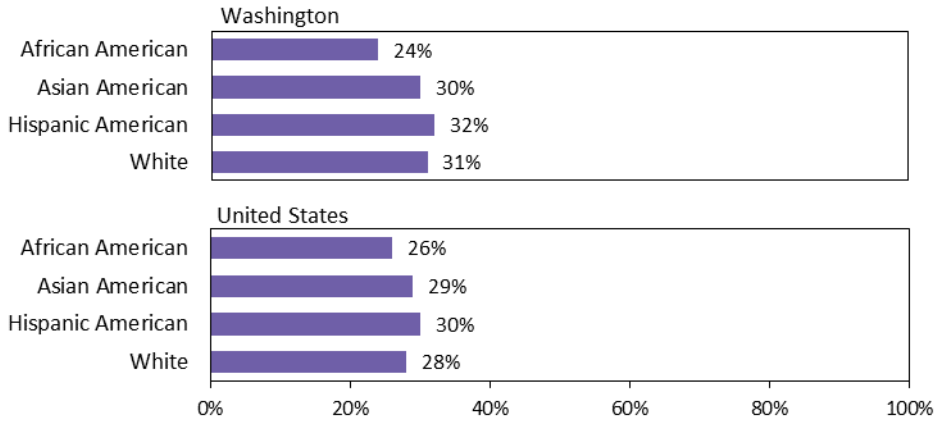
H. Business Success — Business expansion

Comparing expansion and contraction for firms owned by different groups is also useful in assessing the success of minority-owned businesses. As with closure data, only some data on expansions and contractions for the nation were available at the state level.

The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of privately held Washington state businesses that expanded and contracted between 2002 and 2006.

Figure H-5 presents the percentage of all businesses that increased their total employment between 2002 and 2006. In Washington state, relatively fewer African American- and Asian American-owned businesses expanded compared with white-owned businesses.

H-5. Percentage of businesses that expanded, 2002 through 2006, Washington and the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

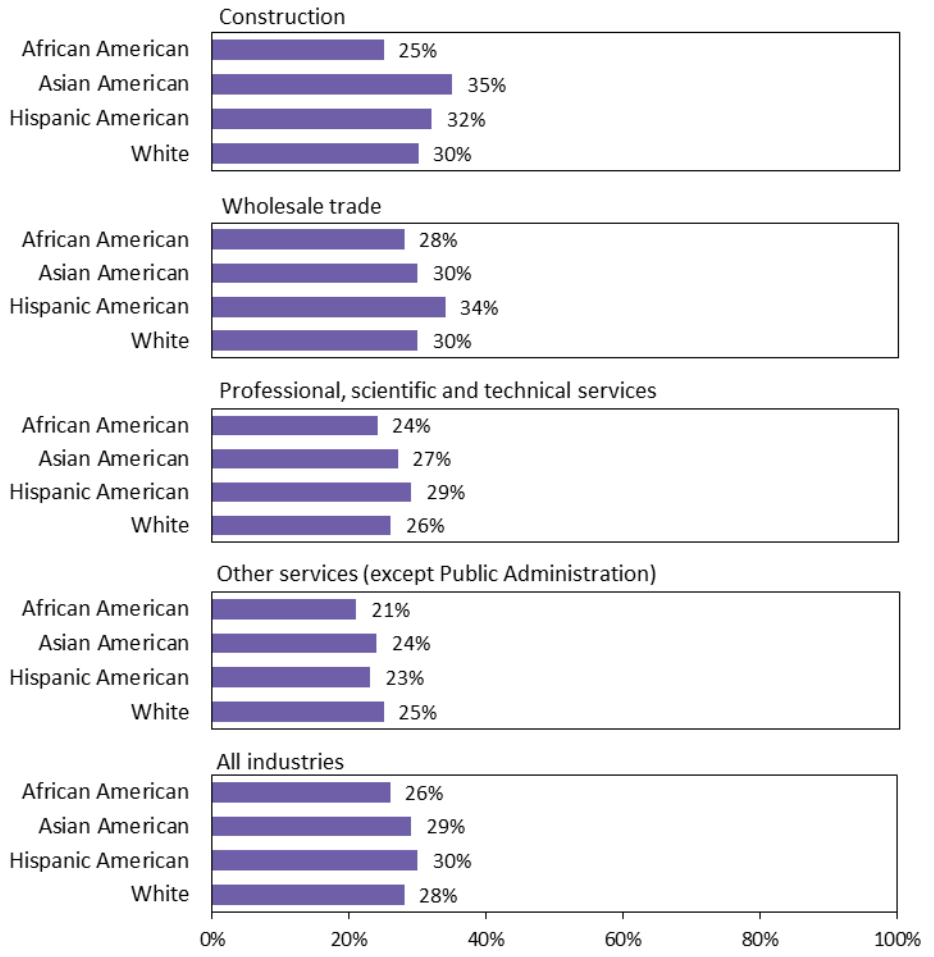
179–208). University of Chicago Press; Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

H. Business Success — Business expansion

Figure H-6 presents the percentage of businesses that expanded in construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services and in all industries in the United States. (The SBA study did not report results for businesses in individual industries at the state level.)

In each industry examined, a smaller percentage of African American-owned firms expanded compared to white-owned firms. Asian American- and Hispanic American-owned firms in some industries were more likely to expand than white-owned businesses.

H-6. Percentage of businesses that expanded, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

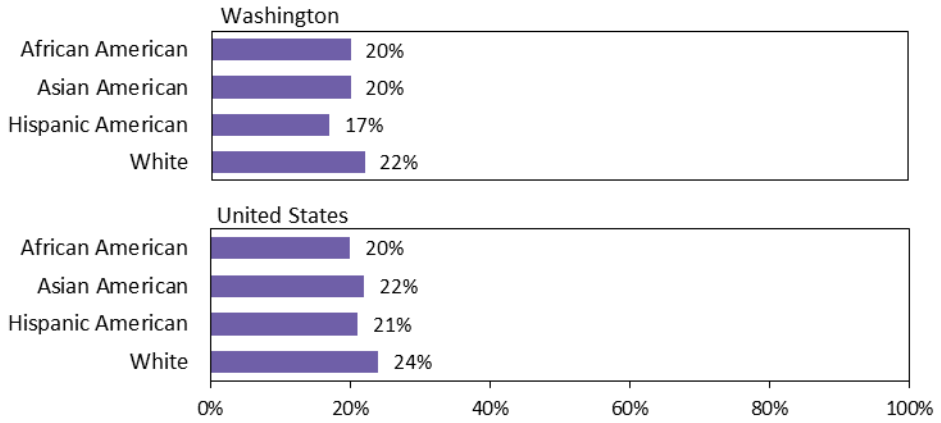
H. Business Success — Business contraction

Figure H-7 shows the percentage of privately held businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Washington state and in the nation.

- African American-, Asian American- and Hispanic American-owned firms in the state of Washington were less likely to contract between 2002 and 2006 than nonminority-owned businesses. When coupled with the higher percentage of minority-owned firms that closed during this time period (shown in Figure H-1), it is possible that minority-owned firms in economic distress are less likely to contract and more likely to close than majority-owned firms in distress.

- Trends in business contraction for Washington state are similar to those for the United States as a whole. Nationally, relatively fewer businesses owned by individuals in each minority group contracted compared with white-owned companies.

H-7. Percentage of businesses that contracted, 2002 through 2006, Washington and the U.S.



Note: Data refer to non-publicly held businesses only.

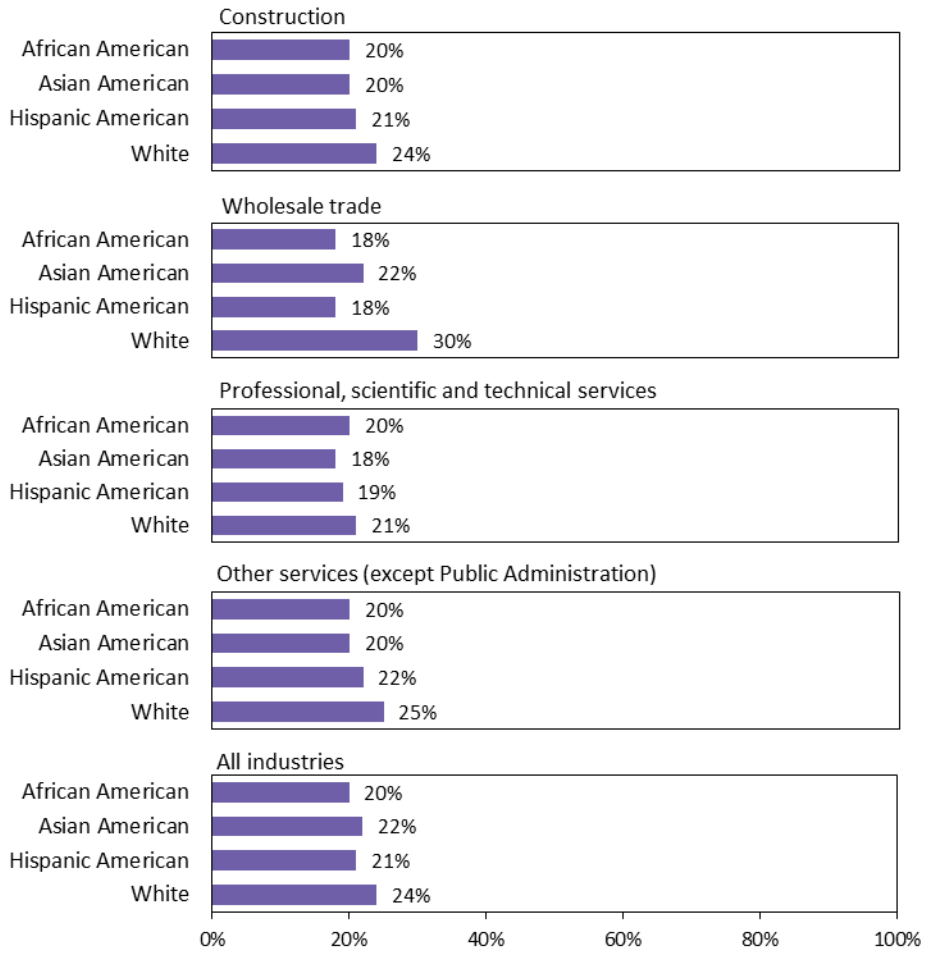
As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

H. Business Success — Impact of COVID-19 Pandemic on closure, expansion and contraction

The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-8 displays the percentage of businesses that contracted in the relevant study industries and in all industries at the national level. Compared to white-owned businesses in the United States, in general, a smaller percentage of minority-owned businesses in the relevant study industries and in all industries contracted between 2002 and 2006.

H-8. Percentage of businesses that contracted, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

H. Business Success – Impact of COVID-19 Pandemic on closure, expansion and contraction

Closure

As of the writing of this report, research suggests that the COVID-19 pandemic negatively affected business success and that the magnitude of these effects vary by race, ethnicity, gender and education. Establishment closure and opening was an important feature of the early pandemic. At the height of the pandemic during the spring of 2020, more than 700,000 establishments, or single operating locations of potentially larger businesses, closed at least temporarily.[15] Certain businesses navigated multiple cycles of establishment closures and openings, and many establishments were permanently closed because of the pandemic. Permanent closures, or exits, during 2020 reached 1.1 million and exceeded pre-pandemic (2015-2019) rates by roughly 181,000.[16] Washington state had the fifth-highest business closure rate in the nation during the first six months of the pandemic. About 11 out of every 1,000 businesses had permanently closed in the Portland-Vancouver metro area by September 2020.[17] Coming out of the pandemic, new establishments surged in 2021.[18]

One study performed by the Federal Reserve Bank found that minority-owned small businesses had been disproportionately impacted by the pandemic. Firms owned by Asian Americans and Hispanic Americans had higher rates of closure than non-Hispanic whites, and African Americans faced the highest rate of business closure at more than twice the rate of businesses owned by non-Hispanic whites.[19]

The 2020 Small Business Credit Survey (SBCS) included questions related to the COVID-19 pandemic's effect on business operations. As of fall 2020, the number of businesses that temporarily closed at one point during the pandemic was one in four for non-Hispanic white-owned firms and higher for firms owned by people of color (see Figure H-9).

H-9. Effect of the COVID-19 pandemic on U.S. employer firms, 2020

Race/ethnicity	Temporarily closed	Reduced operations	Maintained operations*	Expanded operations	No impact
African American	26 %	67 %	39 %	5 %	2 %
Asian American	33	67	43	3	2
Hispanic American	27	63	44	3	3
Native American	36	56	47	5	9
Non-Hispanic white	25	54	49	5	5

Note: "Maintained operations" includes those that maintained operations with modifications; respondents were instructed to select all that apply, therefore the percent of respondents may add to more than 100%.

Source: Federal Reserve Bank. (2020). 2020 Small Business Credit Survey [Data file]. Retrieved from https://www.fedsmallbusiness.org/survey.

[15] Decker, R et al. (2022, May 06). Business entry and exit in the COVID-19 pandemic: A preliminary look at the official data. Retrieved from https://www.federalreserve.gov/econres/notes/feds-notes/business-entry-and-exit-in-the-covid-19-pandemic-a-preliminary-look-at-official-data-20220506.html

[16] Ibid.

[17] Washington State Legislature. (29 September 2020). *Senate special committee on economic recovery – 9/29/2020 10:00 AM.* Retrieved from https://app.leg.wa.gov/committeeschedules/Home/Documents/26986?//0/09-01-2020/12-31-2020/Schedule///Bill/

[18] Ibid.

[19] Misera, L. (2020). *An uphill battle: COVID-19's outsized toll on minority-owned firms* (Rep.). Cleveland, OH: Federal Reserve Bank of Cleveland. doi: 10.26509/frbc-cd-20201008

H. Business Success — Impact of COVID-19 Pandemic on closure, expansion and contraction

Expansion and Contraction

The 2020 Small Business Credit Survey also asked firms if their revenue and employment had increased, decreased or not changed from previous years. Figure H-10 shows these results.

From fall 2019 to fall 2020, more than three-quarters of U.S. employer firms reported that their revenue decreased. About one-half reported that their employment decreased. These data indicate that the COVID-19 pandemic negatively impacted revenue and employment.

Except for Native American-owned firms, minority-owned companies were more likely than non-Hispanic white-owned firms to report revenue decreases (for both fall 2019 to fall 2020 and fall 2020 to fall 2021).[20] Overall, minority-owned businesses were more likely to report losses in revenue compared to businesses owned by non-Hispanic whites over the 2019 to 2021 period.

H-10. Percent of firms that reported change in revenue and employment in prior 12 months, U.S. employer firms, 2020 and 2022

	2020		2022	
Race/ethnicity	Revenue	Employment	Revenue	Employment
Increase				
African American	10 %	10 %	40 %	20 %
Asian American	5	7	29	20
Hispanic American	12	9	44	28
Native American	12	14	43	27
Non-Hispanic white	15	12	47	31
No change				
African American	6 %	37 %	20 %	57 %
Asian American	5	39	24	56
Hispanic American	8	41	18	48
Native American	14	43	23	49
Non-Hispanic white	9	43	17	46
Decrease				
African American	85 %	53 %	40 %	23 %
Asian American	90	54	47	25
Hispanic American	80	51	38	24
Native American	75	43	34	24
Non-Hispanic white	76	45	36	23

Source: Federal Reserve Bank. (2023). 2022 Small Business Credit Survey [Data file]. Retrieved from https://www.fedsmallbusiness.org/survey.

[20] Small Business Credit Survey 2022 Report on Firms Owned by People of Color. (2022) FED Small Business. Retrieved from https://www.fedsmallbusiness.org/survey/2022/2022-report-on-firms-owned-by-people-of-color.

H. Business Success — Impact of COVID-19 Pandemic on closure, expansion and contraction

Impact on Woman-Owned Firms

A U.S. Chamber of Commerce study found evidence that the pandemic disproportionately affected woman-owned firms. The study surveyed small business owners in the quarter before the pandemic and in the third quarter of 2020. Findings are summarized in Figure H-11.

- Between January and July of 2020, the share of woman-owned firms that reported their overall business health as "good" fell from 60 percent to 47 percent. This drop exceeded what was seen for male-owned companies.
- The share of woman-owned firms that indicated increasing staff in the previous calendar year fell from 18 percent in January 2020 to 15 percent in July 2020, while the portion of male-owned firms rose from 17 percent to 25 percent. The share of woman-owned firms that expected to increase size of staff in the coming year fell, while the share of male-owned firms that expected to increase staffing grew.
- The share of woman-owned firms that planned to increase investments was stable, while the share of male-owned firms that planned on increasing investments grew.
- Fewer woman-owned firms expected their revenue to grow in the following year, compared to little change for male-owned firms.

Some variation may be due to industry makeup; woman-owned businesses were a relatively higher portion of firms in the retail, services and healthcare/professional services industries, which had been more impacted by social distancing guidelines.[21]

H-11. Survey responses about business success, before and during the COVID-19 pandemic

Demographic group	Before COVID-19 pandemic (January 2020)	July 2020
Female		
Ranked overall health of business as "good"	60 %	47 %
Increased staffing in previous year	18	15
Expect to increase size of staff in coming year	31	24
Plan to increase investments in the coming year	32	32
Expect next year's revenue to increase	63	49
Male		
Ranked overall health of business as "good"	67 %	62 %
Increased staffing in previous year	17	25
Expect to increase size of staff in coming year	30	36
Plan to increase investments in the coming year	28	39
Expect next year's revenue to increase	59	57

Source: U.S. Chamber of Commerce. (2020). *MetLife & U.S. Chamber Special Report on women-owned small businesses during COVID-19* (Rep.). Retrieved from https://www.uschamber.com/workforce/special-report-women-owned-small-businesses-during-covid-19.

[21] U.S. Chamber of Commerce. (2020, August 26). *Coronavirus pandemic disproportionately affecting female-owned small businesses, according to new U.S. Chamber poll* [Press release]. Retrieved January 15, 2021, from https://www.uschamber.com/press-release/coronavirus-pandemic-disproportionately-affecting-female-owned-small-businesses

H. Business Success — Impact of COVID-19 Pandemic on closure, expansion and contraction

Research suggests that the added labor of childcare and elderly care will continue to impact women and women-owned businesses.[22] Average childcare duties rose from 9 hours per week to 17 hours early in the pandemic and 22 hours by fall 2020. Even as women remained employed, the burden of care led many to sacrifice opportunities that may impact their long-term professional success. It is within this context that African American women, who worked in the leisure or service industry and who became primary caretakers of children or elderly relatives, were the most impacted by COVID-19.

[22] Goldin, C. (April 2022). Understanding the Economic Impact of COVID-19 on Women. *National Bureau of Economic Research*. Retrieved from https://www.nber.org/papers/w29974

H. Business Success — Business receipts

Annual business receipts and earnings for business owners are also indicators of the success of businesses. The study team examined:

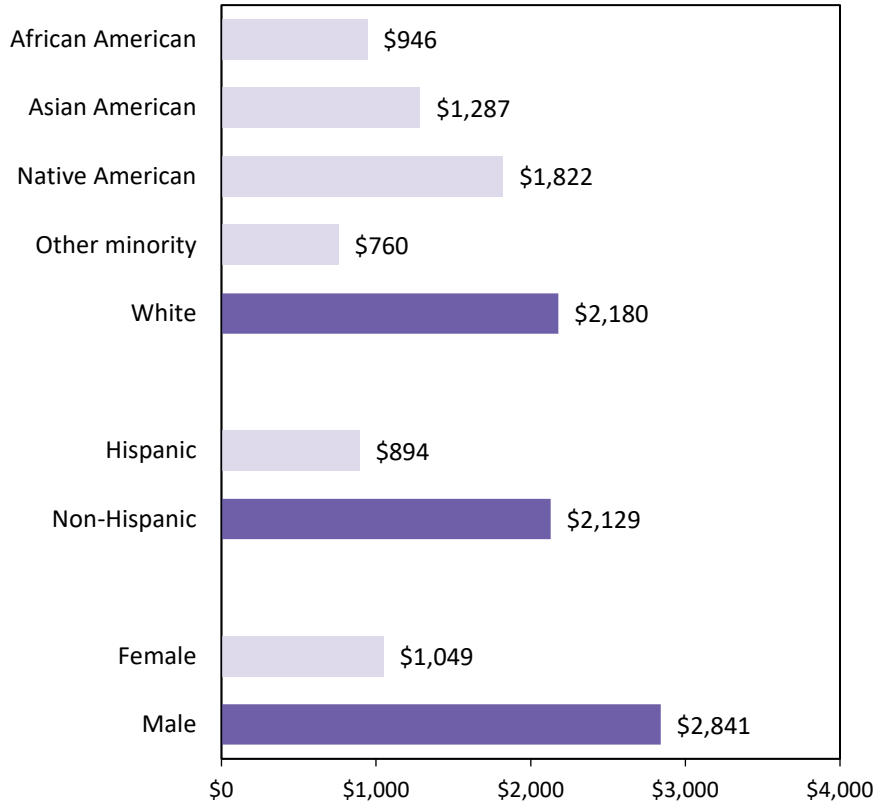
- Business receipts data for Washington state from the U.S. Census Bureau 2017 Annual Business Survey (ABS);
- Business earnings data for business owners in the Portland-Vancouver marketplace from the 2018–2022 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in the Portland-Vancouver marketplace that the study team collected as part of the 2024 availability surveys.

Receipts for All Businesses

The study team examined receipts for businesses using data from the 2017 ABS, conducted by the U.S. Census Bureau.

Figure H-12 presents 2017 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender.[23] The ABS data across all industries in Washington show lower receipts for minority- and woman-owned businesses than for nonminority and male-owned businesses, respectively.

H-12. Mean annual receipts (thousands) for all businesses, by race/ethnicity and gender of owners, 2017, Washington



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

As sample sizes are not reported, statistical significance of these results cannot be determined.

Source: U.S. Census Bureau's 2017 Annual Business Survey.

[23] Racial categories are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans.

Receipts by Industry

The study team also analyzed ABS receipts data for businesses in construction, professional services, goods and other services.

Figure H-13 presents mean annual receipts in 2017 for firms in the economic sectors that correspond to the study industries. Disparities for minority- and woman-owned businesses seen in all industries combined persist when examining results for most individual industries.

H-13. Mean annual receipts (thousands) for all firms in the relevant study industries, by race/ethnicity and gender of owners, 2017, Washington

Demographic group	Construction	Professional, scientific and technical services	Wholesale trade	Other services
Race				
African American	$ 1,327	$ 663	$	$ 127
Asian American	1,441	1,502	5,187	255
Native American	3,082	1,090	3,084	655
Other minority	1,065	378		
White	2,071	1,100	9,411	675
Ethnicity				
Hispanic	$ 915	$ 1,469	$ 4,319	$ 280
Non-Hispanic	2,156	1,123	9,056	600
Gender				
Female	$ 1,670	$ 655	$ 6,766	$ 383
Male	2,447	1,435	11,092	758

Note: Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.

As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

Source: U.S. Census Bureau's 2017 Annual Business Survey.

H. Business Success — Business earnings

To assess the success of self-employed minorities and women in the relevant study industries, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the 2018–2022 ACS. The study team analyzed earnings of incorporated and unincorporated business owners ages 16 and older who reported positive business earnings. All results are presented in 2022 dollars.

Figure H-14 shows mean annual business owner earnings for 2018 through 2022 for relevant study industries by race/ethnicity and gender.

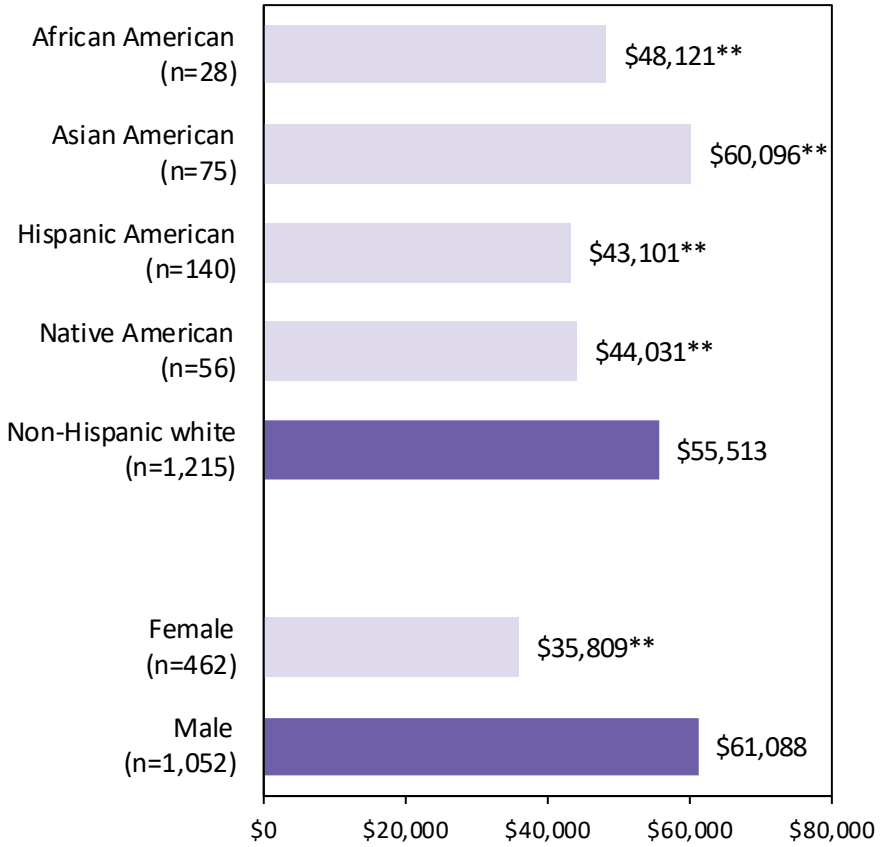
All Study Industries

Keen Independent examined earnings for businesses in study industries in the Portland-Vancouver marketplace. The PUMS data show that:

- Average earnings for minority business owners were less than earnings for non-Hispanic white business owners (except for Asian American business owners); and
- Average earnings for female business owners were less than those of male business owners in the study industries.

These differences were statistically significant.

H-14. Mean annual business owner earnings in all study industries, 2018 through 2022, Portland-Vancouver marketplace



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2022 dollars.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples. The 2018–2022 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

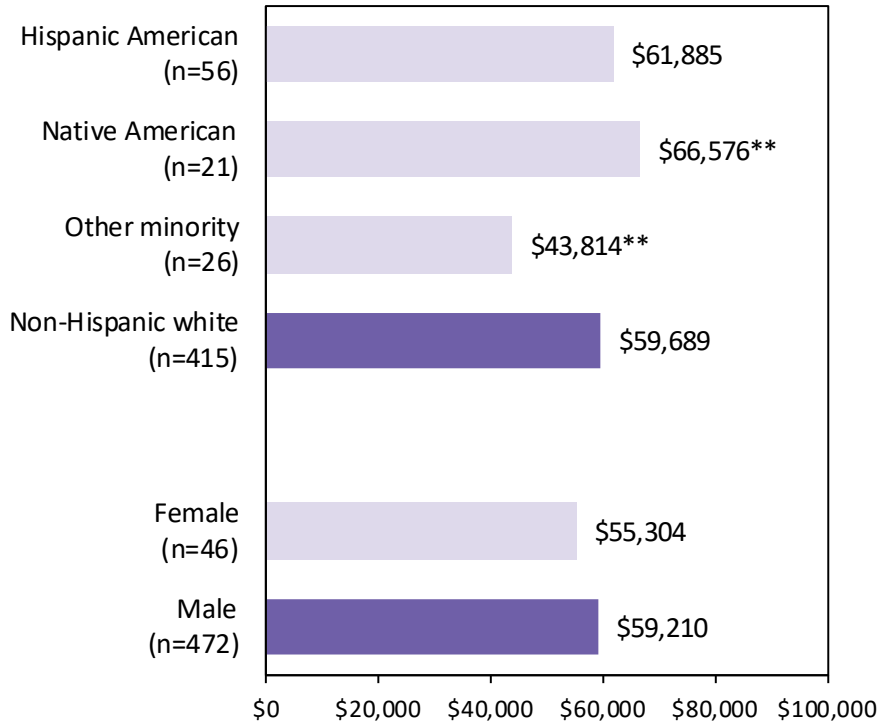
Construction Industry

Keen Independent also analyzed business owner earnings in the PUMS data for the construction industry.

Figure H-15 shows mean annual business owner earnings for 2018 through 2022 for the construction industry in the Portland-Vancouver marketplace. Asian American and African American business owners were combined into a single category ("other minority") due to small sample size.

- On average, earnings for Asian American and African American business owners (combined) were less than earnings for non-Hispanic white business owners. This difference was statistically significant.
- Average earnings for female business owners were less than earnings for male business owners, although this difference was not statistically significant.

H-15. Mean annual business owner earnings in the construction industry, 2018 through 2022, Portland-Vancouver marketplace



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2022 dollars.

"Other minority" includes Asian Americans and African Americans.

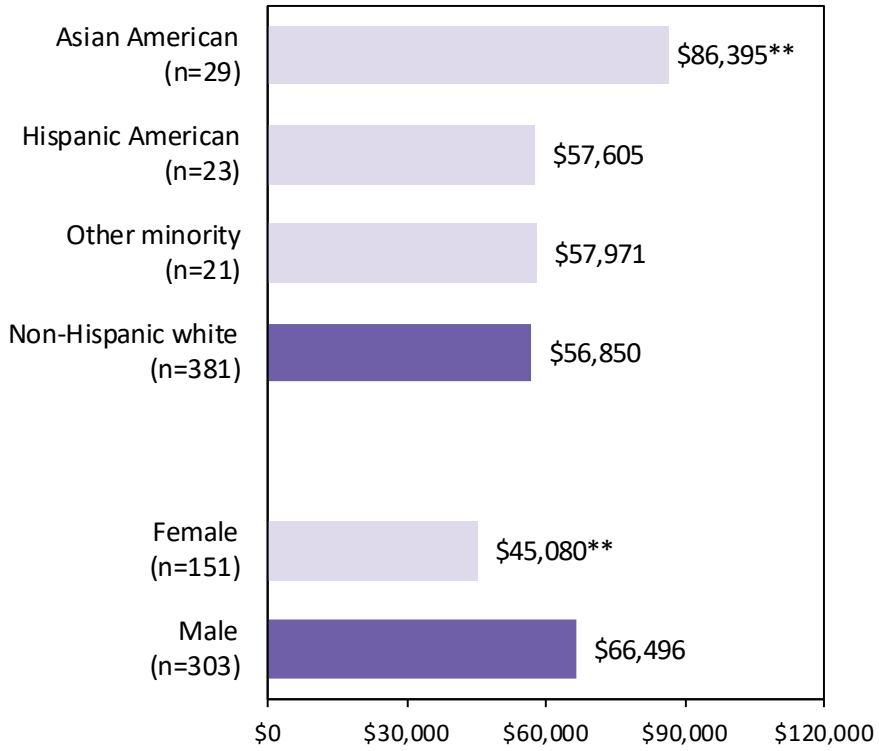
Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

Professional Services Industry

Figure H-16 shows mean annual business owner earnings for 2018 through 2022 for the Portland-Vancouver professional services industry. African Americans, Native Americans and other minorities were combined into a single category ("other minority") due to small sample size of these groups in the local industry.

- Hispanic American- and other minority-owned professional services firms had mean earnings that were similar to non-Hispanic white-owned professional services firms.
- Asian American-owned professional services firms had earnings higher than non-Hispanic white-owned firms.
- Mean earnings for female business owners were less than earnings for male business owners. This difference was statistically significant.

H-16. Mean annual business owner earnings in the professional services industry, 2018 through 2022, Portland-Vancouver marketplace



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2022 dollars.

"Other minority" includes African Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

H. Business Success — Business earnings

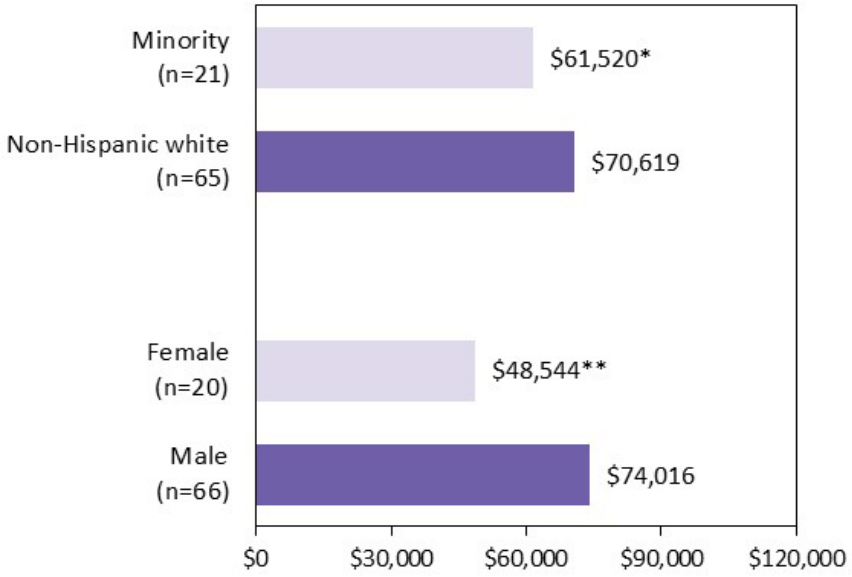
Goods Industry

Figure H-17 displays business owner earnings for 2018 through 2022 for the Pacific Northwest goods industry. People of color were combined into a single "minority" category due to small sample size in the Pacific Northwest goods industry.

- On average, business earnings for people of color were less than earnings for non-Hispanic white business owners.
- Average earnings for female business owners were less than those of male business owners.

These differences were statistically significant.

H-17. Mean annual business owner earnings in the goods industry, 2018 through 2022, Pacific Northwest marketplace



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2022 dollars.

"Minority" includes African Americans, Asian Americans, Hispanic Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

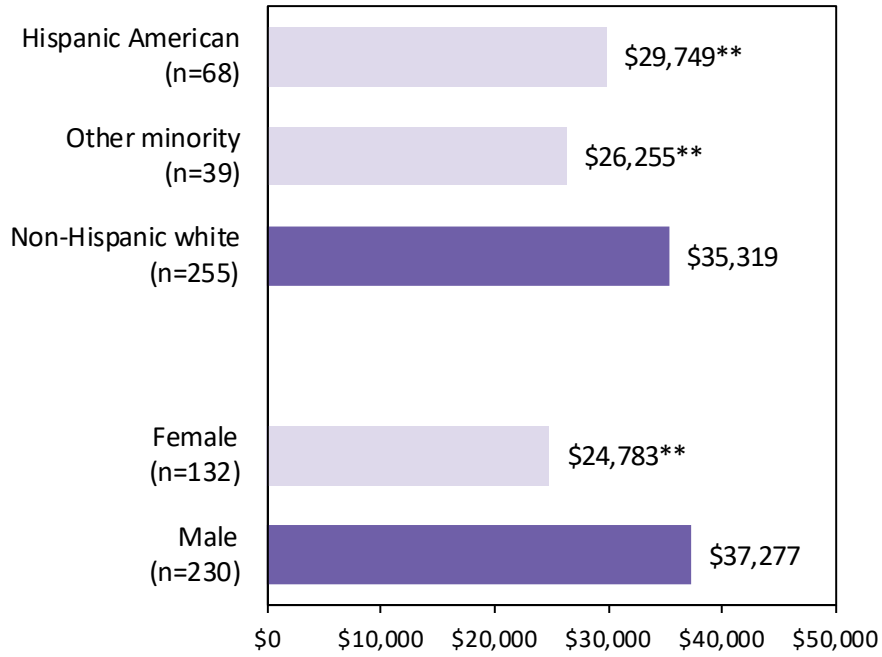
Other Services Industry

Figure H-18 displays business owner earnings for 2018 through 2022 for the Portland-Vancouver other services industry. African Americans, Asian Americans, Native Americans and other minorities were combined into a single category due to small sample size of these groups in the Portland-Vancouver other services industry.

- On average, earnings for African American, Asian American and Native American other services industry business owners (combined) were less than earnings for non-Hispanic white business owners.
- Average earnings for female business owners were less than those of male business owners in this industry.

These differences were statistically significant.

H-18. Mean annual business owner earnings in the other services industry, 2018 through 2022, Portland-Vancouver marketplace



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2022 dollars.

"Other minority" includes African Americans, Asian Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

H. Business Success — Business earnings regression analysis

Differences in business earnings across groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status and educational attainment. The study team created a statistical model through regression analysis to examine whether there were differences in average business earnings between people of color and non-Hispanic whites, and women and men after accounting for certain neutral factors. Data came from the ACS for 2018 through 2022 for the Portland-Vancouver marketplace for construction, professional services and other services and the Pacific Northwest marketplace for the goods industry.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts from other disparity studies.[24] The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race, ethnicity and gender of business owners, the model also included measures of factors that are likely to affect earnings, including age, marital status, ability to speak English well and educational attainment.

[24] For example, National Economic Research Associates, Inc. (2012). *The state of minority- and women-owned business enterprise in construction: Evidence from Houston* (Rep.). Retrieved from City of Houston website: http://www.houstontx.gov/obo/disparitystudyfinalreport.pdf; BBC Research & Consulting. (2012). *Availability and disparity study* (Rep.). Retrieved from the California Department of Transportation website: https://dot.ca.gov/-/media/dot-media/documents/2012-caltrans-availability-and-disparity-study-a11y.pdf

Construction Industry Earnings Regression Analysis

Figure H-19 on the right illustrates the results of the regression model for 2018 through 2022 earnings in the construction industry in the Portland-Vancouver marketplace. This model included 518 observations.

In the Portland-Vancouver metro area construction industry:

- Business owners who were married tended to have higher business earnings.
- Age was also positively related to business earnings, but less so for the oldest individuals.
- Business owners with disabilities tended to have lower business earnings.

After accounting for race- and gender-neutral factors, there were no statistically significant differences in earnings from being a business owner of color or a woman business owner.

H-19. Model results for mean annual business owner earnings, Portland-Vancouver marketplace construction industry, 2018 through 2022

Variable	Coefficient
Constant	7.8486 **
Age	0.0981 *
Age-squared	-0.0011 **
Married	0.6223 **
Disabled	-0.8845 **
Speaks English well	0.1513
Less than high school education	-0.0082
Some college	0.0176
Four-year degree	-0.1120
Advanced degree	-0.1539
Hispanic American	-0.2065
Native American	0.2093
Other minority	-0.1394
White woman	-0.1346

Note: *,** Denote statistically significant differences between groups at the 90% and 95% confidence levels, respectively.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2022 dollars.

"Other minority" includes African Americans and Asian Americans.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

Professional Services Industry Earnings Regression Analysis

Figure H-20 on the right illustrates the results of the regression model for 2018 through 2022 earnings in the Portland-Vancouver professional services industry. This model included 454 observations.

In the Portland-Vancouver professional services industry, older business owners tended to have higher business earnings than younger business owners; however, the oldest individuals had slightly lower earnings.

After accounting for race- and gender-neutral factors, non-Hispanic white woman business owners reported lower business earnings than non-Hispanic white men. This difference was statistically significant.

H-20. Model results for mean annual business owner earnings, Portland-Vancouver professional services industry, 2018 through 2022

Variable	Coefficient
Constant	7.6828 **
Age	0.1217 **
Age-squared	-0.0012 **
Married	0.1077
Disabled	-0.3453
Less than high school education	-1.6441
Some college	-0.3464
Four-year degree	-0.1065
Advanced degree	-0.4074
Asian American	0.2706
Hispanic American	-0.1926
Other minority	0.2557
White woman	-0.3102 *

Note: *,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2021 dollars.

"Other minority" includes African Americans, Asian Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

Goods Industry Earnings Regression Analysis

Figure H-21 on the right illustrates the results of the regression model for 2018 through 2022 earnings in the Pacific Northwest area goods industry. This model included 82 observations.

In the Pacific Northwest goods industry:

- Older business owners tended to have higher business earnings than younger business owners; however, the oldest individuals had slightly lower earnings;
- Business owners who were married tended to have higher business earnings; and
- Compared with those who had just a high school degree, business owners who had less than a high school education, some college or who had an advanced degree tended to have lower business earnings.

After accounting for race- and gender-neutral factors, non-Hispanic white women owning a business in the goods industry had lower earnings than non-Hispanic white male business owners. This difference was statistically significant.

H-21. Model results for mean annual business owner earnings, Pacific Northwest goods industry, 2018 through 2022

Variable	Coefficient
Constant	5.6915 **
Age	0.2180 **
Age-squared	-0.0023 **
Married	1.4423 **
Disabled	-0.3109
Less than high school education	-1.4430 **
Some college	-0.6185 *
Four-year degree	-0.5783
Advanced degree	-1.6442 **
Minority	-0.4545
White woman	-1.1084 *

Note: *,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2021 dollars.

"Minority" includes African Americans, Asian Americans, Hispanic Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

Other Services Industry Earnings Regression Analysis

Figure H-22 on the right illustrates the results of the regression model for 2018 through 2022 earnings in the Portland-Vancouver other services industry. This model included 362 observations.

In the Portland-Vancouver other services industry:

- Older business owners tended to have higher business earnings than younger business owners; however, the oldest individuals had slightly lower earnings; and
- Business owners who were married and who had some college education tended to have higher earnings.

After accounting for race- and gender-neutral factors, there was a statistically significant difference in white women business owners' earnings when compared with non-Hispanic white male business owners.

H-22. Model results for mean annual business owner earnings, Portland-Vancouver other services industry, 2018 through 2022

Variable	Coefficient
Constant	5.6993 **
Age	0.1303 **
Age-squared	-0.0012 **
Married	0.4203 **
Disabled	-0.5274
Speaks English well	0.4347
Less than high school education	0.1310
Some college	0.6155 **
Four-year degree	0.3025
Advanced degree	0.2009
Hispanic American	0.1561
Other minority	-0.4567
White woman	-0.5297 **

Note: ** Denote statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2021 dollars.

"Other minority" includes African Americans, Asian Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2018–2022 ACS Public Use Microdata samples.

H. Business Success — Gross revenue of firms from availability survey

In the availability telephone surveys of the Portland-Vancouver marketplace,[25] the study team conducted in 2024 (discussed in Appendix C), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous five years (2018 to 2022).

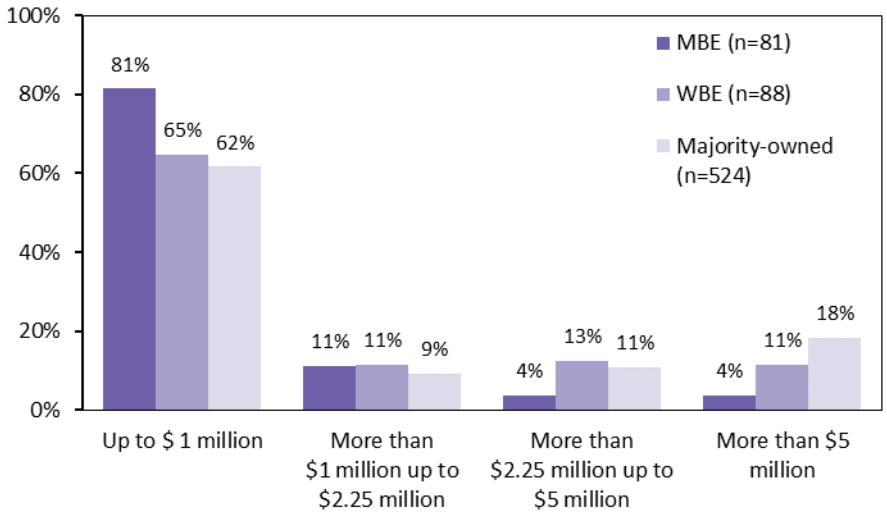
The availability survey encompasses firms working in the construction, professional services, goods and other services industries. Availability survey results pertain to firms indicating qualifications and interest in City of Vancouver work.

All Study Industries

Figure H-23 presents the reported annual gross revenue for MBE, WBEs and majority-owned businesses in the availability surveys. MBE and WBEs were less likely than majority-owned firms to report high average annual revenue.

- Relatively fewer MBE and WBE firms reported average revenues of more than $5 million per year (4% and 11%, respectively) compared with majority-owned firms (18%).
- MBEs and WBEs were more likely than majority-owned companies to be in this lowest revenue group. A larger share of MBEs (81%) and WBEs (65%) reported average revenue of no more than $1 million per year compared to 62 percent of majority-owned companies.

H-23. Average annual gross revenue of company over previous five years, Portland-Vancouver marketplace



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Totals may not sum to 100 due to rounding.

Answers are from all firms in the availability database across both market areas (Portland-Vancouver market area for firms in the construction, professional services and other services industries, and Pacific Northwest market area for firms in the goods industry).

Source: Keen Independent Research from 2024 availability surveys.

[25] The 2024 availability survey included telephone surveys of business owners in two different market areas. The Portland-Vancouver market area was used for businesses in the construction, professional services and other services industries and includes Clackamas, Columbia, Multnomah, Washington and Yamhill counties in Oregon and Clark and Skamania counties in Washington. The Pacific Northwest market area was used for businesses in the goods industry and includes all counties from the Portland-Vancouver market area as well as Cowlitz, Kittitas, Pierce, Thurston, and Lewis counties in Washington. Availability survey results and analyses are based on responses from businesses in each industry's market area. The marketplace, which includes both market areas, is referred to as the "Portland-Vancouver marketplace" throughout this appendix.

H. Business Success — Relative bid capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the "relative capacity" of businesses included in an availability analysis.[26] The study team directly measured bid capacity in its availability survey.[27]

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., "bid capacity" as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

Data

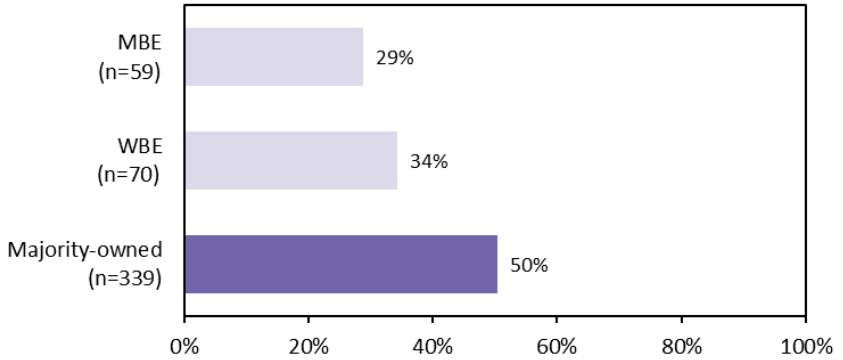
The availability survey produced a database of construction, professional services, goods and other services businesses for which bid capacity could be examined.

"Relative bid capacity" for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the six years preceding when the study team interviewed it based on responses to availability survey questions.

Results

For all industries, Figure H-24 shows the percentage of MBEs, WBEs and majority-owned firms reporting that they had been awarded or had bid on contracts or subcontracts of $500,000 or more. Overall, MBEs and WBEs were less likely than majority-owned firms to report having been awarded or bid on a contract of $500,000 or more.

H-24. Percentage of MBEs, WBEs and majority-owned firms in the Portland-Vancouver marketplace indicating bid capacity of $500,000+



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Answers are from all firms in the availability database across both market areas (Portland-Vancouver market area for firms in the construction, professional services and other services industries, and Pacific Northwest market area for firms in the goods industry).

Source: Keen Independent Research from 2024 availability surveys.

[26] For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense, et al.,* 545 F.3d 1023 (Fed. Cir. 2008).

[27] See Appendix C for details about the availability interview process.

H. Business Success — Relative bid capacity

Above Median Bid Capacity

The study team further explored bid capacity on a subindustry level. Subindustries such as public building construction tend to involve relatively large contracts (or subcontracts). Other subindustries, such as remediation services, typically involve smaller contracts.

Figure H-25 reports the median relative bid capacity among Portland-Vancouver marketplace businesses for each of the 35 subindustries examined in the study. Results categorized companies according to their primary line of business.

H. Business Success — Relative bid capacity

H-25. Median relative capacity of Portland-Vancouver marketplace businesses by subindustry

Subindustry	Median bid capacity	Subindustry	Median bid capacity
Construction industry		**Other services**	
Public building construction	$5 million – $10 million	Staffing services	$500,000
Park, playground and recreational area construction	$5 million	Janitorial services	$100,000 – $500,000
		Waste collection and disposal	$100,000 – $500,000
Water and sewer line construction	$1 million – $5 million	Security systems services	$100,000 – $500,000
Excavation, site prep, grading and drainage	$1 million – $5 million	Equipment repair	$100,000 – $500,000
Electrical work including lighting and signals	$100,000 – $500,000	Vehicle repair and maintenance	$100,000
Road construction	$100,000 – $500,000	Printing	$100,000 or less
Plumbing and HVAC	$100,000 – $500,000	Remediation services	$100,000 or less
Concrete flatwork (including sidewalk, curb and gutter)	$100,000 – $500,000	Portable toilet rental	$100,000 or less
		Landscaping services	$100,000 or less
Roofing	$100,000 – $500,000	Security guard services	$100,000 or less
Inspection and testing	$100,000 or less		
Goods		**Professional services**	
Cars and trucks	$500,000 – $1 million	Architecture and engineering	$500,000 – $1 million
Industrial equipment and supplies	$100,000 – $500,000	Environmental consulting services	$500,000
Electrical equipment	$100,000 – $500,000	Appraisal services	$100,000 or less
Construction equipment	$100,000 – $500,000	Computer system design and IT maintenance	$100,000 or less
Vehicle parts and supplies	$100,000 – $500,000		
Firefighter and police equipment	$100,000 – $500,000		
Petroleum and petroleum products	$100,000		
Building materials	$100,000 or less		
Small arms and ammunition	$100,000 or less		
Farm and garden equipment	$100,000 or less		

Note: Answers are from all firms in the availability database across both market areas (Portland-Vancouver market area for firms in the construction, professional services and other services industries, and Pacific Northwest market area for firms in the goods industry).

Source: Keen Independent Research from 2024 availability surveys.

H. Business Success — Relative bid capacity

Comparison of above median bid capacity for firms owned by minorities and women. Based on the median bid capacity figures identified in Figure H-26, the study team classified firms into "above median bid capacity," "at median bid capacity" and "below median bid capacity" for the subindustry that described their primarily line of business.

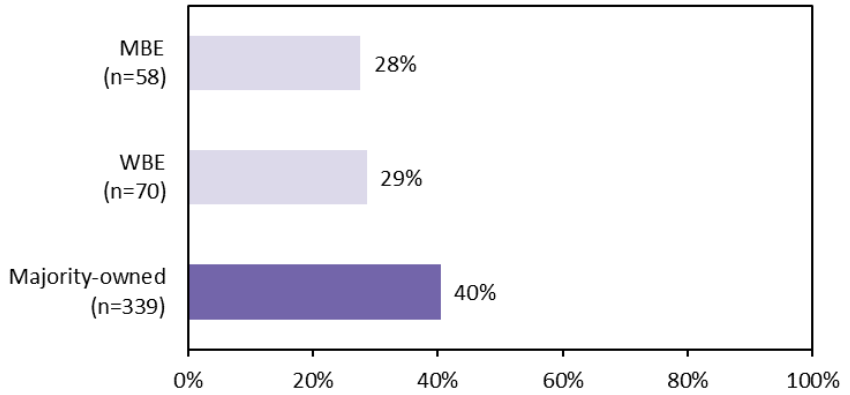
The share of MBEs, WBEs and majority-owned firms with a bid capacity above the median for their subindustry are presented in Figure H-26. MBEs (28%) and WBEs (29%) were more likely than majority-owned firms (40%) to report below-median bid capacity for their subindustry.

Regression analyses. Keen Independent also prepared regression analyses to identify whether these differences in bid capacity for MBEs and WBEs persisted after controlling for length of time in business (in addition to subindustry).

Keen Independent developed a probit regression model of whether a firm had above median bid capacity for its subindustry that included three independent variables: MBE status, WBE status and age of firm.

The differences between MBE and WBE bid capacity relative to majority-owned firms were not statistically significant after controlling for both subindustry and length of time in business.

H-26. Percent of firms above median bid capacity for their subindustry, Portland-Vancouver marketplace, 2024



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Answers are from all firms in the availability database across both market areas (Portland-Vancouver market area for firms in the construction, professional services and other services industries, and Pacific Northwest market area for firms in the goods industry).

Source: Keen Independent Research from 2024 availability surveys.

H. Business Success — Survey responses about potential barriers

In the availability surveys conducted with Portland-Vancouver marketplace businesses, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. (Appendix C provides additional information.) Results are presented for each study industry as some questions were industry specific. Groups of questions are:

- Bidding requirements and project size;
- Learning about bid opportunities; and
- Receiving payment for projects.

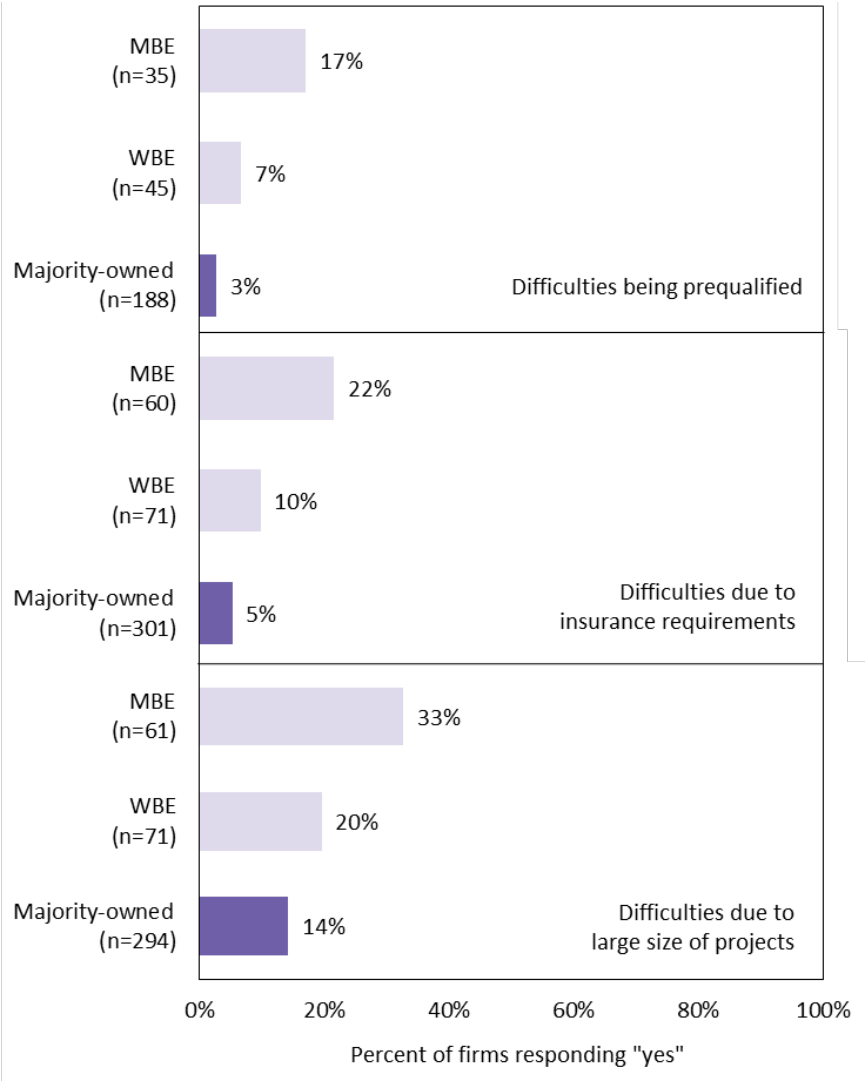
Appendix G provides results to the survey question about access to capital and bonding.

Prequalification, Insurance and Project Size

In the availability survey, firms were asked about being prequalified for work, insurance requirements and whether project size was a barrier to bidding. Figure H-27 shows results for MBEs, WBEs and majority-owned businesses.

- A much higher percentage of MBEs reported having difficulties being prequalified, difficulties due to insurance requirements and difficulties due to the large size of projects when compared to majority-owned firms.
- WBEs were also somewhat more likely than majority-owned firms to indicate these same difficulties.

H-27. Responses to availability survey questions concerning difficulties with prequalification, insurance and project size, Portland-Vancouver marketplace



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2024 availability surveys.

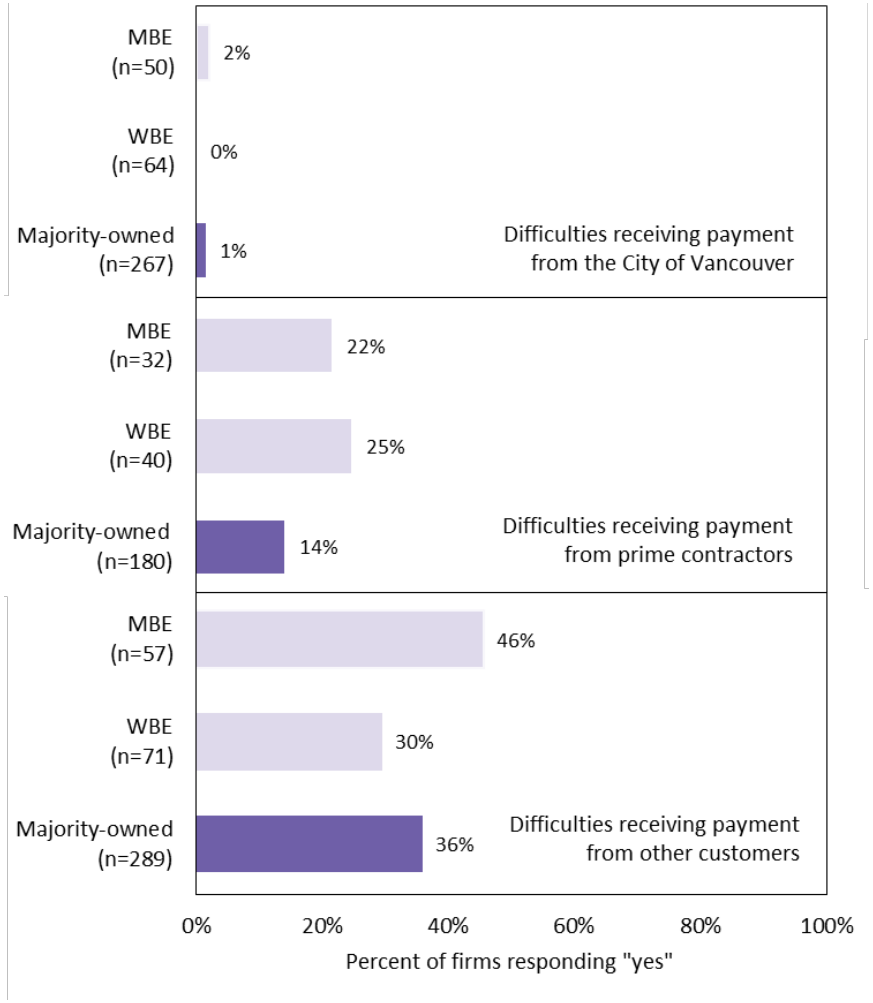
H. Business Success — Survey responses about potential barriers

Receiving Payment and Approvals

Figure H-28 examines reported difficulty receiving payments based on the 2024 availability survey results.

- Very few firms reported difficulties receiving payment from City of Vancouver. This is in part due to many firms not having experiences working with the City.
- MBEs and WBEs were more likely than majority-owned firms to report difficulties receiving payment from prime contractors.
- MBEs were more likely than other firms to report difficulties receiving payment from other customers.

H-28. Responses to availability survey questions concerning receipt of payments, Portland-Vancouver marketplace firms



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

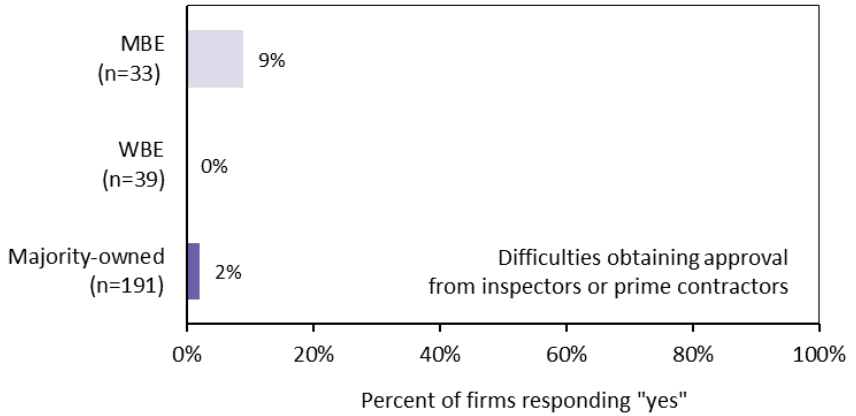
Source: Keen Independent Research from 2024 availability surveys.

Obtaining Approval of Work from Inspectors or Prime Contractors

Figure H-29 examines difficulty in obtaining approval from inspectors or prime contractors (in general in the marketplace).

Although very few firms reported having issues with obtaining approval from inspectors or prime contracts, MBEs (9%) were more likely than majority-owned businesses (2%) to report this difficulty.

H-29. Responses to availability survey questions concerning approval of work, Portland-Vancouver marketplace firms



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2024 availability surveys.

H. Business Success — Survey responses about potential barriers

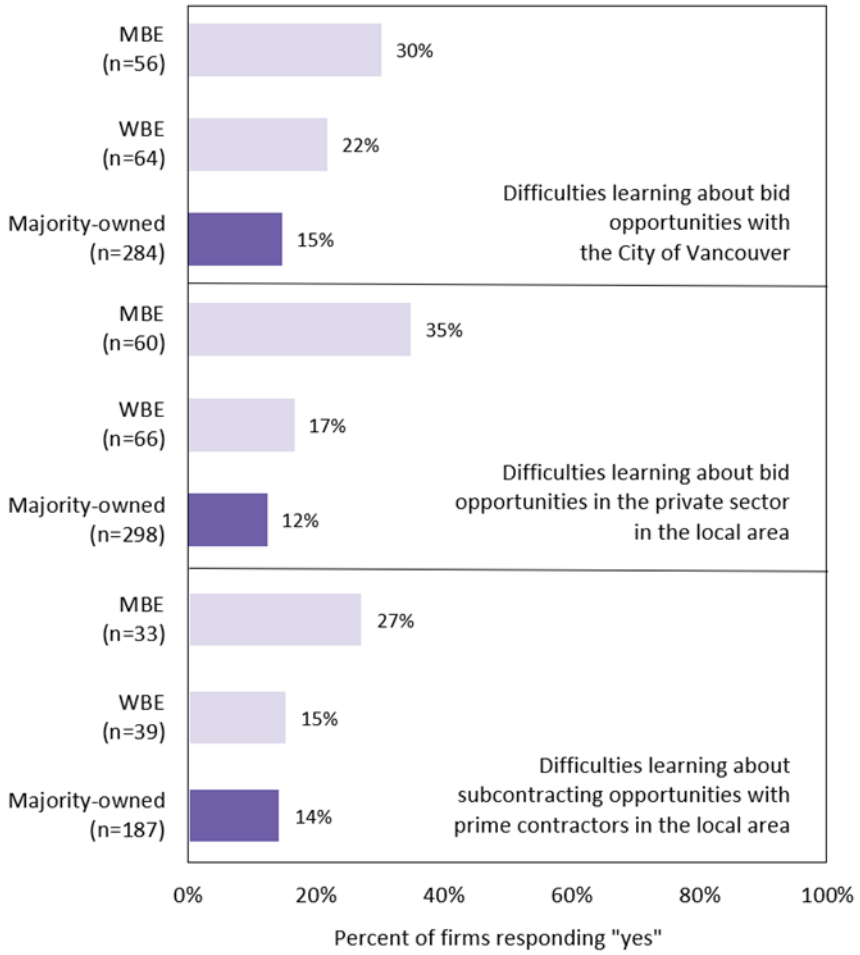
Learning about Bid Opportunities

The survey also asked firms about any difficulties learning about bid opportunities.

- A higher percentage of MBEs and WBEs than majority-owned firms reported difficulties learning about bid opportunities with the City of Vancouver and bid opportunities in the private sector in the marketplace.
- MBEs were also more likely than other firms to report difficulties learning about subcontracting opportunities with prime contractors in the local area.

These results are presented in Figure H-30.

H-30. Responses to availability survey questions concerning learning about bid opportunities, Portland-Vancouver marketplace firms



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

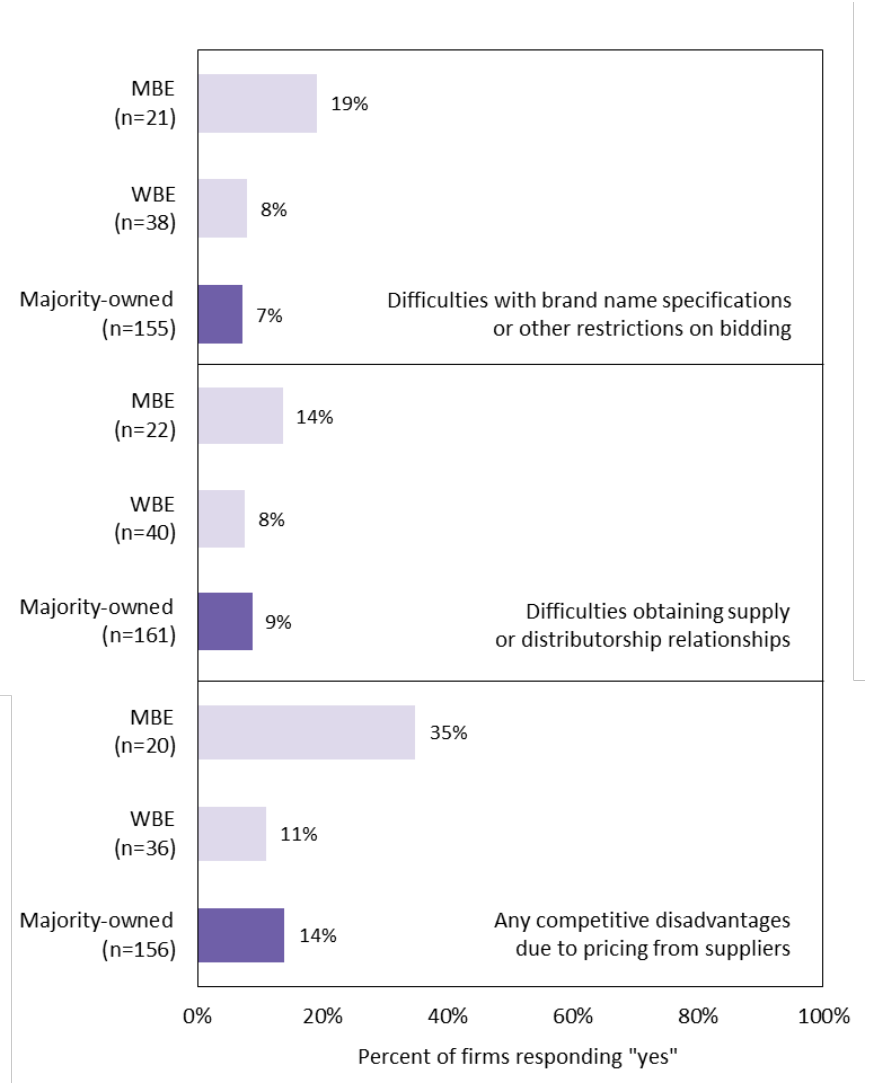
Source: Keen Independent Research from 2024 availability surveys.

Bid Restrictions

Businesses were also asked if they ever experienced difficulties with brand name specifications, obtaining supply or distributorship relationships or competitive disadvantages due to pricing from suppliers.

- Results in Figure H-31 show that relatively more MBEs reported difficulties with brand name specifications and difficulties obtaining supply or distributorship relationships compared to other companies.
- In addition, relatively more MBEs reported experiencing competitive disadvantages due to pricing from suppliers compared to other firms.

H-31. Responses to 2024 availability survey questions concerning bid restrictions, Portland-Vancouver marketplace firms



Note: "MBE" represents minority-owned firms, "WBE" represents white woman-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2024 availability surveys.

H. Business Success — Summary

Keen Independent explored many different types of business outcomes in the Portland-Vancouver marketplace for minority- and woman-owned firms compared with majority-owned companies. Many different data sources and measures indicate disparities in marketplace outcomes for minority- and woman-owned businesses and evidence of greater barriers for people of color and women to start and operate businesses in the Portland-Vancouver marketplace construction, professional services and other services industries and the Pacific Northwest goods industry. There were some data that did not show differences in outcomes for MBEs or WBEs compared to majority-owned firms.

Business Closure, Expansion and Contraction

The study team used the most recent SBA study of minority business dynamics to examine business closures, expansions and contractions for privately held businesses between 2002 and 2006. The SBA study reported results for each state, including Washington. Compared with majority-owned firms in Washington state, that study found that:

- African American- and Asian American-owned firms were less likely to expand; and
- African American-, Asian American- and Hispanic American-owned businesses were also more likely to close.

Data for the COVID-19 pandemic also indicate that MBEs and WBEs were more likely to close than other firms.

Business Revenue and Earnings

The study team used data from several different sources to analyze business receipts and earnings for businesses owned by people of color and women.

- In general, U.S. Census Bureau data from the 2017 Annual Business Survey showed lower average receipts for businesses owned by people of color and women in Washington than businesses owned by non-minorities or men.
- Data from 2018–2022 American Community Survey for the Portland-Vancouver and Pacific Northwest marketplaces indicated the following statistically significant differences in business earnings:
  - For the study industries combined, African American, Hispanic American and Native American business owners had lower business earnings than non-Hispanic white business owners and women had lower business earnings than men.
  - Average earnings for Asian American and African American construction business owners (combined) were less than earnings for non-Hispanic white business owners. On average, business earnings for people of color in the goods industry were less than earnings for non-Hispanic white business owners.
  - This was also true for female versus male business owners in the professional services industry and the goods industry. Hispanic American, other people of color and women who owned other services businesses had lower business earnings than non-Hispanic whites and men.
  - These differences persisted for women business owners in the professional services, goods and other services industries after controlling for other factors.
- Data from the availability survey showed lower revenue for MBEs and WBEs compared with majority-owned firms.

H. Business Success — Summary

Bid Capacity

From Keen Independent's availability survey, minority- and woman-owned firms had lower bid capacity than majority-owned firms in the Portland-Vancouver marketplace study industries, but those differences did not persist after accounting for the types of work they perform and length of time in business.

Marketplace Barriers

Answers to availability survey questions concerning marketplace barriers indicated that relatively more MBEs and WBEs than majority-owned firms face difficulties related to:

- Being prequalified;
- Insurance requirements; and
- Large project size.

Firms were also asked about any difficulties receiving payment and approvals.

- MBEs and WBEs were more likely than majority-owned firms to report difficulties receiving payment from prime contractors.
- MBEs were also more likely than other firms to report difficulties receiving payment from other customers and obtaining approval of work from inspectors or prime contractors.

The survey also asked firms about any difficulties learning about bid opportunities.

- A higher percentage of MBEs and WBEs than majority-owned firms reported difficulties learning about bid opportunities with the City of Vancouver and bid opportunities in the private sector in the marketplace.
- MBEs were also more likely than other firms to report difficulties learning about subcontracting opportunities with prime contractors in the local area.

There were also differences in responses from MBEs when asked about bid restrictions:

- A greater share of MBEs than other firms reported difficulties with brand name specifications and obtaining supply or distributorship relationships when compared to other firms.
- MBEs were also more likely than other firms to report competitive disadvantages due to pricing from suppliers.

For additional information about the types of difficulties companies experience in the local marketplace, see the qualitative information from in-depth interviews in Appendix J.

APPENDIX I. Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, the study team used data from a range of sources, including:

- The 2018–2022 five-year American Community Survey (ACS), conducted by the U.S. Census Bureau;
- The 2016 Annual Survey of Entrepreneurs (ASE), conducted by the U.S. Census Bureau;
- The 2017 Annual Business Survey (ABS), conducted by the U.S. Census Bureau;
- The 2022 Small Business Credit Survey (SBCS), conducted by the Federal Reserve Bank; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following pages provide further detail on each data source, including how the study team used it in its marketplace analyses. (See Appendix C for a description of the availability survey.)

I. Description of Data Sources for Marketplace Analyses — American Community Survey (ACS)

Focusing on the study industries, Keen Independent used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center's Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.[1] For the analyses contained in this report, the study team used the 2018–2022 five-year ACS sample.

2018–2022 American Community Survey

The study team examined ACS data obtained through IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long form.[2] Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. Currently, these surveys cover roughly 1 percent of the population per year. The 2018–2022 ACS five-year estimates represent average characteristics over the five-year period and correspond to roughly 5 percent of the population.

[1] Ruggles, S., Flood, S., Goeken, R., Grover, J., Meyer, E., Pacas, J., and Sobek, M., IPUMS USA: Version 9.0 [dataset]. Minneapolis, MN: IPUMS, 2020. https://doi.org/10.18128/D010.V9.0

[2] U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing, 2009. Available at https://www.census.gov/content/dam/Census/library/publications/2010/acs/acs_design_methodology.pdf

Categorizing individual race/ethnicity. To define race/ethnicity, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into six groups:

- African American;
- Asian American;
- Hispanic American;
- Native American;
- Other minority (unspecified); and
- Non-Hispanic white.

The study team created the race definitions using a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual was considered "non-Hispanic white" if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. Using the rank ordering methodology, an individual who identified multiple races or ethnicities was placed in the reported category with the highest ranking in the study team's ordering. African American is first, followed by Native American, and then Asian American. For example, if an individual identified herself as "Korean," she was placed in the Asian American category. If the individual identified herself as "Korean" in combination with "Black," the individual was considered African American in these analyses.

- The Asian American category included persons who have origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent or the Pacific Islands.
- American Indian, Alaska Native, Native Hawaiian and Latin American Indian groups were considered Native American.
- If an individual was identified with any of the above groups and an "other race" group, the individual was categorized into the known category. Individuals identified as "other race," "Hispanic and other race" or "white and other race" were categorized as "other minority."

For some analyses — those in which sample sizes were small — the study team combined minority groups.

Education variables. The study team used the variable indicating respondents' highest level of educational attainment (EDUCD) to classify individuals into four categories: less than high school, high school diploma (or equivalent), some college or associate degree, and bachelor's degree or higher.[3]

Home ownership and home value. Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of households living in dwellings owned free and clear, and dwellings owned with a mortgage or loan (OWNERSHPD codes 12 or 13) were considered homeowners. Median home values are estimated using the VALUEH variable, which reports the value of housing units in contemporary dollars. In the 2018–2022 ACS, home value is a continuous variable (rounded to the nearest $1,000) and median estimation is straightforward.

[3] In the 1940–1980 samples, respondents were classified according to the highest year of school completed (HIGRADE). In the years after 1980, that method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn it.

I. Description of Data Sources for Marketplace Analyses — American Community Survey (ACS)

Definition of workers. Analyses involving worker class, industry and occupation include workers 16 years of age or older who are employed within the industry or occupation in question. Analyses involving all workers regardless of industry, occupation or class include both employed persons and those who are unemployed but seeking work.

Business ownership. The study team used the Census-detailed "class of worker" variable (CLASSWKR) to determine self-employment. The variable classifies individuals into one of eight categories, shown in Figure I-1. The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

I-1. Class of worker variable code in the 2018–2022 ACS

Description	2018–2022 ACS CLASSWKRD codes
N/A	0
Self-employed, not incorporated	13
Self-employed, incorporated	14
Wage/salary, private	22
Wage/salary at nonprofit	23
Federal government employee	25
State government employee	27
Local government employee	28
Unpaid family worker	29

Source: Keen Independent Research from the IPUMS program: http://usa.ipums.org/usa/.

Business earnings. The study team used the Census "business earnings" variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners age 16 and over with positive earnings in the analyses.

Study industries. The marketplace analyses focus on four industries: construction, professional services, goods and other services. The study team used the IND variable to identify individuals as working in one of these industries. That variable includes several hundred industry and sub-industry categories. Figure I-2 identifies the IND codes used to define each study area.

Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2018–2022 ACS OCC codes used in the study team's analyses.

I-2. 2018–2022 Census industry codes used for construction, professional services and goods and other services

Study industry	2018–2022 ACS IND codes	Description
Construction	0770	Construction industry
Professional services	7270, 7290, 7380, 7390, 7490	Legal services; architectural, engineering and related services; computer systems design and related services; management, scientific and technical consulting services; other professional, scientific and technical services
Goods	2570, 3080, 3490, 3570, 4070, 4090, 4265, 4270, 4490, 4570, 4670, 4690, 4870, 4890, 5680	Wholesale trade; retail trade; manufacturing
Other services	1990, 7580, 7680, 7690, 7770, 7790, 8770, 8790, 8870	Printing and related support activities; employment services; investigation and security services; services to buildings and dwellings; landscaping services; waste management and remediation services; automotive repair and maintenance; electronic and precision equipment repair and maintenance; commercial and industrial machinery repair and maintenance

Source: Keen Independent Research from the IPUMS program: http://usa.ipums.org/usa/.

I-3. 2018–2022 ACS occupation codes used to examine workers in construction

2018–2022 ACS occupational title and code	Job description
First-line supervisors of construction workers 2018-22 Code: 6200	Directly supervise and coordinate activities of construction or extraction workers.
Cement masons, concrete finishers and terrazzo workers 2018-22 Code: 6250	
Construction laborers 2018-22 Code: 6260	Perform tasks involving physical labor at construction sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, and clean up rubble, debris, and other waste materials. May assist other craft workers. Construction laborers who primarily assist a particular craft worker are classified under "Helpers, Construction Trades" (47-3010).
Construction equipment operators 2018-22 Code: 6305	Operate equipment used for applying concrete, asphalt, or other materials to road beds, parking lots, or airport runways and taxiways or for tamping gravel, dirt, or other materials. Includes concrete and asphalt paving machine operators, form tampers, tamping machine operators, and stone spreader operators. Operate pile drivers mounted on skids, barges, crawler treads, or locomotive cranes to drive pilings for retaining walls, bulkheads, and foundations of structures such as buildings, bridges, and piers. Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. May repair and maintain equipment in addition to other duties.
Electricians 2018-22 Code: 6355	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems, or electrical control systems.

I-3. 2018–2022 ACS occupation codes used to examine workers in construction (continued)

2018–2022 ACS occupational title and code	Job description
Plumbers, pipefitters and steamfitters 2018-22 Code: 6442	Assemble, install, alter, and repair pipelines or pipe systems that carry water, steam, air, or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinkler fitters.
Roofers 2018-22 Code: 6515	Cover roofs of structures with shingles, slate, asphalt, aluminum, wood, or related materials. May spray roofs, sidings, and walls with material to bind, seal, insulate, or soundproof sections of structures.
Construction and building inspectors 2018-22 Code: 6660	Inspect structures using engineering skills to determine structural soundness and compliance with specifications, building codes, and other regulations. Inspections may be general in nature or may be limited to a specific area, such as electrical systems or plumbing.
Highway maintenance workers 2018-22 Code 6730	Maintain highways, municipal and rural roads, airport runways, and rights-of-way. Duties include patching broken or eroded pavement and repairing guard rails, highway markers, and snow fences. May also mow or clear brush from along road, or plow snow from roadway. Excludes "Tree Trimmers and Pruners" (37-3013).
Heating, air conditioning and refrigeration mechanics and installers 2018-22 Code: 7315	Install or repair heating, central air conditioning, HVAC, or refrigeration systems, including oil burners, hot-air furnaces, and heating stoves.

I. Description of Data Sources for Marketplace Analyses — Annual Survey of Entrepreneurs (ASE)

Keen Independent analyzed selected economic and demographic characteristics for business owners collected through the Annual Survey of Entrepreneurs (ASE). The ASE includes nonfarm businesses that file tax forms as individual proprietorships, partnerships or any type of corporation, have paid employees, and have receipts of $1,000 or more. Unlike the SBO, the ASE samples only firms with paid employees (the SBO includes both employer firms and non-employer firms). The 2016 ASE sampled approximately 290,000 businesses that operated at any time during a given year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

The ASE collects information on businesses as well as business ownership (defined as having 51 percent or more of the stock or equity in the business). Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race, ethnicity and gender categories in the ASE are the same as those used in SBO and Census data. Because ethnicity is reported separately and respondents have the option of selecting one or more racial groups when reporting business ownership, all ASE calculations use non-mutually exclusive race/ethnicity definitions.

Topics within the ASE include some business information covered in the SBO, as well as information relating to the businesses' sources of capital and financing. Keen Independent used ASE data to analyze main sources of capital used to start or acquire a firm, firms that secured business loans from a bank or financial institution, firms that avoided additional financing because they did not think the business would be approved by lender, and firms that cited access to financial capital as negatively impacting the profitability of their business. Analyses included comparisons across race/ethnicity and gender groups.

I. Description of Data Sources for Marketplace Analyses — Annual Business Survey (ABS)

Keen Independent used 2017 ABS data to examine sources of capital used to start or acquire a business. The 2017 Annual Business Survey (ABS) is a recent collaborative effort between the Census Bureau and the National Science Foundation (NSF). The ABS includes a variety of topics, as it replaces both the ASE and SBO, as well as the Business R&D and Innovation for Microbusiness (BRDI-M) and the innovation section of the Business R&D and Innovation Survey (BRDI-S) surveys. However, the marketplace analyses continue to use data from the ASE because the 2017 ABS data released for public use are limited and do not provide sufficient detail for the analyses.

The 2017 ABS data were collected in 2017 but refer to conditions in 2016. The ABS includes all nonfarm employer businesses filing the 941, 944, or 1120 tax forms. This survey is conducted on a company or firm basis rather than an establishment. The 2017 ABS sampled approximately 300,000 businesses that operated at any time during that year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

Like the ASE, the ABS collects business ownership information. Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race/ethnicity and gender categories provided in the ABS are the same as those provided in ASE, SBO and Census data.

I. Description of Data Sources for Marketplace Analyses — Home Mortgage Disclosure Act Data

The study team analyzed mortgage lending in Washington using Home Mortgage Disclosure Act (HMDA) data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Depository institutions were required to report 2022 HMDA data if they had assets of more than $50 million on the preceding December 31 ($48 million for 2021, $47 million for 2020, $46 million for 2019, or $45 million prior), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they were for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan originations in the past year or b.) exceeding $25 million, had a home or branch office in an MSA (or received applications for, purchase or originate five or more mortgages in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

The study team used those data to examine differences in racial and ethnic groups for loan denial rates and subprime lending rates from 2018 through 2022. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

APPENDIX J. Qualitative Information — Introduction

Appendix J presents qualitative information that Keen Independent collected as part of the 2024 City of Vancouver Disparity Study. Appendix J is based on input from more than 275 businesses, trade association representatives and other interested individuals.

Appendix J includes 19 parts:

- Introduction;
- Starting a business;
- Dynamic firm size, types of work and markets served;
- Current conditions in the Vancouver marketplace;
- Keys to business success;
- Working with the City;
- Whether there is a level playing field;
- Challenges not faced by other businesses;
- Access to capital;
- Bonding and insurance;
- Issues with prompt payment;
- Unfair treatment in bidding;
- Stereotyping and double standards;
- "Good ol' boy" and other closed networks;
- Contractor-subcontractor relationships;
- Business assistance programs and certifications;
- Future firm challenges;
- Other insights and recommendations for the City; and
- City of Vancouver Construction Workforce Apprenticeship Program.

APPENDIX J. Qualitative Information — Introduction

Study Methodology

From November 2023, through April 2024, the Keen Independent study team collected qualitative information from the following:

- In-depth interviews;
- Open-ended availability survey questions;
- Public meetings; and
- Other means.

Keen Independent held two virtual public meetings in November 2023 to introduce the study and study methodology to the community.

The study team gathered input from business owners and representatives as well as industry association and business assistance organization representatives. Keen Independent provided opportunities for public comments via mail and the designated telephone hotline, email address and website.[1]

For anonymity, Keen Independent analyzed and coded comments without identifying any of the participants.[2]

Business owners and representatives reported on experiences working in construction, professional services, goods and other services; experiences working with the City of Vancouver; perceptions of certification programs and other supportive services; and input on other relevant topics.

Throughout, Appendix J summarizes examples of comments gathered through these study methods.

Business owners and representatives interviewed were often quite specific in their comments. On occasion, certain statements are reported in more general form for purposes of anonymity.

Review of Other Qualitative Information Sources

Keen Independent reviewed results of interviews, focus groups and public meetings that were part of disparity studies conducted for the State of Washington,[3] Washington State Airports[4] and Port of Portland.[5] Business owners from these additional studies are coded in this appendix by an identifier representing the corresponding study in which their comments appear followed by a number designated for each interviewee (1, 2, 3 and so on).[6]

[1] The study phone hotline number was 602-704-0125; email address was vancouverwadisparity2024@keenindependent.com; and the website was https://www.keenindependent.com/vancouverwadisparity2024.

[2] In-depth interviewees are identified in Appendix J by I-1, I-2 and so on; business assistance organizations and trade associations are coded as TOs; and availability survey respondents are identified as AS-1, AS-2 and so on.; public meeting participants are coded as PM-1, PM-2. Interviewees represented construction, professional services, goods and other services industries. Business owners and representatives interviewed represented a cross-section of certified and non-certified minority- and woman-owned firms and firms owned by white males.

[3] Colette Holt & Associates. (2019). State of Washington Disparity Study 2019.

[4] Colette Holt & Associates. (2019). Washington State Airports Disparity Study 2019.

[5] Colette Holt & Associates. (2018). Port of Portland Small Business Program Disparity Study 2018.

[6] In-depth interviewees from the State of Washington Disparity Study are coded as WS-1 and so on; interviewees from the Washington State Airports Disparity study are identified by WA-1, WA-2 and so on; and Port of Portland study participants are identified as PP-1, PP-2 and so on.

J. Qualitative Information — Starting a business

Working in the Industry Before Starting a Business

The Keen Independent study team asked interviewees about starting their businesses, beginning with their previous experience.

Most business owners, or their families worked in the industry, or a related industry, before starting their firms. [e.g., AS-158, I-1-5, 8 -13, 14, 16, 19, 21, 22b, 27, 29, TO-7]

Examples of comments are provided below and on the right side of this page.

You'll hear from an employee that's been at a company for 20 years and then [their relative] learned about the industry from familial ties … we see quite a bit of that which presents some challenge in terms of trying to bring new workforce into legacy industry and then to try to capture interest in [a] … more frontier industry.

TO-1. Asian American female representative of a trade association

We have a lot of family businesses in our membership that are local, where they grew up in the industry and then there was succession planning with their families to keep the business growing and move on to the next generation. [There is] a lot of that … specifically in, Southwest Washington.

TO-4. White female representative of a trade association

I was a project manager for another company …. A lot of the customers liked what I had to offer and so we started our own business.

I-25. White male representative of a woman-owned construction-related firm

We have some family businesses and we're seeing more younger people who are taking over the family business for their parents or relatives who might be ready to retire after running it for a while. We've seen a lot of businesses … from younger people maybe, stepping off the corporate ladder and wanting to found something themselves that's relevant to their expertise.

TO-6. Male representative of a business assistance organization

I had extensive experience in the engineering and design side of things, especially on the construction side …. I was one of the last people let go [by my former employer] and there were no jobs available because they … [had] all been filled by everybody else. I started my business … and it has gone from there.

I-24. Native American male owner of a professional services firm

I worked for [another firm] that's where I got introduced to [my line of work] and I fell in love. I moved [out of state], I got a job with [another firm]. [That state] was too busy, so I decided to move back to Washington …. [The previous firm] got bought by a big company and the direction that [they were] going I did not agree on, so I left … and borrowed a laptop, [invested] my last paycheck and I got my business license.

I-26. Hispanic American female owner of an other services firm

Negative Treatment Working in Field Prior to Starting a Business

Some business owners said that they had negative experiences in their careers due to issues related to race, ethnicity or gender or had observed such disadvantages.

Examples of the range of comments received are provided on the right side of this page.

Businesses, especially diverse businesses, always want to know what these entities are doing to improve the situation because they're used to decades of being turned away. Some of them might even remember a time where they could have been … told, 'I'm not working with you because you're a woman,' and obviously now, you can't do that anymore, but those memories persist for a lot of these people.

TO-6. Male representative of a business assistance organization

Legacy relationship is really [a] determining success factor in Clark County and in the City …. When I hire a new employee, one of the first things that people ask is, 'Oh, are they from Vancouver, are they from Clark County?' Not like, what amazing skills does this person have to contribute and help grow our community?

TO-1. Asian American female representative of a trade association

When I went off to college … in [the mid-90s] it was always white, it was always male. Now in [specified professional services], I see more females. I know sometimes some of the firms that want to recruit women of color don't know how to approach a historically Black college … and then there's some that [will] never do it.

I-17. African American female owner of a professional services firm

J. Qualitative Information — Dynamic firm size, types of work and markets served

Business Size, Expansion and Contraction

Some business owners reported that they carefully control the size of their firms. [e.g., I-2, 5, 8, 11, 30, TO-7]

Some interviewed described varied business sizes, for example:

The majority of our contractors are on the small scale …. As more projects are coming to Vancouver, we're seeing more of the national general contractors that are joining are some of the big players.

TO-4. White female representative of a trade association

Many interviewees described how their firm size is based on workload or fluctuates seasonally.

We're in our 'jump off the cliff' season where it's really quiet right now, December, January [and] February. And getting into the end of March is when we start seeing some movement.

I-1. African American male owner of a construction-related firm

We see a lot of seasonal businesses in construction …. Some businesses are honestly fine to be at the level of revenue they're at and they're not really looking to grow. But we have seen growth in certain businesses …. All it takes sometimes is one big contract and that kind of transforms the entire future of one business.

TO-6. Male representative of a business assistance organization

Other interviewees explained that some businesses are looking to grow over time.

[The owner] is looking to expand and grow the company …. One of our long-term goals … is [the owner] would like to begin [to] hire a small salesforce …. He's trying to take more of a back seat … [in the] company.

I-15. White male representative of a goods firm

We've been able to break into new areas by engaging with engineering firms and that's resulted in several small jobs. We're starting to get market penetration in our local market, but [now] it's largely word of mouth.

I-22b. White male representative of a construction-related firm

J. Qualitative Information — Dynamic firm size, types of work and markets served

Sizes of Contracts

Some interviewees said that their firms bid on a range of small and large contracts. [e.g., AS-209, I-11,13,23, TO-7]

Some business owners pointed out where they were constrained by the size of contracts they bid. [e.g., AS-77, I-2, TO-7]

Examples are provided below and to the right.

Our project size ranges from … tens of thousands of dollars up to $6 to $7 million dollars, so we have a broad spectrum of project size. We did more small projects in the beginning but as we developed legacy customers, we found ourselves doing large projects for them and then a lot of follow-on smaller work.

I-5. White male owner of a construction-related firm

Since I've been here for [several] years, I've gotten multiple contracts through a lot of cities …. They range anywhere from very small … all the way up to larger cities …. We can handle any size.

I-15. White male representative of a goods firm

[Because I am a new business owner], I'm just taking any and everything. I'm not really rejecting it; it could be a small project. I've worked with another firm [out of state] where it's been as small as [a few thousand dollars]. I have one here that would be maybe five figures.

I-17. African American female owner of a professional services firm

We don't work well on super small projects; we're just not set up for success in that. There are minimums that we request ….

I-14. White female owner of a professional services firm

It really all comes down to capacity. Do [the businesses] have the dollars and do they have the team to support the job?

TO-4. White female representative of a trade association

A [challenge] is barriers to entry in terms of the size of contracts. We see it with construction firms, especially where they might want to bid on a piece of work that's just far too large in scale for them.

TO-6. Male representative of a business assistance organization

We've done all the way up to … $300,000 all the way down to $3,000 in the contracts for government works.

I-25. White male representative of a woman-owned construction-related firm

J. Qualitative Information — Dynamic firm size, types of work and markets served

Changes in Types of Work

The study team asked interviewees to report on the type of work their firm conducts and any changes in work performed over time.

Some of the interviewees indicated changes in types of work over time, largely based on market opportunities. This includes businesses that sought to diversify to provide more financial stability for their company. [e.g., I-15, 28, TO-4]

We just had a major setback which caused us to venture out into other areas … to keep our doors open. We were creative in our approach and the product lines we offered turned out to be successful and carried us through those years and now we are functioning [at] 100 percent in all of our capacities.

I-7. African American male owner of a professional services firm

…. The larger natural disasters are what really brought in the opportunity for the small businesses to work together … we can form a team to work together to be able to tackle those big projects.

I-18. White male owner of an ESB-certified professional services firm

[My competitor's] advantage may be that they may provide a wider breadth of services than what I currently offer. That's probably the main thing.

I-31. Hispanic American male owner of a professional services firm

Work in Public or Private Sectors, or Both

Business owners and representatives discussed whether their firms conduct work in the public, private or both sectors.

Mostly private sector. A few of the businesses indicated that they mostly do private sector work. [e.g., I- 12, 14, 21, 23, 24, 30, TO-6]

Business owners sometimes cite paperwork and other difficulties competing for public sector contracts, including their perceived need to be a union contractor. The top right of this page provides examples of interviewee comments.

Mostly public sector. Some companies primarily compete for public sector work. [e.g., I-7, 9, 10] Examples of comments are to the right in the middle of the page.

Both private and public sector work. Some firm owners or managers said that they do both public and private sector work. [e.g., AS-245, I-6, 8, 12, 14, 15 20, 22a, 22b, 28 TO-4, 7]

Please see quotes on the bottom right of this page.

[The firms we represent focus on] private [sector work] …. A lot of the main organizations or the main clients that we have that would work in the public sector are contractors on transportation-type projects or working as subcontractors for departments of transportation.

TO-5. White male representative of a business assistance organization

I pretty much only work with private individuals, and I have wanted to get involved with the City of Vancouver.

I-4. White male owner of a construction-related firm

Mostly private …. I've been doing private because there's been more money there.

I-11. White male owner of a construction-related firm

The majority [of our work] is public contracts, prevailing wages, schools and some military buildings.

I-27. White female owner of a construction-related firm

Most of our business has been generated through owner direct negotiating contracts. We've been fortunate that we've been able to build our business off a mix of both private and public sector contracts.

I-5. White male owner of a construction-related firm

I work with school districts, I work with municipalities, I work with non-profits, I also work for-profit companies like landscaping companies and construction companies … and really anybody.

I-31. Hispanic American male owner of a professional services firm

It's a little bit of everything. We don't back out of any project….

I-26. Hispanic American female owner of an other services firm

J. Qualitative Information — Dynamic firm size, types of work and markets served

Work as a Prime Contractor, Subcontractor or Both

The study team asked business owners and representatives whether they worked as a prime or subcontractor/subconsultant. Comments varied.

Some firms only serve as prime contractors or as subcontractors, but many might be a prime contractor on one project and a subcontractor on another.

Mostly prime contractor. A few of the businesses indicated that they mostly work as prime contractors. [e.g., I-1, 6, 9, 12, 29, 31]
For example:

Historically, we're trying to do more prime work.

I-24. Native American male owner of a professional services firm

Mostly subcontractor. Sometimes this is because of the nature of the work. Some types of work on projects are typically performed as a subcontractor. Examples of comments are provided on the top right side of the page.

Both prime contractor and subcontractor. Some firm owners or managers said that work as both the prime and as a sub. [e.g., I-4, 8, 18, 20, 28]

Comments are provided at the bottom right side of this page.

We've looked at some of the bid postings that have come out and they have been a little too large for us to engage with. The body of work is just too big. That's where engaging with prime contractors has been a challenge as far as finding out the right point of contact.

I-22b. White male representative of a construction-related firm

[We work] only as a subconsultant. We've not been successful in any direct proposals.

I-10. Native American female owner of a professional services firm

Within construction … almost all [the firms in our membership] work as subs. The projects tend to be too big for them to get opportunities as prime contractors. With professional services prime contracting is probably more common among our constituents.

TO-6. Male representative of a business assistance organization

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[We're] usually a sub. I would say maybe 15 percent of the time we're prime.

I-23. White female representative of a professional services firm

[Our membership is] a mix of [both]. We see … [bigger firms] … joining our membership because … they [may have a job that is forecasted for] 5 to 10 years … in this area … so they join our membership to network and meet a lot of the [local] subcontractors.

TO-4. White female representative of a trade association

I would have to say both, but primarily as the prime.

I-7. African American male owner of a professional services

J. Qualitative Information — Dynamic firm size, types of work and markets served

Geographic Markets Served

Business owners and representatives reported where they conducted business and if over time, they had expanded the geographic locations where they perform work.

Examples of comments are to the right.

If I can find closer work, travel is a significant expense, there are opportunities, but the more we travel the more expensive it is.

AS-218. White male owner of a construction-related firm

We run the gambit across all sectors. We have offices running down the West Coast and each one has its own bread and butter.

I-23. White female representative of a professional services firm

J. Qualitative Information — Current conditions in the Vancouver marketplace

Impact of COVID-19

Interviewees reported on the economic conditions in the local marketplace. COVID-19 has had a significant impact on conditions in Washington State, as well as throughout the nation.

Many business owners and trade association representatives reported unfavorable economic conditions that have persisted due to the COVID-19 pandemic. [e.g., AS-11, I-6, 8, 12, 15, 20, 25, 26, 31]

For example, some interviewees commented on the increasing price of materials during and after the pandemic.

Towards the end of COVID when material prices started going up and continued to go up and are still going up, our contracts don't have any cost escalation usually, subcontractors do not have that ability to have that in their contract and so we did lose money on a few jobs recently.

I-27. White female owner of a construction-related firm

[The COVID-19 pandemic] was a tough time …. Materials were very difficult … it was materials that made the work slowdown.

I-4. White male owner of a construction-related firm

[The COVID-19 pandemic was] very challenging. The cost of construction increased substantially and never came back down, especially on the state side. The DOT used up all their funding because these projects that were going on during that time were escalating rapidly in price and so they cost the state more which meant other projects that were supposed to be funded with that money didn't get funded.

TO-4. White female representative of a trade association

Many interviewees commented on the negative impact of working from home and limited in-person networking due to the pandemic, as well as other challenges.

The phenomenon of working from home disproportionately impacts the manufacturing industry workers who don't have the availability to work from home … in a time when childcare, and childcare facilities, were [closed] and are a big challenge to [the] community.

TO-1. Asian American female representative of a trade association

We started our business shortly before … COVID which basically put a big damper in our business plan …. [Our industry] depends a lot on personal interactions. You can't get a lot of personal interaction when you're doing Zooms and things of that sort because there really is no opportunity to feel out individual clients.

I-7. African American male owner of a professional services firm

During COVID I think things shifted a little bit because there wasn't as much in-person networking. But as soon as we returned to doing things in person, there was a huge shift in people showing up trying to do their old-school networking. That's one of the biggest things we try to emphasize to our firms is that at the end of the day, you have to be out there selling yourself, making these connections.

TO-6. Male representative of a business assistance organization

We grow or we adjust to what our customers want …. When COVID hit, the demand was [specific product] so when I had started offering [those product] services, met with the [clients] and figured out what is it was that they wanted and those are the services that we offered.

I-26. Hispanic American female owner of an other services firm

I did not have experience [in this industry], I come from a family-owned background of [another industry] and the pandemic really put a lot of that business in jeopardy, and this was an opportunity to have security …. My wife was in the industry for years and so I utilized a lot of her knowledge.

I-18. White male owner of an ESB-certified professional services firm

The bigger players in town [in my industry] … have a lot more buying power … especially during COVID, they were able to buy out the stock when it was hard to get things and made it impossible for the smaller contractors to get supplies [and] parts.

I-4. White male owner of a construction-related firm

One interviewee commented on government assistance during the COVID-19 pandemic.

We got hit hard. We were dead. We [had]to take out some of those PPP loans to keep employees.

I-1. African American male owner of a construction-related firm

Other comments related to the COVID-19 pandemic are shown below.

Firms like ours were impacted [during COVID] and part of the reason … is because we're small and it's hard to weather storms.

I-28. White male owner of a professional services firm

It depended on [the] industry. We had some massive contractions in some industries, at least here in Seattle. Construction slowed down initially and then when things started to reopen there was a huge construction boom …. We had some bankruptcies; we had some companies needing to sell off a lot of equipment that they had bought.

TO-6. Male representative of a business assistance organization

Positive Outcomes Related to the Pandemic

Conversely, some reported doing well despite (or perhaps due to) the effects of the COVID-19 pandemic on the marketplace.

We really did well over the pandemic …. Our guys just stayed home and worked their tails off. I just had to manage them.

I-24. Native American male owner of a professional services firm

There was actually a pretty big impact [from COVID] on my business where the RFP process got lifted for a lot of organizations … during the pandemic, I was able to get jobs, fulfill them on a high level and have my portfolio built and then, when 2022 came, those emergency management protocols were then removed, and we stopped getting that work. We left the pandemic with a … more elevated portfolio, but we lost a significant portion of revenue.

I-14. White female owner of a professional services firm

After the initial slowdown from COVID, we came out of it better than we started, so it turned out to not be a big problem for us …. The pandemic actually spurred a lot of growth on the residential side.

I-16. White male owner of a professional services firm

Even during COVID in all the uncertainty, we had one of our best years. I think that again comes back to those relationships and building the trust.

I-23. White female representative of a construction-related firm

Barriers for Minorities and Women in the Vancouver Marketplace

Many interviewees indicated that there is discrimination and other barriers for women and people of color in the Vancouver marketplace. For example:

Women are a minority in the construction industry and people think that they can't do it …. On some of the bigger projects that we've subcontracted … it'll be something someone says or a lack of respect.

I-4. White male owner of a construction-related firm

I was looking at buying a truck … and I had posted on Facebook Marketplace, and I had to take down my ad because of so many negative comments about, 'Nobody was [going to] hire, nobody was [going to] use some random [person].' … I'm always the last one that people want to look at.

I-6. White female owner of a goods firm

I was the only Black female [in my college program] and my classmates did not like me there, they did not want me. I started [in my role] at a couple places [but] being the only Black female was not wanted there, so again that's just my norm.

PM-4. City of Vancouver public meeting participant

When you are at a job site, you're not [going to] find a female anywhere so that makes it less appealing as a woman to be on a job site. I would just have that representation, whether you're [a] minority or [a] woman, that is definitely a factor.

TO-4. White female representative of a trade association

Just from my personal life of knowing people who work in the construction trades, certainly construction sites can … present more of a challenge for women but also people who identify as LGBTQ.

TO-5. White male representative of a business assistance organization

The type of person who runs a minority-own[ed] business, they tend to want to focus more on their capabilities, and I think when they do experience discrimination, they kind of just brush it off … but if there's ways for anonymous reporting and if there's confidence that that reporting will actually be followed up on, then there probably [would] be a higher rate of people sharing their stories.

TO-6. Male representative of a business assistance organization

J. Qualitative Information — Current conditions in the Vancouver marketplace

Access to Materials and Equipment

Inflation and increasing prices of materials and equipment were frequently mentioned as challenges in the local marketplace.

2025 looks scary right now. The economy is very weird, [and] all the traditional markers don't seem to relate anymore, or at least right now the interest rates are real. Inflation is also real. We're seeing anywhere from 5 to 10 or 15 percent increases over last year in material costs, so those things concern me.

I-5. White male owner of a construction-related firm

The more stringent the rules around environmental issues become, the more challenging it will be to meet those rules …. [The industry we represent] has equipment that is more green [environmentally friendly] and does what it needs to. The challenge there is the industry is not talking to the environmentalists to come to the table to impact legislation in an appropriate way.

TO-4. White female representative of a trade association

Over this past year inflation has been a big concern in addition to rising interest rates, the finding of affordable spaces … for a commercial space and then just prices on finding raw materials, inventory …. Smaller businesses find it a little bit harder to adjust their prices or be as sensitive to increases in prices from their suppliers because they are much more reticent about raising prices than larger organizations would be.

TO-5. White male representative of a business assistance organization

J. Qualitative Information — Keys to business success

The study team asked interviewees to describe the factors that impact business success.

Having to Learn the "Business" Side of Running a Business

Many people who start businesses are experts in their technical fields but need to learn the administrative aspects of operating a business.

Some interviewees indicated that new business owners "don't know what you don't know" and may not know where to go for help.

Examples of comments are shown on the right side of the page.

There needs to be more information about contracting with others and how to start that process.

AS-89. White male representative of a professional services firm

Making sure that I understand and follow all the tax laws, it's been a journey through just leadership and management and making sure that I can keep … up to date and at pace with changing technology and just continuing to offer an excellent service in an ever-changing marketing field [have been challenges].

I-14. White female owner of a professional services firm

When [firms] get started, we hear a lot of people come in and they're completely lost. They say, 'I know construction; I know how to build things with my hands, but I have no idea how to file my taxes.'

TO-4. White female representative of a trade association

No one told us the amount of paperwork that was going to involve starting a business and the number of different departments that you have to communicate with …. They don't give you a list saying, 'Okay, now that you're a business owner, you need to apply for a city license ….' I had to find out by accident or by talking to other[s].

I-26. Hispanic American female owner of an other services firm

J. Qualitative Information — Keys to business success

Expert Assistance

Interviewees were asked if they utilized any expert assistance when starting their firm, such as accountants or attorneys, as well as if they encountered any barriers to obtaining outside assistance. [e.g., I-3, 11, 13]

A number of interviewees indicated that they seek or are seeking outside expert assistance. [e.g., I-2, 4, 5, 8, 12-14, 17, 25, 26, 28, 30]

We will have some minority-owned law firms or accounting firms that we work with that then try to sell their services to other minority-owned businesses …. Something that we try to emphasize is … look within your small business network, look within your minority business network to find people who are capable of doing that because then it helps drive business between the two of them.

TO-6. Male representative of a business assistance organization

Specific examples of related challenges follow below and to the right.

Some of the smaller companies and some of the Latino- and Hispanic-owned companies have shared that trying to find an accountant or a bookkeeper to communicate with in Spanish [can be a challenge].

TO-1. Asian American female representative of a trade association

The biggest barrier [to expert assistance] is just continuing to spend the dollars and the investment in it, and then also just managing and making sure that you're getting what you've hired for.

I-14. White female owner of a professional services firm

A challenge [is] finding a CPA that's a really good fit for us. Our current CPA does good work, but I don't think they're strong in our specific area of work …. The law firm that we're using has a spotty service as well.

I-16. White male owner of a professional services firm

It's like a bookkeeper [and] accountant desert right now for smaller companies. That has been a challenge.

I-21. Hispanic American female owner of a professional service firm

If you want an accountant that specializes in construction, they cost more than a regular accountant and so that's a challenge for sure.

TO-4. White female representative of a trade association

[I] haven't had the need to go with legal. But I would imagine my biggest concern would be the financial impact [of] that.

I-24. Native American male owner of a professional services firm

[Finding expert assistance] has been one of the biggest challenges that we have faced …. We are here in the U.S. with an E-2 visa [Treaty Investor visa], 'investor visa' … most accountants and attorneys are not familiar with the implications of that.

I-30. Hispanic male owner of a professional services firm

Marketing a New Business and Learning About Opportunities

Some interviewees discussed the difficulty new business owners have in marketing their companies and finding opportunities for work. [e.g., AS-36, 165, I-3-4, 7, 9, 12, 14, 16, 18]

Examples are comments are shown below and to the right. (More on relationship- and network-building and can be found later in this appendix.)

One thing that makes the difference is longevity [and] brand name recognition. For us, being a newer [small] business, we don't have decades of people seeing our logo and we don't have decades of customer references. I'll call it a disadvantage as much as it is just a business reality.

I-5. White male owner of a construction-related firm

I don't have a website because I can't afford to build one and I can't afford to hire someone to build one. But I can meet and beat just about any price that a different vendor could give you.

I-6. White female owner of a goods firm

Just keeping and retaining customers is the biggest challenge and, I think that it really boils down to just delivering a fair price in the market as well as great customer service …. It's just a matter of having our customers believe in the service and that it's something that they need and want to continue to do.

I-8. White male owner of a construction-related firm

An effective website or capability statements are always big. We see sometimes that someone might be great at what they do, but if they have no capability to show those who are buying that that their product is desirable overall, they might not get any traction …. When it's a one-person operation or a small team, they might not have anyone dedicated to aspects that they might think are unimportant.

TO-6. Male representative of a business assistance organization

Trying to get my name out there and as a resource for [potential clients] was hard. And I had no idea [how to market my firm] I knew how to run a business because my parents have been in business for a long time. But I didn't know how to run my business and I didn't know how to market it.

I-24. Native American male owner of a professional services firm

Just finding out where those opportunities are, where they post it [has been a challenge]. Sometimes it's almost a full-time job just combing through all the different publications …. It's been a couple of good solid hours a day looking for gigs and then seeing if they're worth pursuing at that point.

I-13. White male owner of a construction-related firm

You talk to a hundred companies and maybe you get one or two that say yes. It's just playing the numbers and continuing to go out [and] follow-up and building relationships with people.

I-31. Hispanic American male owner of a professional services firm

The networking is paying off with some of those firms that are in [the Puget Sound area] …. All last year all I was doing was networking going to the big events … and it's starting to pay off. Now I'm trying to be mindful about not to overload myself, the work is coming in.

I-17. African American female owner of a professional services firm

J. Qualitative Information — Keys to business success

Competition with Larger or Established Businesses

Some interviewees reported that competition with large companies or more established businesses is a challenge for new businesses. [e.g., AS- 25, 31, 34, 58, 77, 194, 196, 203, I-1, 3, 5, 9, 12, 15, 16]

Examples of comments are shown below and on the right side of the page.

[Project owners] don't even view our package, our response to our RFP, maybe and don't take it seriously because larger companies who come out there with the name and with all these 35 pages of gloss …. Some people just get enamored with all this fluff as I look at it as opposed to looking at the true credentials of the individuals who are actually performing the work.

I-7. African American male owner of a professional services firm

Because I'm such a small [firm], I am often overlooked. I just need an equal opportunity to give my 'here's what I can give you' [pitch].

I-6. White female owner of a goods firm

Because it's a large firm and they have more manpower to turn a project around … versus someone like me it's going to take me a little bit longer for a large project.

I-26. Hispanic American female owner of an other services firm

[The City] really needs to focus on developing small businesses. Small businesses can pivot to meet a customer's needs much easier … like with all these diverse projects that they have coming up they're going to get a much better product, much more interested, much more proactive and energized group of people from a small company than [from one] one big company.

I-24. Native American male owner of a professional services firm

There are a lot of [firms in my industry] that are large corporate entities that span multiple states and offices and lots of employees, so they will generally get larger state contracts … and that's where we're looking to be highly competitive against them with having more skilled-certified people able to do hands-on work. That, with low overhead, we can be competitive with pricing.

I-18. White male owner of an ESB-certified professional services firm

There's a huge barrier to entry being an independent [business] getting into the larger [public entities arena].

I-21. Hispanic American female owner of a professional services firm

Marginalized owners, whether it's women-, veteran disabled-, [or] minority-owned businesses, might feel like there's not ample opportunities for them to compete because there's an inertia around picking the same suppliers every time that may have been supplying for a decade or longer.

TO-6. Male representative of a business assistance organization

J. Qualitative Information — Keys to business success

Capital and Cashflow Necessary to Start a Business

Having the capital to start a business is a key to success and obtaining start-up capital can be a major barrier for some businesses, as summarized on this page. (More information about access to capital is provided later in this report.)

Sources of capital. Some interviewees described different sources of capital used to start businesses. For example, use of personal assets and personally backed loans is common. [e.g., I-1-6, 8, 10, 11, 13-16, 19-21, 22a, 22b, 29-31, PM-5, 6]

We bootstrapped it. My parents helped me out a little bit [with capital].

I-24. Native American male owner of a professional services firm

[My capital] was all personal. There was also a nice thing about this industry; it was not a lot of startup cost that was needed and generates pretty low overhead.

I-18. White male owner of an ESB-certified professional services firm

Just our own income savings [were used to start the business]. We didn't have a lot of capital back then when you could start pretty easily without capital.

I-27. White female owner of a construction-related firm

[Our start-up capital was] my severance package that I negotiated with the company that I was leaving.

I-25. White male representative of a woman-owned construction-related firm

Difficulty obtaining start-up capital and generating cash flow. Business owners also commented on the difficulty obtaining start-up capital and then generating immediate cash flow to be able to launch new companies. Examples of comments are provided below.

If you aren't able to find financing through a bank or credit union, then your [options] are basically either don't do it because you can't find the funding for it or you try to find some alternative source of financing or you just do the sort of extreme bootstrapping route and try to self-finance, which obviously can limit the … growth potential.

TO-5. White male representative of a business assistance organization

Access to capital at this point in the economy will only be an increasing challenge as the capital markets contract [and as] the savings rates contract …. Access to capital for companies and business owners who represent a higher risk portfolio to lenders often exacerbates disparity that is already evident in the community.

TO-1. Asian American female representative of a trade association

[It is] very expensive to operate a business [at] any scale and then when you're talking about smaller businesses, emerging businesses, minority- or women-owned, it is a real issue, the access to capital … you need resources if you're [going to] take on risk.

I-5. White male owner of a construction-related firm

J. Qualitative Information — Keys to business success

Importance of Relationships to Business Success

Many interviewees described the importance of relationships with customers and others as a key factor for success. [e.g., I-1, 4, 16, 17, 21, 31]

We've built up our relationships in Vancouver and prove ourselves in the work we do. I think a lot of companies end up coming back to us and we get a lot of repeat clients.

I-23. White female representative of a construction-related firm

We're high-quality performers, we've got great relationships with our customers. Realistically, all of our customers are either legacy-based or recommendation based.

I-24. Native American male owner of a professional services firm

[What gives one firm an advantage over another] really comes down to technical expertise and client relationships and that all rolls together under experience.

I-28. White male owner of a professional services firm

The key factors [to our firm's success] is our work product we offer results, … along with the relationships and the investment in our community that we've made.

I-14. White female owner of a professional services firm

Relationships with old contacts we had already made [has been beneficial] but getting new ones has been a problem. Most of our work has been through previous contacts that we already had.

I-22a. White female owner of a construction-related firm

Some also cited their reputation as a key ingredient. [e.g., AS-201, I-3, 6, 7, 11, 13, 16, 28, TO-5] Many commented on the importance of networking for business success.

Examples of comments are shown below.

I host events in our area and … I've seen minority contractors, women-owned [firms] … join [our organization], and they start to network. They come to events and they're a constant presence and once you become a constant presence … you establish a reputation, and you meet people and you are helped.

TO-2. White male representative of a trade association

Companies who network … are able to identify supply chain leads, assess capital, build relationships with vendors like accounting firms or legal counsel who can help guide them in ways and so the relationship building cannot be underestimated as a success factor here.

TO-1. Asian American female representative of a trade association

When you're getting into a new industry that you don't have experience in, [it] can be overwhelming at times, but I reached out and was able to work with people that have been in the field for 30-plus years [to] get their advice, some training.

I-18. White male owner of an ESB-certified professional services firm

It's a big network of people but a small circle of people at the same time and if you are known as a subcontractor that doesn't do good work, people are not going to want to use you.

TO-4. White female representative of a trade association

J. Qualitative Information — Keys to business success

Importance of Employees to Business Success

Some interviewees said that building and retaining a skilled team of employees was a key factor for success. [e.g., AS-77, 193, I-20, 29]

I would like to find help finding people who want to work and not just people from the unemployment office.

AS-149. White female owner of a construction-related firm

Some interviewees indicated that employers are facing staffing issues and are unable to expand their workforce [e.g., AS-30, 45,154, I-2, 14-16, 20, TO-7].

The tough part right now is qualified employees.

I-11. White male owner of a construction-related firm

I want to expand my business, but there's always that fear …. It's hard to retain good working employees right now and my business is a very small business because I'm [new] …. I have a lot at risk….

I-6. White female owner of a goods firm

Right now, access to talent is one of the number one challenges in trying to recruit and retain employees with a multitude of skills ….

TO-1. Asian American female representative of a trade association

We have definitely seen with the aging population that … not having these career-focused programs [that] basically get everyone familiar with [a skill] … went away. There's a culture … that construction is for those that aren't good enough for college, which any of us in the industry know [is not true] …. That would probably be the biggest struggle for the industry.

TO-4. White female representative of a trade association

J. Qualitative Information — Working with the City

Business owners and representatives discussed their experience working with or attempting to get work with the City of Vancouver.

Positive experiences. Many business owners and representatives indicated having positive experiences while working with the City. [e.g., AS-14, 56, 91, 138, 211, 219, 228, I-20, PM-1]

We appreciate [the City's] work. We did work for the City and have the opportunity to bid on it. We value it.

AS-136. White female representative of a construction-related firm

[Working with the City] was pretty easy actually. There was a need, and I was contacted by City staff to see if I'd be interested.

I-12. White male owner of a professional services firm

We haven't had any experience that we would say was negative working with the City.

I-20. White male representative of a construction-related firm

I've heard from our team that they really enjoyed working with the City of Vancouver. I haven't heard any problems. Most of the projects that I've seen come to fruition have been very successful.

I-23. White female representative of a professional services firm

Generally speaking, our membership praises City of Vancouver regularly. They actually talk about City of Vancouver and how they're doing it compared to the County or compared to … another city locally. I would say overall they're kind [of] leading in that sense and doing a really great job at it.

TO-4. White female representative of a trade association

Negative experiences. Some interviewees reported negative experiences. [e.g., AS-136, 204, I-4, 23, 24, 26] For example:

Vancouver doesn't exactly have a stellar reputation when it comes to caring about diverse causes, so to speak.

TO-6. Male representative of a business assistance organization

[The City] forgets about smaller companies and goes for larger ones when the smaller ones can do the work.

AS-203. White female owner of a professional services firm

[The City] needs to make it [procurement opportunities] open to everybody.

AS-83. White male owner of an other services firm

A lot of the times when we deal with cities or governments, the person in charge may not know how many contractors it takes to build something. You can't just go to one little guy and ask him to build something.

AS-153. White male owner of a goods firm

J. Qualitative Information — Working with the City

Pursuit of City Bid Opportunities

Business owners and representatives reported on their pursuit of work with the City.

Many interviewees indicated that they would like to work with the City. [e.g., AS-2, 3, 5, 28, 29, 36, 40, 41, 69, 70, 71, 72, 75, 81, 82, 88, 120, 137, 139, 142, 147, 184, 212, 226, I-1, 3, 4, 16, 20, 21, 30]

We haven't seen a lot of RFPs [for the City of Vancouver] recently. I think we would pursue most of them if we did. We have really good connections in Vancouver. I don't see anything stopping us from pursuing projects.

I-23. White female representative of a professional services firm

Some of the people commenting on the City said that the procurement process is relatively transparent or consistent with other public sector entities in the region. [e.g., I-5, 23, 27]

We have folks that track opportunities with different clients particularly in the region and the City of Vancouver is not different than anyone else.

I-28. White male owner of a professional services firm

[The City is] trying to address the challenges with making it fair by having several different ways to release contracts. They have a small work[s] roster … then they have just competitive bid so I think they think they did a really good job of putting together a few different ways so that they can maintain quality [and] at the same time they can maintain the fairness of doling out the work.

I-25. White male representative of a woman-owned construction-related firm

[The bidding process] was pretty straightforward, got an email from the RFP announcement … put the presentation together based on the outline of the RFP, sent it over to the contacts at the City of Vancouver and then got a response saying that we weren't being brought forward to the next evaluation phase.

I-14. White female owner of a professional services firm

Many other interviewees said the City's procurement process is not transparent or could be improved. [e.g., AS-83, 167, 172-174, 176, 179, 222, 235, 240]

It is really helpful for organizations to go through a closed bidding process for [specified industry] assessments instead of having something out in the wild. Having a more intimate conversation is better than a lot of bids all over the place.

AS-140. White male owner of a professional services firm

How do we share where public sector spending is going and make it a process that is compliant but not so bureaucratic that people are unwilling to explore that as a market opportunity?

TO-1. Asian American female representative of a trade association

As a small firm, you don't have the marketing staff that will be chasing 32 different roster programs for your 32 or 33 agencies …. One central, one-stop-shopping procurement I think would be great for the small firm.

WS-4. Representative of a firm

J. Qualitative Information — Working with the City

The bigger challenge interestingly is trying to penetrate government and school districts. It's been really difficult in the State of Washington for me to do that and, primarily because there are no RFPs that come out for what I do.

I-31. Hispanic American male owner of a professional services firm

If there's a portal similar to Orpin that [the] City of Vancouver uses to advertise and announce solicitations … that would definitely help level the playing field streamlining the solicitation documents so it's easier to provide a more straightforward response that isn't time and cost prohibitive.

I-5. White male owner of a construction-related firm

I don't come across any bids. I don't know where to look. [The City of Vancouver] is not an easy city to work with. I get a lot of bid requests through Washington State and Vancouver is rarely there.

I-26. Hispanic American female owner of an other services firm

To date I have not seen any opportunities come through in the portal that were presented to us, or even pushed out saying, 'Hey, we have an opportunity.' I've not seen any of those, or anything coming out of the City of Vancouver.

I-7. African American male owner of a professional services firm

[I've been] finding out through other people for example [that in some entities in] Washington I will never be a prime on a contract …. For a very small firm like mine, I'm always going to have to connect with another firm.

I-17. African American female owner of a professional services firm

[For] other cultures [barriers to participating in City contracts might be] … language barriers, knowledge barriers, they're new to the community …. I know there's several small business partners that are trying to break down a lot of those barriers and help with the process …. The big one that's really relevant right now is once they do learn about how to get on the list … they still have to go through the whole process to be certified.

TO-4. White female representative of a trade association

J. Qualitative Information — Working with the City

Barriers to Bidding

Interviewees discussed whether there were barriers to bidding on City work.

Some representatives said that there were no barriers.

I think the way that [the City] advertises [the opportunities] and the way that the rosters are set up and the way that even the MATOC [Multiple Award Task Order Contract] agreements are set up, it's equal opportunity. It's open to everybody and it's [advertised] well. If you were interested in doing work with the City, I think you could find it.

I-25. White male representative of a woman-owned construction-related firm

No complaints, everything runs smoothly.

AS-184. White male representative of a construction-related firm

We are a small company, and we don't have any concerns.

AS-209. White male representative of a professional services firm

I never had a problem working with the City.

AS-14. White female representative of an other services firm

Many more said that there were barriers to bidding on work with the City of Vancouver. [e.g., AS-90, 108, 115, 161, 202, 216, 233-235]

From a marketing perspective, the … economic development business resources landing page is a lot. If you're a company and you click on the marketing presence it's like business resources, and that can be intimidating or time consuming to navigate [for help] ….

TO-1. Asian American female representative of a trade association

There seems to be just so much extra stuff that's being asked for new solicitations that you have to respond to and as a smaller company without a large administrative staff … it can be cost prohibitive to go after public work.

I-5. White male owner of a construction-related firm

The ever-increasing business regulations make it difficult to bid on contracts.

AS-128. White male owner of a construction-related firm

The way that the RFPs are written, they're catered to large and established [specified professional services] consultants. They aren't catered towards small companies that are looking to grow so they want extensive project histories …. Everything I've ever seen for Vancouver [requires a] minimum of five projects of a similar size and scope …. You're going to get the same players playing no matter what.

I-24. Native American male owner of a professional services firm

[Lack of] diversity and equity for veteran-owned businesses [bidding opportunities] … [is a barrier to success].

AS-162. White male veteran owner of an other services firm

The City does not make it easy for small businesses. The RFP questions are hard to understand and difficult to explain what we do or how a small business works.

AS-163. White female owner of an other services firm

For people who are starting out into contracting, just navigating all the different government websites that are out there and the list of proposals … and keeping up to date on them can be a little bit of a challenge just because sometimes that requires basically having a dedicated sort of staff person … who's not out doing the jobs who's constantly refreshing those lists.

TO-5. White male representative of a business assistance organization

I know that [some Washington public entities] will send out emails for, 'Hey, if you put your NAICS codes in our database and you sign up to be notified about opportunities related to those NAICS codes, we'll send them out.' I think it's kind of a hit or miss. Sometimes we'll get opportunities that have nothing to do with us … other times we won't hear about … an opportunity at all that came out even though it is relevant to us.

TO-6. Male representative of a business assistance organization

They will toss bids … so you have to start low.

AS-204. Native American male representative of a construction-related firm

The margins are lower [on public sector projects] and the administrative burden is probably higher on those projects, there's more paperwork.

I-28. White male owner of a professional services firm

Removing Barriers to Bidding on City Contracts

Interviewees provided insights into whether there were barriers to bidding on work with the City of Vancouver. Many indicated that they have faced barriers to bidding on work. [e.g., AS-2, 5, 7, 9, 10, 12-14, 22, 24-26, 31, 32, 36, 41, 44, 46-48, 56, 61, 65, 67, 68, 76-78, 80, 82, 87, 164, 179, 181, 205, 216, 223, 225, 233, 234, 240, 241, I-1,5, 21, 30, TO-1, 6]

Similar comments follow below and on the following page.

First of all, make [firms] aware of opportunities and then give them a fair shot … to compete for those opportunities by … thinking outside the box, so to speak … not looking at [firms] that you continually have done business with over the years and looking for new ways and creative ways.

I-7. African American male owner of a professional services firm

[The City] could maybe set aside a project plan …. They could maybe do a 'blind bid system' where you can't see who's bidding as far as like if it's a female bidder or a male bidder. Help forming, contracts with women-owned companies, a women's mentorship program.

I-6. White female owner of a goods firm

The willingness of the City of Vancouver to accept partial bids would remove barriers for small businesses.

AS-214. White female owner of a construction-related firm

There should be continuous emphasis on bringing in new businesses into the ecosystem instead of focusing on already existing businesses.

AS-224. White male owner of a professional services firm

[It's] too difficult to get contracts in Vancouver because of [the] requirements; including but not limited to deposits and experience requirements.

AS-244. African American male owner of an other services firm

The City needs to simplify the system of applications so that local small businesses can do great work.

AS-118. White male owner of a professional services firm

A lot of City contracts and City opportunities ask and request for a lot of information in a short amount of time.

AS-156. White female representative of a professional services firm

[Barriers are] getting somebody helping them access Bonfire [eProcurement Solution], getting registered as vendor, setting your profile up so that they're getting notifications … probably understanding some of the RFP documents …. It's rather technical and that can be a little bit intimidating….

I-12. White male owner of a professional services firm

[Entities have] the opportunity to pivot with the market and build newer relationships based on today's standards … not relying solely on a relationship but awarding based on merit …. It's more relationship-based and less merit-based.

I-21. Hispanic American female owner of a professional services firm

I was really surprised that there's not any initiative on behalf of the City to recognize and to want to make sure that there is some equitable distribution of opportunities.

PM-7. City of Vancouver public meeting participant

City Permitting

Some interviewees commented on the City's permitting process and provided suggestions for improving it. Examples of comments are shown below.

We would like permits not to expire so quickly. They only last three months.

AS-22. Whie male owner of a construction-related firm

[The City's] permitting process could be faster and smoother.

AS-23. White male representative of a majority-owned construction-related firm

There was an enormous learning curve and there's not a lot of people out there when you start a business like this that can help you, specifically it was very hard to figure out the permitting system …. This is for Vancouver, specifically Vancouver's permitting system was hard to figure out. There weren't a lot of people that could answer your questions. It's very hard to get a hold of them.

I-4. White male owner of a construction-related firm

J. Qualitative Information — Whether there is a level playing field

Business owners and representatives reported on whether a level playing field exists and any experiences with or knowledge of unfair treatment in the marketplace.

General Comments

A few participants commented that there was a "level playing field" for minority- and woman-owned firms or other small businesses. For example:

I think [the City does] a really good job with having the different methods to secure work with the City by having … the small works roster, the master agreements, and then the large public works bidding process. I really think that that's probably the best system that I've seen for keeping it level [in the playing field].

I-25. White male representative of a woman-owned construction-related firm

However, many other participants discussed experiencing or witnessing inequity in the marketplace based on race, ethnicity or gender. [e.g., I-4, 10, TO-6] For instance:

[A level playing field would mean] having an equal opportunity and having the same chances of being able to do … the same jobs than somebody else that's owned by a man.

I-6. White female owner of a goods firm

A level playing field would be giving opportunities to [small firms] …. I'm very capable of doing [work for] the City of Vancouver.

I-14. White female owner of a professional services firm

The next 15 pages cover this topic in greater detail including:

- Challenges for minority- and woman-owned firms or other small businesses not faced by other businesses;
- Access to capital;
- Bonding and insurance;
- Issues with prompt payment;
- Unfair treatment in bidding;
- Stereotyping and double standards; and
- "Good ol' boy" network and other closed networks; and
- Contractor-subcontractor relationships.

These pages are followed by comments regarding business assistance programs and certification and other recommendations for the City.

J. Qualitative Information — Challenges not faced by other businesses

Some interviewees discussed challenges experienced by minority- and woman-owned firms or other small businesses that are not typically faced by other businesses.

Limited Opportunities for People of Color

A number of interviewees reported that minority-owned businesses are often taken advantage of or given less work than other non-minority-owned firms. Some reported bait-and-switch experiences where awarded contracts never resulted in work.

The contracting decision is only part 100 and it misses the issues with all 99 of the other parts leading up to that and I think that's probably where the playing field is a lot less level because a lot of the emphasis has been put into how we make the actual contracting and buying decisions equitable and … that's great. But the playing field before that I don't think is level at all. It was much more of an uphill battle for small diverse businesses to even get to that point.

TO-6. Male representative of a business assistance organization

The last 16 months it's been extraordinarily difficult …. All of these RFPs that I busted my butt on and worked for … the couple that I've got awarded, there's no work, they go in there all promising, 'Yeah, you got stuff coming up' and then it's just delay after delay and it's just like shoot I'd be ecstatic. [If] you've seen how many meetings I've attended, I have not received one hour of work from any of those meetings.

I-24. Native American male owner of a professional services firm

Language Barriers

Several interviewees commented on how language barriers impact some minority business owners.

We've heard from companies and partners, that there can be a language barrier to accessing City information so specifically from partners in the Hispanic and Latin American community.

TO-1. Asian American female representative of a trade association

People who speak a different language … absolute hell of a time starting to get into the trade. It's an enormous barrier for them.

I-4. White male owner of a construction-related firm

J. Qualitative Information — Access to capital

Importance of Access to Capital

Business owners and others reported that access to capital was critical to success and very difficult for their companies. [e.g., AS-122, I-3, 4, 10, 13, 18, 19, 21, 24, 30]

It's bad for us right now, bad. I'm established …. I'm working with the banks right now to get a line of credit … that's even something I can't even get established. I've tried before …. I tried to get a loan through one of the credit unions [and] they asked me if I own a house that could give me a line of credit.

I-1. African American male owner of a construction-related firm

When I was going through my line of credit process … I would say as a small business, especially that doesn't have other outside investors loans and lines of credit are challenging.

I-5. White male owner of a construction-related firm

I've seen access to capital issues all over the place 'big time,' be it bank savings and loans, whatever it may be. There is always access to capital issues that minority-owned small businesses are faced with.

I-7. African American male owner of a professional services firm

It was very tough to get loans and I only recently just finally got a credit card through my bank, but I think that's standard because I'm just a very new company …. Only two and a half years, and I think most banks won't even look at you for two years.

I-4. White male owner of a construction-related firm

Maybe working capital [is a barrier]. Especially if we're working for a general [contractor], sometimes it takes 60 days or longer to get paid and so you have to have enough capital to pay your suppliers and your payroll until you start getting paid.

I-27. White female owner of a construction-related firm

We have a lot of our general contractors that are having gaps in their schedule because … they were [on] a project [a] year down the road and now here we are down the road, interest rates are [a] big, big factor right now developers can't afford the loans that are needed to build some of these projects so they're putting them on hold.

TO-4. White female representative of a trade association

We just had an incident where we had a banker that we were trying to get a line of credit for [tens of thousands of dollars] and the bankers like, 'Whoa let's do it for [more than that], that would be better' and then it was denied and … I've seen where getting access to capital can be a challenge, for sure.

I-25. White male representative of a woman-owned construction-related firm

J. Qualitative Information — Access to capital

How Access to Capital is Related to Size of Contracts a Firm Can Bid

Bonding is one way that access to capital affects the size of contracts a firm is able to bid. Some interviewees explained other connections between access to capital and the size of contracts a firm can bid on and perform.

It's challenging as a small business to work towards contracting with larger scale projects. [I'm] having a hard time with contracts in the public sector in bonded contracts.

AS-175. White male owner of a professional services firm

If you have some $2,000,000,000 contract out there there's a very small amount of general contractors who can bid that and they normally joint venture it so breaking [it] up into pieces is a viable option …. You just get more contractors involved when you make it smaller and it's all about bonding capacity at the end of the day.

TO-2. White male representative of a trade association

Capital and equipment [give one firm an advantage] cause I'm still thinking heavy construction stuff like that …. Bonds are expensive, big jobs could be expensive and you have got to have a little bit of money to back that up. So really having the [right] capital [is important].

I-13. White male owner of a construction-related firm

Not being able to get loans, not having any kind of ability to get bonding [has been a challenge]. That was a lot of work to try and get bonding because again the first thing they asked for is your credit score and your personal net worth information.

I-19. African American female owner of a construction-related firm

Being able to plop down a chunk of change on inventory or the kind of materials that are needed to go into a particular project can sometimes be hard to front that cash knowing that you're going to get paid maybe halfway through the project and then at the end especially for newer smaller firms.

TO-5. White male representative of a business assistance organization

Right now [access to capital is a key to my firm's success]. Every time I go to a networking event, they talk about all things but money. I need money in order to get [work and] sometimes can't do certain things [like purchase equipment]. I just find it highly annoying that I don't have a whole lot of contracts to order to show the bank.

PM-2. City of Vancouver public meeting participant

How Access to Capital for Business is Related to Personal Finances

Some interviewees explained the connection between business lending and one's personal finances.

I financed a $100,000 [specialty equipment] …. When it shows my income versus what [debt] I have out there … I have the student loans … plus I have a $100,000 loan for [specialty equipment], it shows that my debt [to income] ratio isn't good, even though … I've never missed a payment; my credit score is high.

I-6. White female owner of a goods firm

Since we started, [we have not] been able to get any type of loan [or] any kind of line of credit because … at the time, I had a good credit score, but the rest didn't. Through holding this business, my credit [has] also gone down. My debt-to-income ratio hasn't increased at all …. I sold [my house] and put the profit into the business.

I-19. African American female owner of a construction-related firm

Big barriers that we see are just access to personal capital … individually, but also in the friends and family networks. We see the effects of generational wealth, pretty distinctly where somebody is able to own their own real estate …. How much money they're able to tap into that from the friends and family network that's either low cost, super low cost or free to them and then the other big thing that we see a lot is … some challenges with credit scores.

TO-5. White male representative of a business assistance organization

J. Qualitative Information — Access to capital

Barriers to Access to Business Capital for People of Color and Women

Some business owners and representatives described barriers to access to capital that are specific to people of color and women. [e.g., I-7, 18, 21]

It would be awesome if the State had a specific type of loan program that was based on the value of the contract because there's a lot of factoring lenders out there that are taking advantage of [small firms].

WS-3. Representative of a firm

[A] challenge when it comes to public sector work that's a disadvantage for small businesses is some of the procurement requirements, some of the performance and payment bond requirements … really cut out smaller businesses from being able to compete for larger projects … we see this wealth gap increasing in our country and you also see an industry gap increasing across a lot … of different industries.

I-5. White male owner of a construction-related firm

It' just frustrating when you see [the City claiming to support women-owned businesses and they're not]. The reality is having to borrow money from a family friend ….

PM-3. City of Vancouver public meeting participant

The idea that I haven't proven myself to be able to have financing is just mind blowing to me when we like to put people of color on posters at banks and say, look at how much we're doing for our community …. You're doing it with businesses that are already established and grown. That has been the most challenging.

I-10. Native American female owner of a professional services firm

When my business was early on it was very difficult for the SBA to consider me, so I ended up early on taking some very high interest loans when I had less capital accessible at that time and, now we just know that … the failure rates [are] much higher for women-owned businesses and there's still no kind of grants or anything to support.

I-14. White female owner of a professional services firm

There are a lot of people out there that want to own a business that want to do something that they don't have the resources, they don't have the confidence … but they have the capabilities. That is really where the playing field isn't level and public agencies especially can do good work in investing money into developing the capacity of these diverse businesses.

TO-6. Male representative of a business assistance organization

[Access to capital] has been a massive obstacle for my wife and I because we have either been unable to secure a source of capital or whenever we find a lender that will be willing to lend us for our operations, the interest rates are simply inconsistent with the level of profit margins that we can expect from any contract.

I-30. Hispanic American owner of a professional service firm

J. Qualitative Information — Bonding and insurance

Bonding and insurance requirements can present difficulties for businesses in the marketplace. Some minority and female business owners and representatives reported difficulties securing bonding and meeting insurance requirements on projects. (Additional comments regarding bonding can be found later in this appendix.)

One of the biggest areas in construction where you can help small businesses is just [by keeping] them bonded.

WS-2. Representative of a firm

When it comes to public sector procurement or payment performance bonds, if you're a small business and you don't have a whole bunch of liquid, it's impossible. It's just frankly impossible.

I-5. White male owner of a construction-related firm

Insurance and bonds can be difficult for small businesses who are entering the market.

AS-110. White female owner of a construction-related firm

The biggest [challenge] is probably bonding …. Smaller businesses' bond rates are going to be higher than a bigger company.

I-11. White male owner of a construction-related firm

Insurance and funds can be difficult for small businesses entering the market.

AS-110. White female owner of a construction-related firm

You can't do a job if you can't get a bond for it.

TO-4. White female representative of a trade association

I felt like some of the bonds that I purchased last year were overpriced based on the size of our business. We paid more so we paid to play on a large contract. I don't think that was very fair, but insurance companies aren't in there to help people, they're in there to make money.

I-13. White male owner of a construction-related firm

Bonding back then you could get bonding by putting up [for example] we once put up a … pickup as collateral to bond a job; it's changed a lot since then. I think it's harder now for someone to start out because of what's required to get bonding and insurance.

I-27. White female owner of a construction-related firm

Sometimes it's difficult for [firms] to get proper bonding to work on a contract because the revenue they generate isn't large enough to justify the level of bonding. So, we've had issues where they might even win a contract, but they can't get the required bonding to actually be able to execute the contract because their revenue is too small. That's definitely a big barrier to entry we've seen.

TO-6. Male representative of a business assistance organization

There's always a concern of liability and we're fully insured. Each one of us has our own insurance, but there's always that [concern in the] back of the head of what if there's a lawsuit and we're involved somehow but also with that just getting set up as vendors with the insurance process for different clients has just been a total nightmare.

I-18. White male owner of an ESB-certified professional services firm

J. Qualitative Information — Issues with prompt payment

Slow payment can be especially damaging for groups of firms that do not have the same access to capital as other companies. Many business owners and representatives reported experiencing issues with prompt payment. [e.g., I-3, 14-16, 18, 21, 24, TO-3, 4]

Our payment structure is 60 [days], but payment does not come until 30 days after [that]. The employees must be paid before the payment for projects. It would be nice to be paid on time as such as the woman-owned businesses do.

AS-112. White male owner of a professional services firm

It's challenging … being a business owner and dealing with cash flow, … dealing with the individual organization's payment terms and trying to stay up with technology along with being lean and live off the land so it's like the polarity of it all.

I-14. White female owner of a professional services firm

[The test I perform is] once a year, and it's $55 for a [specified] test. It's a substantial amount for some folks, but other folks, it's a $50 bill and so they pay fairly quickly …. We've made it easy in order to do that by allowing credit card payments. My predecessor … he preferred cash or check and so he slowed down his payment process because he didn't take advantage of the electronic payment because he didn't want to pay the excess fees.

I-8. White male owner of a construction-related firm

I am incredibly frustrated about how we serve as a sub, and we get paid 100 days after somebody works.

I-10. Native American female owner of a professional services firm

[Issues with prompt payment occur] because either the person that was involved started the project [and] it's not the person that's ending the project, they left, and we submit the invoices, and they don't get paid on a timely basis because the original person left.

I-26. Hispanic American female owner of an other services firm

I'm finding with some of the other contracts that I'm on, this 30- to 45-day [payment period] sometimes just does not cut it. [In a] perfect world, [it] would be nice if … we would get paid a little bit quicker…. [There was] this incident where they lost the invoices and it's like 60 days and I'm scrambling for funding. It's not a fun feeling.

I-17. African American female owner of a professional services firm

[Prompt payment is] what I'm worried about with the next wave of work. Some of these [future clients], they're taking three, four months and I'm like, you want me to sit on this waiting for six months total from start to payment. I'm a small [business] leveraging half of my staff to your project.

I-24. Native American male owner of a professional services firm

If you're a small organization or a smaller firm and you are only doing one or two projects at a time, then … having an accounts payable sitting out there for 180 days-plus can be quite a challenge.

TO-5. White male representative of a business assistance organization

I've heard talk of prompt payment, not always being prompt. I know that some of the agencies we work with have done a pretty good job at changing the way that their payment works …. They started to recognize the burden it can put on a small business's cash flow to have to wait 90-plus days for something.

TO-6. Male representative of a business assistance organization

J. Qualitative Information — Unfair treatment in bidding

Business owners and representatives reported on bidding issues.

Denial of Opportunity to Bid

Some business owners described situations where they were not given an equal opportunity to bid on a contract, for example:

You cannot get a contract if you do not have any contract experience. You should be able to bid based on merit.

AS-152. White male representative of a goods firm

Unfair Rejection of Bid

Some interviewees provided insight into the topic of unfair consideration or rejection of a bid on a contract. [e.g., I-4, 16, TO-4] For example:

I've had one [rejection of a bid] that I thought was unfair and it was solely because … it was a situation [where] they chose the local company over anybody else.

I-15. White male representative of a goods firm

It would be nice if the government approved contracts based on qualifications instead of whether the business is woman- or minority-owned.

AS-148. White male owner of a professional services firm

Bid Shopping and Bid Manipulation

Some business owners and representatives reported that bid shopping and bid manipulation exists in the local marketplace. [e.g., AS-66, I-5, 21]

I've heard of things like that happening before where [a firm] really put in [a] huge amount of work … for something that they are fairly confident that they are qualified to get and then it ends up going to an organization that that institution has worked with before or they leverage that information to get better deals from someone that they've worked with before.

TO-5. White male representative of a business assistance organization

I've had some bid shopping done …. We created some documents to get clarity on our proposal and send it back to define our scope. They canceled the RFP; they actually used the drawings that we made for their next round of proposals.

I-24. Native American male owner of a professional services firm

[Project owners] are supposed to take the low bid. They're not supposed to try to tell someone else what the low bid was and have them change their bid even though it has happened. There's no real recourse if that does happen.

I-27. White female owner of a construction-related firm

There's so much politicking on the public sector side …. You hear a lot of whispers about [bid manipulation and bid shopping] and it's hard to differentiate between what's purely speculation and what actually might be legitimately colluding and conspiratorial.

TO-6. Male representative of a business assistance organization

J. Qualitative Information — Unfair treatment in bidding

Limited Feedback on Submitted Bids

Many participants noted a lack of feedback on submitted bids.

The communication follow-up on the selection of who [the City] chose and why would be helpful, it's granted upon request, [but] it ends up being an entire process to go through …. Being transparent from the get-go would lend more clarity to the participants that didn't get it.

I-14. White female owner of a professional services firm

Transparency [in] the scoring is helpful so that people can see this is how we scored versus the competition. Any sort of transparency that just helps people see that like, 'Okay our bid was scored 15 points lower than theirs; we don't really have a legitimate grievance here,' but debriefing I think is really big.

TO-6. Male representative of a business assistance organization

There's been rejections that maybe are not explained well, but it's hard to see whether it's unfair. Sometimes you just can't get any information on the selection process.

I-16. White male owner of a professional services firm

J. Qualitative Information — Stereotyping and double standards

Some participants discussed whether there are stereotypes or double standards that impact a firm's ability to perform or secure work and noted clear instances of discriminatory and biased behavior.

Gender-Based Stereotyping

Some business owners and representatives reported negative stereotyping of women as "less fit" than men, as well as gender-based intimidation or harassment.

There would be cities that chose him in an RFQ. They just look that he's older and male, so he must be more experienced. I don't think that's correct.

I-9. White female owner of a professional services firm

Being in the transportation sector of commerce is hard because I'm a woman-based company … so nobody wants to deal with a woman because I don't know anything about transportation …. Once they take that step and they listen to me then they realize that I do have the knowledge that they don't think I have.

I-6. White female owner of a goods firm

I really don't see color, race or anything like that …. Sometimes I hear it's like, 'Oh, we want a bid from you because you're [a] minority-owned woman' and I was like, well, I was hoping you wanted a bid [from] me because you heard how good of a job we do.

I-26. Hispanic American female owner of an other services firm

In the past, years ago there were some generals that talked down to me. But I haven't [recently] dealt with that it's changed a lot ….

I-27. White female owner of a construction-related firm

Racial Stereotyping

Some business owners of color and others described incidents of stereotyping people of color as less capable. [e.g., AS-34, I-4, 28]

Job sites can be hostile at times because we are a minority company.

AS-74. African American male representative of a construction-related firm

When my team was presented against another [all white] team, and we had the same set of credentials, we did not get to work because … people around the table were also not minorities.

I-7. African American male owner of a professional services firm

The color of your skin means you will encounter racism.

AS-127. Hispanic American male owner of an other services firm

In general, I always just feel like I always have to do better, kind of go above [and beyond] the rest than everybody else.

I-17. African American female owner of a professional services firm

Buyers expect minority-owned businesses to come in with lower pricing …. We'll see … minority businesses will come in with the same pricing [as a majority firm] and they'll get scored lower … because you're minority-owned, you should be doing things for cheaper.

TO-6. Male representative of a business assistance organization

In the rural markets there's a lot of inappropriate speak/behavior and we're very clear as a prime that that's not to be tolerated; we've fired subcontractors or subcontractor employees because of that.

I-5. White male owner of a construction-related firm

J. Qualitative Information — "Good ol' boy" and other closed networks

Many business representatives reported that the "good ol' boy" network or other closed networks persist in the marketplace. [e.g., I-1, 3, 4, 9, 12, 16, 20, 21, 22b, 28, 29, TO-1, 3, 5]

Evidence of Closed Networks in the Marketplace

Examples of related comments follow.

In the rural areas that I've worked, I think that 'good ol' boy' network … will stymie opportunities for anybody who's not in the inner circle, including minority- and women-owned businesses.

I-5. White male owner of a construction-related firm

['Good ol' boy' networks] would be in any industry …. It not only falls to the private sector, [but it also] falls to the higher education, it falls to the cities and the counties …. Most of the people that control those entities are Caucasian males so therefore they reach out and deal with those Caucasian-male companies or their fraternity brothers and that type of thing that they built with or have a relationship.

I-7. African American male owner of a professional services firm

The 'good ol' boys,' absolutely [exist] … and the women are not included in those [closed] networks. It's hard for me.

I-6. White female owner of a goods firm

With RFPs specifically, there's a lot of nepotism involved …. Not knowing that you're submitting proposals with a very, very low chance of getting [an] outcome …. It's just almost to the point where RFPs aren't worth our time because when you start getting … an elevated portfolio, you don't want to waste resources on things that just have such a low conversion rate.

I-14. White female owner of a professional services firm

I still see ['good ol' boy' networks] …. Typically, it's not with the bidding process … when it goes through a purchasing department that's more equitable for everybody. But … I contacted some warehouses or meter shops and municipalities and [they say], 'Well, I always order from these guys because they're down the street and they're local and we've used them forever.'

I-15. White male representative of a goods firm

It feels like [there's a 'good ol' boy' network]. I've approached many school districts in the State of Washington, for example and it feels like if you're not part of that group or they don't know you, it's very hard to penetrate. That's what I'm doing now is I'm just trying to get into meet everybody and get to know who the key players are.

I-31. Hispanic American male owner of a professional services firm

I don't think we've worked directly with the City. It's been pretty competitive for the types of projects that we want to chase, and so we haven't since we don't have strong relationships with a lot of the staff.

I-16. White male owner of a professional services firm

I know there's sort of an idea of, 'Hey, this is public contracting, it's democratically accountable, there are certain mechanisms in place to make sure that it's fair and impartial,' but I think that's a little bit of wishful thinking on their end. At the end of the day, we see that the relationships are helping drive who's getting selected by the buyers, whether it i's legal or questionable.

TO-6. Male representative of a business assistance organization

I can see the general consensus in our industry being primarily led by older white men. I think, as a woman, I do recognize that a bit more.

I-23. White female representative of a professional services firm

If I was really working more as a subcontractor, I would say yes, that the good ol' boy network example probably keeps the door closed for newer subcontractors' ability to partner with generals.

I-5. White male owner of a construction-related firm

Comments Indicating Closed Networks Do Not Exist or Are Not Harmful

A few interviewees noted that there were no closed networks in the local market area or their industry, or that those networks did not negatively affect them or had weakened over time.

No [closed networks]. It comes down to do you understand the job? …. I've seen that before as a minority … I'm not 'gonna' say … you're not entitled to the to the job because you're a minority.

I-11. White male owner of a construction-related firm

I would say ['good ol' boy networks'] used to [exist] … I think with the information age for sure it's all public information …. There are always people trying to work an angle of something, but I really think that with the information age and the public records … I think that ['good ol' boy networks' are] really a thing of the past.

I-25. White male representative of a woman-owned construction-related firm

I can't think of a single contractor that we work with that fits in that bucket [of a 'good ol' boy' network] …. There's a lot of factors in that, you have an aging population that's moving out so you're seeing a younger generation move in …. I don't think that [the good ol' boy network] is still an issue, but I think that we're recovering from when that was an issue.

TO-4. White female representative of a trade association

J. Qualitative Information — Contractor-subcontractor relationships

Business owners and representatives were asked to comment on their experiences with prime contractor-subcontractor relationships.

Creating and Maintaining Networking Connections

Some interviewees described the need for firms to proactively connect with potential prime contractors and/or subcontractors.

Many reported difficulties making these connections. [e.g., AS-124, 182, 183, I-13] Examples of related comments on existing and potential relationships follow.

We have the National Minority Supplier Diversity [Development] Council, which is the national organization that if we need assistance and things of that sort … we call on our 'brothers and sisters' that are part of the Oregon network or part of the Washington network if we need somebody in that … area to perform those services.

I-7. African American male owner of a professional services firm

There's a big bridge freeway project called the '5-20 bridge project' and of course, the DBE contractors want to be on that job because it means a longer contract …. Yes, that big project does suck all the DBEs out of the pipeline …. I would say that that might be an issue for Vancouver because [there are] bigger projects in Portland across the river.

TO-2. White male representative of a trade association

Most of the other companies that we have worked in partnership with on projects have been DBEs. It was a loose association that we came together with as a 'shared struggle.'

I-22b. White male representative of a construction-related firm

I think [subcontractor-prime contractor relationships are] really strong here …. The general contractor finds their electrical contractor, they find their plumbing contractor that they [know] do good work and that they have a great working relationship with … and part of their bid is we already know we have all these subs, we don't need to send out another bid to find all these people.

TO-4. White female representative of a trade association

The State of Washington has agencies that will do 'meet the prime' events. Those are always good because it gives an opportunity for more or less organic conversation to happen between [primes subs].

TO-6. Male representative of a business assistance organization

It has also been a challenge for us to approach the holders of prime contracts to work with them as subcontractors.

I-30. Hispanic male owner of a professional services firm

I would [use certified firms as subs] if I can find them …. I actually talked to a number of electrical organizations and either (a) they're too over extended or (b) there's a couple of RFPs that they needed, mechanical, electrical and plumbing and we don't perform electrical.

I-24. Native American male owner of a professional services firm

The only thing that I have seen [regarding networking] is that we have been bombarding [DBEs] with so much work that they are now overwhelmed. Just in general, not just with the City of Vancouver.

I-23. White female representative of a professional services firm

Encourage the prime contractors to have some kind of list or someone that we can contact or try and get as a subcontractor with them.

I-22a. White female owner of a construction-related firm

J. Qualitative Information — Contractor-subcontractor relationships

Some reported that contractor-subcontractor relationship building can be limited by restrictive bidding requirements.

When it's required to use minority contractors under us it's difficult because they don't have the bonding that these major jobs require … [or] the insurance limits that are required. It's difficult to meet the requirements for minority-owned businesses.

I-27. White female owner of a construction-related firm

We've seen that a few times where [prime contractors] find a supplier they want to work with but that supplier can't get the proper bonding so they can't be brought on …. But I know sometimes they'll try to figure out how we can find solutions where we can provide whatever's needed to get you that level of bonding.

TO-6. Male representative of a business assistance organization

Barriers to Subcontracting

Some interviewees reported that certain contractors are reluctant to work with newer or smaller businesses. A number of subs indicated challenges when working with prime contractors. [e.g., AS-189, I-24, 30]

As a minority company, more often times than not, it feels that when working with large construction companies 'we' are used so that they can meet the requirements of the contract for fulfilling the … minority percentage and are not always paid or treated as a valued partner. The mentality and playing field need to change.

AS-34. Hispanic American representative of a construction-related firm

Folks [say] that 'we can't find minority-owned companies we can't find women-owned companies.' Well, show me the effort that you made …. They take that little slip of paper that they turn in that [says] I can't find anybody and [submit] it, you done your job and move on.

I-7. African American male owner of a professional services firm

The City should be more involved in picking the subcontractors to spread out the work in projects.

AS-126. White male representative of a construction-related firm

I have [had difficulty being considered by primes] in the past. [We've been told] that we were too small of a company. I don't have a man force to come to be able to successfully accomplish the contract that they were looking for.

I-26. Hispanic American female owner of an other services firm

J. Qualitative Information — Contractor-subcontractor relationships

Some interviewees reported primes considering subs as incapable or ill equipped to perform their jobs. Some interviewees reported that primes only engage subs for the less desirable tasks.

We've also learned just by experience what kind of contract language we need in a contract. That's another issue too … because the main thing is the indemnity agreement, some contractors try to make it all on the sub that they're responsible for all the work, everyone's bad, things that happen fall on the subcontractor.

I-27. White female owner of a construction-related firm

I've seen it where minorities come into the job and the quality has been way down low and it's a real challenge to deal with them. That to me is a tough part to get over.

I-11. White male owner of a construction-related firm

[Prime contractors] could literally give me the entire project that [they] don't want to do …. I need some boundaries for the limits of what I'm providing.

I-24. Native American male owner of a professional services firm

One interviewee commented evidence of on bait and switch where subcontractors are included by primes in bids but never receive work when awarded.

I did have a conversation with another [minority-owned] engineering [firm]. She had a list of people she told me to be aware of that they will just … use you to 'check the box' but then you'll never get the work.

I-17. African American female owner of a professional services firm

J. Qualitative Information — Business assistance programs and certifications

The study team asked business owners and representatives about their knowledge of and experience with business assistance programs and certification.

Awareness of Available Assistance

A number of business owners and representatives were aware of business assistance programs. For some, such programs were useful and provided value to their firm. [e.g., TO-1, 7, AS-37]

Team members specifically asked interviewees whether they knew of or are currently participating in public agency mentor-protégé programs.

Examples of comments are shown below and on the right side of the page.

I'm just big enough that I don't really fit into the micro businesses that a lot of the support is given to.

I-14. White female owner of a professional services firm

[The entity that certified my firm has] been hosting a lot of seminars and networking events which have been really beneficial, and I would definitely suggest doing the same in Vancouver … because it that has been beneficial …. Having different disadvantaged businesses in the same room together helps communication and build networking.

I-18. White male owner of an ESB-certified professional services firm

Sometimes there would be so many resources people would tell you to go, and it would just be overwhelming, … and then sometimes, 'Oh, you need to join this, but then it costs money.' And then … I don't really know if it's worth my while to join.

I-17. African American female owner of a professional services firm

[A business assistance program will] have a representative there from different organizations … where you could go in and ask questions …. I could take my paperwork and they'll help me put it together for certifications, but only through [the city that provides it] …. We don't get a lot of support from our government in Vancouver.

I-26. Hispanic American female owner of an other services firm

There's lots of resources out there that are either free or low cost … but [businesses] also might not have personal knowledge of that or even know necessarily how to search for that kind of stuff. A lot of people come to us from [a business assistance organization], but even having knowledge about [that organization] and the number of resources that [they have] to offer [can be a challenge].

TO-5. White male representative of a business assistance organization

A mentor process for people like me [would be helpful]. In the past I've worked with a mentor through the Small Business Association on a different project and I've learned a lot …. When I was trying to become qualified as diversified business owner being woman-based-owned he didn't know the first thing about it …. So, we learned together how to do the process.

I-6. White female owner of a goods firm

I think just opening the opportunities to some kind of small business development and for lack of a better description a mentor-protégé relationship on these projects [would help in leveling the playing field].

I-24. Native American male owner of a professional services firm

J. Qualitative Information — Business assistance programs and certifications

Certification

Many firms had comments about the process of becoming certified.

Positive experiences. Some commented on the ease of the process and positive outcomes of obtaining certification. For example:

[The certification process] was arduous, invasive but necessary because I'm a strong advocate of having certified entities versus self-proclamation because … the key is minority-owned and controlled …. I've seen many [firms] come forth minority-owned but not controlled, which is extremely important. Therefore, the certification process lends itself to making sure that you're doing some forensic reviews of your accounting [and] principles.

I-7. African American male owner of a professional services firm

My MBE [certification] has given me access to certain contacts across the state but some of those contacts are really old, so I don't know how good they are …. I did not renew it this past year.

I-31. Hispanic American male owner of a professional services firm

By becoming an Emerging Small Business, it opened a lot of opportunities through emails and networking events and those have been quite beneficial. I invited the subcontractor's team members as well and it has gotten leads, some have turned into to work.

I-18. White male owner of an ESB-certified professional services firm

I do think that [the] vast majority of the people who have gotten DBE or the 8A certifications, find it very useful … especially cause there's quite a number of projects that have a certain percentage requirement of like … '17 percent of our contractors are X-owned businesses and don't necessarily meet those targets all the time.'

TO-5. White male representative of a business assistance organization

We got our certification in June of 2020, and we got our first government contracts a month later. Directly correlates to the certification and getting those opportunities.

I-19. African American female owner of a construction-related firm

Negative experiences. However, far more participants shared negative experiences and outcomes from the certification process. [e.g., I-22a, 22b, 25, 30, TO-4, 6]

Many of these firms indicated that the certification process was time consuming or cumbersome, or they had mixed feelings about the process. For example:

The renewal is painful. It's like I am a female, I [am the sole owner of my business]. Why [do] I have to spend money to prove that year in and out? It's just ridiculous. I didn't even do it for the first 13 years of being in business …. I came out of the pandemic with needing to really shift because I started getting a lot of this agency work and so then I went through the process and … I think it is a very odd process.

I-14. White female owner of a professional services firm

J. Qualitative Information — Business assistance programs and certifications

Washington State was pretty smooth. Oregon's was a pain in the butt, and I couldn't do Washington, I had to do Oregon first to do Washington …. But I think the systems talk to each other, so I think [that] is why Washington went a lot quicker.

I-17. African American female owner of a professional services firm

When I first applied or was looking into applying [for certification] I was getting a little bit discouraged for the amount of paperwork that they were requesting … but I kept on following cause I am horrible at keeping stuff organized on my end …. I did [call the office several times] to ask questions and they were very nice and answered my question with no hesitation.

I-26. Hispanic American female owner of an other services firm

I was going through the process to sign up to basically get the small business membership and I was surprised that we didn't qualify and … how small the number is that takes you out of the small business consideration. It's only a few million bucks averaged over a few years of revenue …. That bar could be a little higher and I think you could capture more, legitimately small businesses.

I-5. White male owner of a construction-related firm

The easiest ones are the women-owned business and the small [business] owned. [For] the minority process, there's just a lot of paperwork and as an independent and not having an outside contractor do that work, it's just a lot to go through. There's a lot of steps …. They make it as hard as possible.

I-21. Hispanic American female owner of a professional services firm

The problem with the DBE certification is that it's tied to a monetary cap …. If you look at the DBE projects, they have a capsize of $25,000,000 but your DBE cap or assets is like $1.5 million.

I-24. Native American male owner of a professional services firm

Streamline the whole process. Anytime there's a government client, the amount of paperwork involve tends to increase …. There's definitely some of the smaller municipalities … that are much easier.

I-16. White male owner of a professional services firm

I think that veterans should be classified as a minority.

AS-60. White male owner of a construction-related firm

J. Qualitative Information — Business assistance programs and certifications

Contract Goals or Other Preference Programs

Some business owners and representatives supported the need for contract goals programs to level the playing field. With well-monitored compliance, contract goals and other preference programs were perceived as being helpful.

Examples of comments are below and on the right.

There are companies that are a little bit intimidated to do business with the public sector in general …. Part of that could be because the City hasn't had MWSBE … small business set aside goals, or a mechanism that is really suggesting that there are opportunities that are community-wide that could be tenable.

TO-1. Asian American female representative of a trade association

Sometimes you need to have some set asides for certain concepts. I think that entities [should] start being a bit more creative with their mandates … particularly on construction projects or larger projects while mandating that they have some type of inclusion from a goal perspective.

I-7. African American male owner of a professional services firm

I would like the City to issue more projects specifically dedicated to women-owned or minority[-owned] businesses … phasing out smaller projects that they can bid on in the A&E industries.

AS-239. White female owner of a professional services firm

Small contractor businesses have problems coming up with the 5 percent [contract goal], especially when self-contracting on a bigger project.

AS-119. White female representative of a majority-owned construction-related firm

Having the ability to do part-bids. Break the work out into smaller chunks. A way to level the playing field would be not having to engage with such a big [project] and be a little more flexible.

I-22b. White male representative of a construction-related firm

There's a sense among businesses that if the City doesn't hit those goals, they kind of just shrug and say, 'Alright, we'll try to do it next year.' I would recommend building in some sort of systems of accountability …. Especially if the public can see that it's happening, where they discuss … how they need to get to that 3 percent …. In our experience, the spending only goes up if there are direct concerted efforts.

TO-6. Male representative of a business assistance organization

The City [programs] should support contractors and subcontractors, local distributors and local supply chains.

AS-121. White female representative of a construction-related firm

J. Qualitative Information — Future firm challenges

Participants were asked to imagine what future challenges their firms may encounter that will act as barriers to success.

Some discussed foreseeable trends in the marketplace.

There is anticipated to be a vacuum, or an absence of 130,000 younger people aged 10 to 24 entering the workforce in the next decade plus and that is across the greater Portland region … and so what will that inability to access younger talent mean for firms …. Then looking into the future, the onset of AI and how many jobs conceivably will be replaced by AI and what that means for [the] community.

TO-1. Asian American female representative of a trade association

Qualified employees [will be a future barrier].

I-11. White male owner of a construction-related firm

Other comments were business-specific.

I'm going to need an admin person, so I've talked to somebody to [work] less than 20 hours [a] month just [to] do my books to just take that off my hands …. Some things I've done on my own, but they need to be beefed up; [I] don't have a statement of qualifications, I need a better company resume, I just finally got a capability statement done, but those things cost money.

I-17. African American female owner of a professional services firm

Stable work [is a challenge going forward] and that's what I've been working my butt off for two years …. Diverse industries, diverse client-base, diverse project type [are all also future challenges].

I-24. Native American male owner of a professional services firm

Going forward again [the challenge] would be the ability to have a seat at the table. When I say that, an opportunity to identify bids and successfully be able to compete … in a fair and equitable manner without being [discounted] because of the fact that the specs are written so tight.

I-7. African American male owner of a professional services firm

J. Qualitative Information — Other insights and recommendations for the City

Interviewees and availability survey respondents provided many comments and insights regarding how to improve the City's procurement practices and other topics.

Outreach and Other Encouragement

Some business owners and managers and other interviewees recommended greater outreach to certified firms and other small businesses. [e.g., AS- 10, 12, 23, 29, 32, 35, 41, 50, 68, 75, 116, 117, 123, 129, 132, 167, 172-174, 176, 205, 216, 220, 222, 235, 240, I-1, 3, 4, 8, 12, 14, 16, 20, 26]

Examples of comments are provided on the right side of the page.

It is valuable to learn about projects opportunities prior to responding. For small businesses like ours it makes it easier to team with primes if we know about the project in advance.

AS-172. White male representative of a professional services firm

The City did a pretty successful startup-in-a-day campaign, maybe a decade ago and that would be a really amazing thing to see reemerge, and just a voice from the City saying, 'Small business partnerships and place-making are so important to us.' That type of just vocalization about the importance of businesses as community members is something we could hear more about from the City.

TO-1. Asian American female representative of a trade association

I would recommend the City to market its requirements so that businesses like us can serve.

AS-65. Asian American male owner of a professional services firm

In certain states, public entities particularly, they have to post [opportunities] somehow and some of them just use the local newspapers … and that's it and rely upon, word of mouth or … folks who already have a contract to continue to get those contracts but lacking … some vehicle to make folks aware, minority-owned small business owners women-owned companies they have no idea for the most part.

I-7. African American male owner of a professional services firm

It would be great to see more collaboration and outreach programs for companies based in the Pacific Northwest, including Alaska, Washington and Oregon.

AS-221. White female representative of an other services firm

We need more opportunities for all kinds of people. Sometimes you try to contact the cities and I quit trying to reach those cities [because they didn't respond].

AS-86. Hispanic American female owner of an other services firm

The City doesn't call me or give me a chance. They could reach out instead of using big companies.

AS-130. White male owner of a goods firm

When we host events, we invite all the partners from each of the public agencies we work with, but they often don't show up and I think that makes it more difficult for the businesses to break into contracting with them.

TO-6. Male representative of a business assistance organization

J. Qualitative Information — Other insights and recommendations for the City

Information About Opportunities and Education About How to Do Business with the City

Business owners and representatives indicated that they would like access to more information about opportunities and education about how to do business with the City of Vancouver. [e.g., AS-10, 23, 29, 33, 35, 41, 43, 44, 47, 50, 68, 75, 76, 112, 134, 144, 145, 150, 167, 181, 216, 220, 222, 235, 240, 241, I-1, 3, 4, 8, 16]

Maybe there's workshops … that could be offered to smaller businesses, in particular on how to respond to the solicitations, what sort of things do you need to be focusing on and what are some best practices and also give the City of Vancouver an opportunity to get some more feedback on … where they can create a little bit more level playing field.

I-5. White male owner of a construction-related firm

I think they need to look into more veteran-owned companies and small businesses. I think [the City of Vancouver] needs to look into providing more opportunities for veteran-owned and other small businesses.

AS-9. White male veteran representative of a goods firm

We need more opportunities to learn about contracting and learn how contracting with the City works.

AS-85. White female owner of a goods firm

There should be more opportunities for more bids or make it easier to locate those opportunities. Emails or newsletters [would be good].

AS-111. White male representative of a construction-related firm

There needs to be infrastructure in place for small businesses to learn how to offer services to cities like Vancouver. Second- and third-tier contracting does not give us credit, even though we are the ones putting in the work effort.

AS-131. Native American male owner of a professional services firm

Probably communication [is something that could be improved] through the City of Vancouver for small businesses [other entities] are very active in the small business community, they're always sending notifications, are always sending information out for the small businesses.

I-26. Hispanic American female owner of an other services firm

Better availability of jobs available in the City of Vancouver. I have yet to come across opportunities in the City of Vancouver.

AS-159. White female owner of a construction-related firm

[The City] could send out more information about regulations and potential advances that they'd like to do within their state or their region.

I-18. White male owner of an ESB-certified professional services firm

The most helpful thing is just having either a dedicated person or team of people to help [firms] navigate the application process because every city or every government entity or every big institution has their own particular things that they ask for or like different pieces that they emphasize and that's not always obvious just by looking at the website.

TO-5. White male representative of a business assistance organization

J. Qualitative Information — City of Vancouver Construction Workforce Apprenticeship Program

Experience with the City of Vancouver Construction Workforce Apprenticeship Program

Regarding workforce contract goals, most business representatives were unaware of the City of Vancouver Construction Workforce Apprenticeship Program. Two interviewees shared their insights. Examples of comments are shown below.

I'm surprised I don't know about the City of Vancouver Construction Workforce Apprenticeship Program …. If these partner organizations don't know about what can connect these individuals to jobs, then that in itself seems like maybe something that could be better.

We have a fairly large Southwest Washington based contractor … and their biggest challenge is they have more work than they have employees to do the work, so you see them now [and] they're in all of our school districts they have a team of staff that are working with career specialists and creating internship programs and so they've kind of done the boots on the ground.

I know there's a rush like in our region right now we have a bridge project that's coming up and so everyone's panicked where are we going to find 19,000 workers and for construction…. Industry doesn't want the [apprenticeship] process expedited because then you get poor workers …. There's a reason that a union has this lengthy apprenticeship program …. We need more [workers], but we also need to be patient to get to the numbers that we need.

TO-4. White female representative of a trade association

We've got several programs that we're trying to do … we've got women's committees, [etc.] to fill the needs of the demographics and we understand that the workforce [contract goals] needs are changing.

TO-3. White male representative of a trade association

APPENDIX K. Business Assistance Programs — Federal government and other program examples

Local and state agencies, not-for-profit organizations and other groups operate a broad range of assistance programs in the City of Vancouver metro area. Although the list of programs discussed here may not be exhaustive, it describes many programs that local businesses could access. Examples are organized into two groups:

- Federal government and other national organizations and programs; and
- State and local government, trade associations, not-for-profit and private sector initiatives.

Federal Government and Other National Programs

Federal and other nationwide program examples include the following.

Associated General Contractors of America (AGC). AGC is a trade association that provides members with funding opportunities, apprenticeship programs, bidding information for public and private sector opportunities, labor relations assistance, safety training, construction education and employee development, meetings and events and other assistance. It has chapters in Washington and Oregon.[1]

Apex Accelerators (formerly known as Procurement Technical Assistance Program). APEX Accelerators assist underserved businesses navigate government and other solicitations.[2]

Association of Women's Business Centers. This non-profit organization supports over 100 business centers throughout the country to support female entrepreneurs with business training courses, networking and connections to federal small business resources.[3]

COVID-19 Targeted Economic Injury Disaster Advance Loan. This program closed in May 2022 but allowed small business owners up to $2 million in low-interest, fixed-rate and long-term loans to maintain operational costs made difficult by the COVID-19 pandemic. Operated by the U.S. Small Business Administration, these loans offered deferred payments for the first two years.[4]

Ewing Marion Kauffman Foundation. This private foundation seeks to equip entrepreneurs with the tools to create successful businesses. They offer business training courses and networking as well as grants to small business owners.[5]

Federal Opportunity Zone Program. The Federal Opportunity Zone Program provides incentives for investment in local businesses, real estate or development projects through a reduction in tax obligations. Opportunity Zones include the most underserved and disinvested neighborhoods within a community to encourage businesses to consider bringing or keeping their businesses in those areas.[6]

[1] See https://www.agc-oregon.org/

[2] See https://www.apexaccelerators.us/#/about-us

[3] See https://www.awbc.org/

[4] See https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl

[5] See https://www.kauffman.org/

[6] See https://opportunityzones.hud.gov/

K. Business Assistance Programs — Federal government and other program examples

Internal Revenue Service Small Business and Self-Employed Tax Center. This federal website provides resources for taxpayers filing as self-employers or small businesses with assets under $10 million. It provides information on preparing and filing taxes for all stages of owning a business. It also contains a video training library, checklist and other documents on planning the financial side of a business.[7]

National Association of Minority Contractors (NAMC). NAMC is a national membership organization that serves minority construction firms across the country. Member services include education, training, networking, advocacy and capacity building. It has local chapters in Washington and Oregon. [8]

National Association of Women Business Owners (NAWBO). NAWBO is a national member-based organization that serves women entrepreneurs in all sectors, sizes and stages of development. Membership benefits include webinars, product discounts, online directories and other more. There is an Oregon chapter.[9]

National Association of Women in Construction (NAWIC). NAWIC is a national member-based organization that serves women entrepreneurs in all sectors, sizes and stages of development. Membership benefits include webinars, product discounts, online directories and other more. There are Washington and Oregon chapters.[10]

National Association of Minority Contractors (NAMC). NAMC provides advocacy, training and capacity building for its members. It has local chapters in Washington and Oregon. [11]

National Minority Supplier Development Council (NMSDC). NMSDC is a corporate member organization focused on increasing business opportunities for certified minority-owned businesses. It operates the Business Consortium Fund, a non-profit business development program, which offers financing programs and business advisory services for its members.[12]

Operation Hope Small-Business Empowerment Program. The Operation Hope program assists aspiring entrepreneurs in low-wealth neighborhoods. The program combines business training and financial counseling with access to small business financing options. Participants complete either an 8- or 12-week training program, plus workshops on business financing, credit and money management.[13]

SCORE. SCORE is a national organization with local offices. It offers mentorship, business training and networking for established business owners and new entrepreneurs. It was formerly known as Service Corps of Retired Executives.[14] See SCORE Vancouver.

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[7] See https://www.irs.gov/businesses/small-businesses-self-employed

[8] See https://namcnational.org/

[9] See https://www.nawbo.org/oregon

[10] See http://www.nawicpnw.org/

[11] See https://namcnational.org/

[12] See https://www.nmsdc.org/

[13] See https://operationhope.org/small-business-development/

[14] See https://score.org/find-location?state=MO

K. Business Assistance Programs — Federal government and other program examples

State Small Business Credit Initiative (SSBCI). This initiative was reauthorized and expanded under the American Rescue Plan to help entrepreneurs and small businesses grow by providing capital and technical assistance.[15] The initiative has two programs, the Capital Program and the Technical Assistance (TA) Grant Program. See Washington Small Business Credit Initiative.

Small Business Innovation Research (SBIR). The SBIR program is designed to encourage small U.S.-based businesses to engage in Research and Development activities. Solicitations are issued by 11 Federal agencies, including the Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Transportation, Environmental Protection Agency, National Aeronautics and Space Administration, and the National Science Foundation.[16]

Small Business Technology Transfer (STTR). STTR is designed to stimulate technological innovation and provide opportunities for small businesses in the field of research and development in partnership with federal agencies. Small businesses collaborate with agencies such as the Department of Defense, Department of Energy, Department of Health and Human Services, National Aeronautics and Space Administration and National Science Foundation in joint-venture opportunities.[17]

U.S. Chamber Small Business Division. The Small Business Division offers free tools such as the Coronavirus Small Business Resource Guide. The Division also helps with receiving and managing Paycheck Protection Program (PPP) loans and other government resources, selecting offices, cost control and choosing suppliers.[18]

U.S. Department of Commerce Minority Business Development Agency. This federal program offers minority business local business support centers.[19] The Washington office of this federal program is operated by the Washington MBDA Business Center and serves the entire state of Washington.[20]

U.S. Department of Housing and Urban Development (HUD). HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and woman-owned business participation in HUD-funded contracts, as well as participation of project-area residents in those contracts.[21]

U.S. Department of Labor New and Small Businesses. This webpage offers resources to business owners on complying with employee laws and connection to federal and state business resources.[22]

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[15] https://home.treasury.gov/policy-issues/small-business-programs/state-small-business-credit-initiative-ssbci

[16] See https://www.sbir.gov/

[17] See https://www.sbir.gov/about/about-sttr

[18] See https://www.uschamber.com/members/small-business

[19] See https://www.mbda.gov/mbda-programs/business-centers

[20] See https://mbdawashington.com/

[21] See https://www.hud.gov/program_offices/sdb

[22] See https://www.dol.gov/agencies/whd/compliance-assistance/small-business

K. Business Assistance Programs — Federal government and other program examples

U.S. Department of Transportation (USDOT), Office of Small and Disadvantaged Business Utilization (OSDBU). The OSDBU offers a range of programs and resources to assist small and disadvantaged businesses. Programs include a mentor-protégé program, a bonding assistance program, the Women and Girls in Transportation Initiative and a short-term lending program. USDOT partners with the Surety and Fidelity Association of America (SFAA) to help small businesses become bond ready.[23]

U.S. Department of Veterans Affairs (VA), Office of Small and Disadvantaged Business Utilization (OSDBU). The U.S. Department of Veterans Affairs OSDBU assists veteran-owned businesses through the business verification and procurement assistance program and the VA Small Business Mentor-Protégé Program.[24]

U.S. Economic Development Administration (EDA). U.S. EDA works with local communities and regions to advance economic development initiatives based on local requirements. The U.S. EDA provides grants to businesses for planning, technical assistance and infrastructure construction.[25]

U.S. Environmental Protection Agency (EPA) Disadvantaged Business Enterprise (DBE) Program. The EPA is the federal agency that administers regulations and programs regarding environmental protection. The EPA Disadvantaged Business Enterprise (DBE) Program relates to the participation of minority- and woman-owned businesses, small businesses and other targeted businesses in EPA-funded contracts for construction, equipment, services and supplies.

U.S. Small Business Administration (SBA) Office of Veterans Business Development. U.S. SBA Office of Veterans Business Development provides business training, counseling and assistance. It also oversees federal procurement programs for veteran- and service-disabled veteran-owned small businesses.[26]

U.S. Small Business Administration (SBA) 504 Loan Program. The SBA 504 Loan Program provides financial assistance to small businesses that do not qualify for traditional financing so they can purchase or renovate real estate or buy heavy equipment. The program provides competitive fixed-rate financing.[27]

U.S. Small Business Administration (SBA) 7(a) Loan Program. The SBA 7(a) Program provides small businesses access to up to $5 million in loans to fund startup costs, buy equipment, purchase new land, repair existing capital and expand an existing business. Businesses must meet SBA's size standards based on the business's annual receipts and number of employees.[28]

[23] See https://www.transportation.gov/content/office-small-and-disadvantaged-business-utilization

[24] See https://www.va.gov/osdbu/

[25] See https://www.eda.gov/

[26] See https://www.sba.gov/offices/headquarters/ovbd

[27] See https://www.sba.gov/funding-programs/loans/504-loans

[28] See https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans

K. Business Assistance Programs — Federal government and other program examples

U.S. Small Business Administration (SBA) 7(j) Management and Technical Assistance Program. The SBA 7(j) Program provides business assistance to help eligible firms be competitive for federal, state and local government contracts. Business assistance includes training, executive education and one-on-one consulting for a wide range of topics. To be considered eligible for this program, businesses must be located in areas of high unemployment or low income, owned by low-income individuals, and certified as an SBA 8(a) Business Development Program participant, a HUBZone small business and/or an economically disadvantaged women-owned small business.[29]

U.S. Small Business Administration (SBA) 8(a) Business Development Program. The SBA 8(a) Business Development Program is a business assistance program for small disadvantaged businesses. It offers a broad scope of assistance to firms certified under the program (companies that are owned and controlled at least 51 percent by socially and economically disadvantaged individuals). Program participants can compete for set-aside and sole-source federal contracts.[30]

U.S. Small Business Administration (SBA) Historically Underutilized Business Zones (HUBZones). The SBA HUBZone program helps certified small businesses in urban and rural communities gain preferential access to federal procurement opportunities. Firms are eligible for certification if they are a small business according to SBA's size standards, are at least 51 percent owned and controlled by U.S. citizens or a qualified organization, have a principal office located within a Historically Underutilized Business Zone and have at least 35 percent of employees residing in a HUBZone.[31] Program participants benefit in a few ways, including receiving a 10 percent price evaluation in certain contract competitions.

U.S. Small Business Administration (SBA) Mentor-Protégé Program (MPP). The SBA MPP is a program to formalize mentoring relationships between qualified established firms and eligible small businesses. The MPP does not match mentor and protégé firms. Instead, mentor and protégé firms should establish a relationship before applying to the MPP.[32]

Woman-Owned Small Business/Economically Disadvantaged Woman-Owned Small Business (WOSB/EDWOSB) Federal Contracting Program. The WOSB/EDWOSB program administered by the U.S. SBA assists small businesses owned and controlled by one or more economically disadvantaged women to participate in federal procurement processes within industries where woman-owned small businesses are substantially underrepresented.[33]

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[29] See https://www.sba.gov/federal-contracting/contracting-assistance-programs/7j-management-technical-assistance-program

[30] See https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program

[31] See https://www.sba.gov/federal-contracting/contracting-assistance-programs/hubzone-program

[32] See https://www.sba.gov/federal-contracting/contracting-assistance-programs/sba-mentor-protege-program

[33] See https://www.sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contracting-program

K. Business Assistance Programs — State and local program examples

State and Local Government, Statewide Membership Organizations, Not-for-Profit and Private Sector Initiatives

Examples of programs available from local organizations or local chapters of national organizations follow.

Building Industry Association (BIA) of Clark County. This association serves Southwest Washington builders through advocacy and assistance for the building industry and small businesses. BIA offers benefits that include networking, insurance and investments, marketing and product discounts. [34]

Capdeck Business Loans. This company provides funding to small businesses and startups. Capdeck offers different funding options that include, but are not limited to, SMB administration loans, small business lines of credit, and business equipment financing. Capdeck also offers funding to a variety of industries like construction and transportation.[35]

Columbia River Economic Development Council (CREDC). This organization offers free services to startup businesses. CREDC also assists with business expansion and relocation to Southwest Washington.[36] CREDC also operates the Clark County Main Street Support Program (CCMSSP), which offers business with 10 to 20 employees in Clark County emergency grants of up to $10,000.[37]

Fourth Plain Forward. This organization creates economic opportunities in Clark County through workforce development, fostering small business innovation, improving financial literacy and other efforts. One of its small business initiatives is a business incubator and technical assistance for entrepreneurs and small businesses. [38]

Greater Vancouver Chamber. This organization provides professional development and networking opportunities to businesses in the Southwest Washington area. Through the Business Pathway to Opportunity and Development (POD) Program, the Greater Vancouver Chamber hosts workshops and coaching sessions for small business owners.[39]

[34] See https://biaofclarkcounty.org/

[35] See https://capdeck.com/

[36] See https://credc.org/

[37] See https://www.cityofwashougal.us/603/Resources-for-Small-Businesses-Impacted-#:~:text=The%20Columbia%20River%20Economic%20Development,20%20employees%20in%20Clark%20County.

[38] See https://www.fourthplainforward.org/about-fourth-plain-forward

[39] See https://www.vancouverusa.com/business-owners/businesspod/

K. Business Assistance Programs — State and local program examples

Hispanic Metropolitan Chamber. This chamber offers a variety of small business assistance to Spanish and English-speaking business owners at no cost. These assistances include licensing and permitting service, business expansion, loan and bond proposal packaging, access to capital business plan development, and accounting or bookkeeping systems. [40] It has locations in Portland and Vancouver.

Mercy Corps Northwest. This organization has a variety of programs to advance economic development across the Pacific Northwest. Some of its programs provide funding, education, and mentorship to disadvantaged businesses.[41]

Micro Enterprise Services of Oregon (MESO). This entity offers services for emerging, small, and disadvantaged businesses in the Portland metro area, including Vancouver. MESO provides business classes, access to capital, credit repair and building, networking, and business plans. [42]

Office of Minority and Women's Business Enterprises (OMWBE). The State of Washington OMWBE certifies MBEs and WBEs to engage in public contracts and procurements.[43]

Oregon Association of Minority Entrepreneurs (OAME). OAME is a member organization assisting minority-owned businesses in Oregon and Southwest Washington. The association provides its members with technical assistance, business counseling, Clearinghouse access, incubator office spaces at low rates and bi-monthly networking meetings. The organization also assists business with access to capital, either through direct microloans via its subsidiary, OAME Credit Corporation, or by assisting small businesses in identifying outside financing sources.[44]

Oregon Native American Business Network (ONABEN). ONABEN focuses on developing entrepreneurship and growing business capacity in Native and Indigenous communities. The organization assists business using its proprietary Indianpreneurship suite of products, which offers a curriculum designed specifically for Native American, Alaska Native, and Native Hawaiian entrepreneurs. ONABEN also assists businesses with program development, leadership capacity building, training and technical assistance and more.[45]

[40] See https://hmccoregon.com/business/

[41] https://nw.mercycorps.org/

[42] See https://www.mesopdx.org/

[43] See https://omwbe.wa.gov/

[44] See https://oame.org/

[45] See https://onaben.org/

K. Business Assistance Programs — State and local program examples

Portland Metro Chamber. This organization provides support to small businesses in Oregon and Southwest Washington. Offerings include business education and networking opportunities. [46]

SCORE Vancouver. This business assistance center guides startups and existing small businesses through free or low-cost services. Assistance includes mentorship, marketing, business plan preparation and accounting.[47]

South Columbia County Chamber of Commerce. An example of a local chamber of commerce in the Portland metro area, the South Columbia Chamber based in St. Helens, Oregon offers a variety of assistance to its members including resources for business growth and health, networking, and legislative advocacy for regional business vitality. [48]

Southwest Washington Contractors Association (SWCA). This organization offers advocacy and business assistance to SWCA members.[49] Resources include their Online Plan Center.[50]

Washington Small Business Credit Initiative. This program is an updated version of the Small Business Credit initiative. Through the U.S. Department of Treasury, the Washington State Department of Commerce received $163.4 million to promote and assist small and disadvantaged businesses through loans and equity investments. [51]

Washington Small Business Development Center (SBDC). The Washington SBDC assists small business owners in starting and growing their businesses. It is part of the national SBDC program and is governed by the U.S. Small Business Administration (SBA) and Washington State University. [52]

Washington State University Vancouver's (WSUV) Business Growth Mentor & Analysis Program (MAP). This program pairs Carson College of Business students to assist individual small businesses, under faculty supervision and volunteering mentors.[53]

Women Entrepreneurs Organization (WEO) of Clark County. WEO of Clark County assists local woman entrepreneurs through services such as networking and a mentorship program for female entrepreneurs. [54]

[46] See https://portlandmetrochamber.com/

[47] https://www.score.org/vancouver

[48] See https://sccchamber.org/

[49] See https://www.swca.org/

[50] See https://www.swca.org/online-plan-center/

[51] See https://www.commerce.wa.gov/growing-the-economy/business-loans/small-business-credit-initiative/

[52] See https://wsbdc.org/

[53] See https://business.vancouver.wsu.edu/bgmap

[54] https://www.weowomen.com/

HOLLAND & KNIGHT LLP

APPENDIX L

PRIVILEGED AND CONFIDENTIAL

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CITY OF VANCOUVER, WASHINGTON

REPORT ON LEGAL FRAMEWORK AND ANALYSIS

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APPENDIX L. Legal Framework and Analysis — Introduction

A. Introduction

In this Appendix, Holland & Knight LLP provides a summary of the legal framework for the study as applicable to the City of Vancouver, Washington.

The appendix reviews recent cases involving state and local minority and woman-owned business enterprise and disadvantaged-owned business enterprise ("MBE/WBE/DBE") programs, and social and economic disadvantaged business programs, which are instructive to the study.

The appendix also reviews recent cases, which are informative to the study and MBE/WBE/DBE programs, regarding social and economic disadvantaged business programs, the Federal Disadvantaged Business Enterprise ("Federal DBE") Program[1] and the implementation of the Federal DBE Program by local and state governments. The Federal DBE Program recently was continued and reauthorized by Congress in the Infrastructure Investment and Jobs Act of 2021, which reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs,[2] and contains certain types of findings and an evidentiary basis referenced in recent court decisions that are instructive to the study.

Appendix L begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.[3] *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study, including analyzing availability. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Pena*,[4] ("*Adarand I*"), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court's decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this study and analysis, social and economic disadvantaged business enterprise programs, the Federal DBE Program and Federal ACDBE Program (49 CFR Part 23 – Participation of Disadvantaged Business Enterprise in Airport Concessions) and their implementation by state and local

[1] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program"). See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"), and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107. The DBE Program was continued and reauthorized by the Fixing America's Surface Transportation Act (FAST Act: Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312). In October 2018, Congress passed the FAA Reauthorization Act (Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186). In November 2021, Congress passed the Infrastructure Investment and Jobs Act of 2021 (Pub. L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449).

[2] Pub. L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449.

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

[4] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

government recipients of federal funds, MBE/WBE/DBE programs, and strict scrutiny analysis.

In particular, this analysis reviews in Section D below recent decisions within the Ninth Circuit Court of Appeals that are instructive to the study, including the recent decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*[5], *Western States Paving Co. v. Washington State DOT,*[6] *Orion Insurance Group,* and *Ralph G. Taylor v. Washington State Office of Minority and Woman's Business Enterprises, United States DOT, et al.*,[7] *Mountain West Holding Co. v. Montana, Montana DOT, et al.*[8], and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*[9].

The significant 2005 decision in *Western States Paving v. Washington DOT, U.S. DOT and FHWA* set forth legal standards in the Ninth Circuit Court of Appeals for state and local governments (state DOTs in that case) to satisfy the strict scrutiny standard for determining whether there is a compelling governmental interest to have a narrowly tailored race and ethnic conscious DBE program in compliance with the Federal DBE Program, and for cases involving challenges to the Federal DBE Program and its implementation by state DOTs. As discussed in this Executive Summary and in the detailed analysis at Section D below, the *Western States Paving* decision resulted in a specific USDOT Official Guidance for states in the Ninth Circuit to follow. (*See* Section D below for a detailed summary of the decision.)

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

In addition, the analysis reviews in Section F below recent federal cases that have considered the validity of the Federal DBE Program and its implementation by local or state government agencies and the validity of local and state DBE programs, including: *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[10] *Dunnet Bay Construction Co. v. Illinois DOT,*[11] *Northern Contracting, Inc. v. Illinois DOT,*[12] *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads,*[13] *Geyer Signal, Inc. v. Minnesota*

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

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

[7] *Orion Insurance Group, Taylor v. WSOMWBE, U.S. DOT, et al.,* 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication and not precedent); Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

[8] *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication and not precedent) (9th Cir. May 16, 2017). The case on remand was voluntarily dismissed by stipulation of the parties (March 2018).

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

[10] *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al., 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).*

[11] *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT*, et. al. 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay,* 2015 WL 4934560 (7th Cir. 2015).

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

[13] *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (9th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

DOT,[14] *Thomas v. City of Saint Paul.*[15] *Adarand Constructors, Inc. v. Slater*[16] *("Adarand VII")*, *Geod Corporation v. New Jersey Transit Corporation,*[17] and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[18]

As stated above and shown in detail below in Sections D, E and F, these cases establish legal standards for satisfying the strict scrutiny test regarding whether there is the "compelling governmental interest" in a state or local government's marketplace to have a narrowly tailored race and ethnic conscious MBE/WBE/DBE program, that the MBE/WBE/DBE Program is "narrowly tailored," disparity studies, and the standard relevant to cases involving challenges to MBE/WBE/DBE Programs and their implementation by government authorities and state and local governments. Section G below reviews instructive cases involving challenges to federal government social and economic disadvantaged business and MBE/WBE/DBE type programs.

The analyses of these and other recent cases summarized below, including the Ninth Circuit decisions in Section D below, are instructive to the study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs, disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs. They also are pertinent in terms of analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of narrowly tailored local or state government MBE/WBE/DBE programs submitted in compliance with the case law.

As discussed above and in detail below in Section D, the *Western States Paving* decision is a leading case in the Ninth Circuit establishing legal standards for satisfying the strict scrutiny test regarding whether there is the compelling governmental interest in a local or state government's marketplace (state's transportation marketplace as the industry involved in that case) to have a narrowly tailored race and ethnic conscious MBE/WBE/DBE program. In *Western States Paving*, the Court focuses on the state governmental entity's compliance with the Federal DBE Program, whether the state DOT DBE Program was narrowly tailored and properly implemented the federal regulations at 49 CFR Part 26 and the Federal DBE Program, and the standard relevant to cases involving challenges to the Federal DBE Program and its implementation by state DOTs.

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.

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

[15] *Thomas v. City of Saint Paul. Thomas v. City of Saint Paul, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (9th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)].*

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

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

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

Western *States* Paving is thus instructive to this study because the Ninth Circuit applied the strict scrutiny standard in determining the constitutionality of a race and ethic conscious government program, which is similar to the analysis in determining whether a local government, like a school district, has a compelling governmental interest to have a narrowly tailored race and ethic conscious MBE/WBE/DBE program. Following *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states within the jurisdiction of the Ninth Circuit Court of Appeals, recommended the use of disparity studies by local or state 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 by local or state governments in developing their DBE Program to comply with the Federal DBE Program.[19]

The USDOT Guidance suggests consideration of both statistical and anecdotal evidence. The USDOT Guidance instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.[20] The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.[21] The USDOT's Guidance is recognized by the federal regulations as "valid, and express the official positions and views of the Department of Transportation"[22] 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."[23] 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.[24]

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, and found that Caltrans followed the standards set forth in the Western States Paving case. 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.[25] The

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

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

[21] *Id*.

[22] *Id.*, 49 CFR § 2B6.9; *See,* 49 CFR § 23.13.

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

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

[25] *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).

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.[26]

There have been other recent cases in the Ninth Circuit instructive for the study, which are discussed in Section D below, including most recently the following:

In *Braunstein v. Arizona DOT*[27], 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 2005 *Western States Paving Co. v. Washington State DOT*. This left only Braunstein's damages claims against the State and ADOT and against the named individual defendants in their individual capacities.

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."[28] 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.[29]

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[30]. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract.[31]

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.[32] Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE

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

[27] 683 F. 3d 1177 (9th Cir. 2012)

[28] *Id*. at 1183

[29] *Id*.

[30] *Id*. at 1185

[31] *Id*.

[32] *Id*. at 1186.

Program. Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work, which the Court found he did not do.[33]

In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*[34], the Ninth Circuit and the district court applied the decision in *Western States*[35], and the decision in *AGC, San Diego v. California DOT*[36], as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program.[37] The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry."[38] The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination."[39]

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'"[40] Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors."[41]

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

It is noteworthy that the Ninth Circuit in *Mountain West* stated in its Memorandum Opinion that the case is not appropriate for official publication and is not precedent. The Memorandum order expressly provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3." Thus, the decision may not be cited as binding precedential authority in the Ninth Circuit.

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[33] *Id*.

[34] 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication and not precedent), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

[35] 407 F.3d 983 (9th Cir. 2005)

[36] 713 F.3d 1187 (9th Cir. 2013)

[37] 2014 WL 6686734 at *2 (D. Mont. 2014)

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

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

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

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

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The District Court decision in the Ninth Circuit in *Montana, M.K. Weeden*[42], 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.

In addition, another recent case in the Ninth Circuit is *Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al.*[43] Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, alleged violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

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

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

The District court held OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because there was insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

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

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

On appeal, the Ninth Circuit in affirming the District court held it correctly dismissed Taylor's claims against Acting Director of the USDOT's Office of Civil Rights, in her individual capacity, Taylor's discrimination claims under 42 U.S.C. §1983 because the federal

[42] *M.K. Weeden*, 2013 WL 4774517.

[43] 2018 WL 6695345 (9th Cir. December 19, 2018) (Memorandum)(Not for Publication).

defendants did not act "under color or state law," Taylor's claims for damages because the United States has not waived its sovereign immunity, and Taylor's claims for equitable relief under 42 U.S.C. §2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

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

It is noteworthy that the Ninth Circuit in *Orion* stated in its Memorandum decision that the case is not appropriate for official publication and is not precedent. Thus, the case may not be cited as controlling precedential authority in the Ninth Circuit.

Also, recently in other jurisdictions the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,[44] and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*[45], upheld the implementation of the Federal DBE Program by the Illinois DOT.[46] The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.[47] 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.[48]

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program[49], and the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-woman-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence[50]. Congress recently passed legislation in November 2021, which was signed by the President, (H.R. 3684 - 117th Congress, Section 11101, Infrastructure Investment and Jobs Act of 2021)[51] that again reauthorized the Federal DBE Program and its implementation by local and state governments based on evidence and findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs. It also is instructive that recently there were Congressional findings as to discrimination regarding

[44] 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

[45] 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

[46] 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

[47] *Id*.

[48] 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016)

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

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

[51] Pub. L. 117-58; H.R. 3684 – 117th Congress (2021), § 11101(e), November 15, 2021, 135 Stat 443-449.

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MBE/WBE/DBEs relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program.[52]

It is noteworthy and instructive to the study that the U.S. Department of Justice in January 2022 recently issued a report: "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence." This report "summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs." The "Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs" is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This notice announces the availability on the Department of Justice's website of the "updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs." The report is available on the Department of Justice's website at: https://www.justice.gov/crt/page/file/1463921/download.

In addition, the appendix reviews pending cases and certain recent decisions of interest in the courts at the time of this report involving challenges to MBE/WBE/DBE type programs that are instructive to the study, and key recent orders from cases that are informative to the study.

[52] 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

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.[53] 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."[54] 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.[55] The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.[56]

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.[57] 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

[53] 488 U.S. 469 (1989).

[54] 488 U.S. at 500, 510.

[55] 488 U.S. at 480, 505.

[56] 488 U.S. at 507-510.

[57] 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

of individuals who possess the necessary qualifications) may have little probative value." [58]

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 MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[59] "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." [60]

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."[61] 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." [62]

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."[63] "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."[64]

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."[65]

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

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

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

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[58] 488 U.S. at 501 *quoting Hazelwood,* 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

[59] 488 U.S. at 502.

[60] *Id*.

[61] 488 U.S. at 509.

[62] *Id*.

[63] 488 U.S. at 509.

[64] *Id*.

[65] 488 U.S. at 492.

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

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local MBE/WBE/DBE programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program, and its implementation by state and local programs, are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs and an analysis of disparity studies.

1. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to strict scrutiny constitutional analysis.[66] The implementation of the Federal DBE Program by state and local governments and recipients of federal funds also are subject to and must follow the strict scrutiny analysis if they utilize race- and ethnicity-based measures. [67]

The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.[68]

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.[69] 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.[70] Rather, state and local governments must measure discrimination in their state or local

[66] *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); *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; *see, e.g. H. B. Rowe*, 615.3d 233, 241-242 (4th Cir. 2010); *Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II")*, 214 F.3d 730 (6th Cir. 2000); *Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I"),* 6 F.3d 990 (3d Cir. 1993).

[67] *Adarand I*, 515 U.S. 200, 227 (1995); *Mountain West Holding,* 2017 WL 2179120*; Midwest Fence,* 840 F.3d 930; *Dunnet Bay,* 799 F.3d 676; *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; *M.K. Weeden Construction,* 2013 WL 4774517; *South Florida,* 544 F.Supp. 2d 1336; *Geod Corp.,* 746 F.Supp. 2d 642.

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

[69] *Id.*

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

market. However, that is not necessarily confined by the jurisdiction's boundaries.[71]

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.[72] 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).[73]

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, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[74] 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).[75]

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

[72] *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.

[73] *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.

[74] *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; *Geyer Signal, Inc., 2014* WL 1309092.

[75] *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.

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.[76]

- **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.[77]

- **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.[78]

- **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.[79]

- **Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In November 2021, October 2018, December 2015 and in July 2012, Congress passed the Infrastructure Investment and Jobs Act or 2021, the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in "federally-assisted surface transportation markets," in airport-related markets, and that the continuing barriers "merit the continuation" of the Federal DBE Program and the Federal

[76] *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.

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

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

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

> ACDBE Program.[80] Congress also found in the Infrastructure Investment and Jobs Act of 2021, the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal ACDBE Program and the Federal DBE Program.[81]

And, as stated above, the U.S. Department of Justice in January 2022 issued a report entitled: "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence," which "summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs."[82] This "updated report" by the U.S. DOJ, is issued "regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs."[83]

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race-ethnic- 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.[84] If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[85] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[86]

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow

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[80] Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

[81] *Id*. at Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94. H.R. 22, § 1101(b)(1) (2015).

[82] Vol. 87 Fed. Reg. 4955, January 31, 2022; located at https://www.justice.gov/crt/page/file/1463921/download.

[83] Id; see https://www.justice.gov/crt/page/file/1463921/download.

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

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

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

tailoring.[87] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[88] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[89]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[90] "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.'"[91] Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[92]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[93] 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.[94] Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE, ACDBE or MBE/WBE Program to

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

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

[89] *Croson*, 488 U.S. at 500; *see e.g., Midwest Fence, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia,* 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc., 2014* WL 1309092.

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

[91] *See, e.g., Midwest Fence,* 840 F.3d 932 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187 (9th Cir. 2013); *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed* 840 F.3d 932 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 973 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993).

[92] *Croson*, 488 U.S. at 509*; see, e.g., AGC, SDC v. Caltrans*, 713 R.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932 (7th Cir. 2016); *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993).

[93] *Adarand Constructors, Inc. v. Pena*, ("*Adarand III*"), 515 U.S. 200 at 235 (1995); *See, e.g.*, *Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993).

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

demonstrate the unconstitutionality of an affirmative-action type program.[95]

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.[96] 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.[97] Conjecture and unsupported criticisms of the government's methodology are insufficient.[98] 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.[99]

The courts have stated that "it is insufficient to show that 'data was susceptible to multiple interpretations,' instead, plaintiffs must 'present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.'"[100] The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers "both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself."[101]

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.'"[102] 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

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[95] *Id.; Adarand VII*, 228 F.3d at 1166.

[96] *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)); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 W.L. 1396376 at *7, *affirmed,* 840 F.3d 932 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc., 2014* WL 1309092.

[97] *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)); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 WL 1396376 at *7, *affirmed,* 840 F.3d 932 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc., 2014* WL 1309092; *see generally*, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

[98] *See e.g., H.B. Rowe v. North Carolina DOT* 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater,* 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 WL 1396376 at *7, *affirmed,* 840 F.3d 932 (7th Cir. 2016); *see also, Midwest Fence,* 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Kossman Contracting Co., Inc. v. City of Houston,* 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc., 2014* WL 1309092.

[99] *Midwest Fence,* 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, at 242; *see Concrete Works,* 321 F.3d at 991; *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Kossman Contracting Co., Inc. v. City of Houston,* 2016 W.L. 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc., 2014* WL 1309092.

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

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

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

action is necessary.[103] 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.[104] 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.[105]

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact."[106]. In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination."[107].

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.[108]

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a state DOT or recipient of USDOT funds complying with the Federal DBE Program or ACDBE Program, to prove narrow tailoring by the state DOT or recipient implementing the Federal DBE Program or ACDBE Program at the state

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

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

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

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

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

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

DOT or recipient level.[109] "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."[110]

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.[111] The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and woman-owned firms may raise an inference of discriminatory exclusion.[112] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[113]

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE (and ACDBE) availability measures the relative number of MBE/WBEs and DBEs (and ACDBEs) among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.[114] There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,[115] "An analysis is not devoid of probative value simply because it may

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

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

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

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

[113] *Western States Paving*, 407 F.3d at 1001.

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

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

theoretically be possible to adopt a more refined approach."[116]

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[117]

- **Disparity index.** An important component of statistical evidence is the "disparity index."[118] 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."[119]

- **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.[120]

In terms of statistical evidence, Courts have held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence," but rather it may rely on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors[121].

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.[122] The court rejected the district court's "erroneous" legal conclusion that a

[116] *Id*.

[117] *See, e.g., Midwest Fence,* 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

[118] *See, e.g., Midwest Fence,* 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

[119] *See*, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence,* 840 F.3d 932, 950 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191; *H.B. Rowe Co.,* 615 F.3d 233, 243-245; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

[120] *See, e.g., H.B. Rowe Co. v. NCDOT,* 615 F.3d 233, 243-245; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct.; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp*., 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

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

[122] 321 F.3d at 973.

municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson.*[123] 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."[124] 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."[125]

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.[126] Thus, the local government was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden.[127]

Additionally, the court had previously concluded that the local government's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination.[128] Thus, the court held the local government's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.[129]

The court held the district court, *inter alia,* erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.[130] 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.[131]

Consistent with the court's mandate in *Concrete Works II,* the local government attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business."[132] The Tenth Circuit ruled that the local government can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.[133]

The court in *Concrete Works* rejected the argument that the lending discrimination studies, and business formation studies presented by the local government were irrelevant. In *Adarand VII,* the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between

[123] *Id.*

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

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

[126] *Id.* at 973.

[127] *Id.*

[128] *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529.

[129] *Id.*

[130] *Id.* at 974.

[131] *Id., citing Adarand VII*, 228 F.3d at 1166-67.

[132] *Id.*

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

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."[134]

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.[135]

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.[136]

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.[137] But, the courts point out, including the Ninth Circuit, that personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[138] It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."[139]

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE (and ACDBE) owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE (and ACDBE) owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or

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

[135] *Id.* at 977.

[136] *Id.* at 979, *quoting Adarand VII*, 228 F.3d at 1174.

[137] *See, e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n,* 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

[138] *See*, *e.g.*, *Midwest Fence,* 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe,* 615 F.3d 233, 248-249; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *see also, Kossman Contracting Co., Inc. v. City of Houston,* 2016 WL 1104363 (S.D. Tex. 2016).

[139] *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County,* 941 F.2d 910, 919 (9th Cir. 1991).

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 (and ACDBEs) on non-goal projects; and

- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.[140]

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.[141]

b. The narrow tailoring requirement.

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be "narrowly tailored" to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Ninth Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;

- The flexibility and duration of the relief, including the availability of waiver provisions;

- 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.[142]

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study and similar to MBE/WBE programs, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

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[140] *See*, *e.g.*, *AGC, SDC v. Caltrans,* 713 F.3d at 1197-1198; *H. B. Rowe,* 615 F.3d 233, 241-242, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76; *see also, Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1002-1003 (3d Cir. 1993). For additional examples of anecdotal evidence, *see Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic,* 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

[141] *See*, *e.g.*, *AGC, SDC v. Caltrans,* 713 F.3d at 1197; *H. B. Rowe,* 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

[142] *See*, *e.g.*, *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe,* 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 605-610 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1008-1009 (3d. Cir. 1993); *see also*, *Geyer Signal, Inc.*, 2014 WL 1309092.

- 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.[143]

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."[144]

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District* also found that race- and ethnicity-based measures should be employed as a last resort. "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives ….'"[145]

The "narrowly tailored" analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs, or in connection with determining appropriate remedial measures to achieve legislative objectives.

The second prong of the strict scrutiny analysis, as discussed above, similar to MBE/WBE programs, requires the implementation of the Federal DBE Program by state and local governments and recipients of federal funds be "narrowly tailored" to remedy identified discrimination in the particular state or local government or recipient's transportation contracting and procurement market.[146]

In *Western States Paving*, the Ninth Circuit held the state DOT or recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.[147] Thus, the Ninth Circuit held in *Western States Paving* that mere

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[143] *See, e.g., Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; *see also Geyer Signal, Inc.*, 2014 WL 1309092.

[144] *Eng'g Contractors Ass'n*, 122 F.3d at 926 (internal citations omitted); *see also Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff'd per curiam* 218 F.3d 1267 (11th Cir. 2000).

[145] 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).

[146] *AGC, SDC v. Caltrans,* 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; *see, e.g., Midwest Fence,* 840 F.3d 932, 949-953.

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

compliance with the Federal DBE Program does not satisfy strict scrutiny.[148]

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.[149]

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.[150] 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.[151]

In holding the Federal DBE regulations were narrowly tailored, the Eighth Circuit stated those regulations "place strong emphasis on 'the use of race-neutral means to increase minority business participation in government contracting'." [152]

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."[153]

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

[148] *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.

[149] 407 F.3d at 996-1000; *See AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

[150] *See*, *e.g.*, *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans, 713 F.3d at 1199*; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n,* 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr*., 941 F.2d at 923.

[151] *See, Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Virdi*, 2005 WL 13892 (11th Cir. 2005); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n,* 6 F.3d at 1008-1009 (3d. Cir. 1993).

[152] *Sherbrooke Turf, Inc*., 345 F. 3d at 972, *quoting Adarand Constrs., Inc.*, 515 U.S. at 237-38.

[153] *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co*., 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *see also Adarand I*, 515 U.S. at 237-38.

limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"[154]

As noted above the majority opinion by the Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[155] 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."[156] The Court found that the District failed to show it seriously considered race-neutral measures.

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."[157]

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

[154] *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

[155] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

[156] 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).

[157] *Croson*, 488 U.S. at 509-510.

- Streamlining and improving the accessibility of contracts to increase small business participation.[158]

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. [159]

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. For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[160] (2) good faith efforts provisions;[161] (3) waiver provisions;[162](4) a rational basis for goals;[163](5) graduation provisions;[164] (6) remedies only for groups for which there were findings of discrimination;[165] (7) sunset provisions;[166] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[167]

Several federal court decisions have upheld the Federal DBE Program and its implementation by state and local governments and recipients of federal funds, including satisfying the narrow tailoring factors.[168]

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[158] S*ee*, *e.g.*, *Croson*, 488 U.S. at 509-510; *H. B. Rowe,* 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); *see also, Eng'g Contractors Ass'n*, 122 F.3d at 927-29; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

[159] *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, c*iting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng'g Contractors Ass'n*, 122 F.3d at 927.

[160] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* ("AGC of Ca."), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

[161] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP* I, 6 F.3d at 1019; *Cone Corp*., 908 F.2d at 917.

[162] *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; AGC of Ca., 950 F.2d at 1417; *Cone Corp*., 908 F.2d at 917; *see, e.g., Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

[163] *Id; Sherbrooke Turf,* 345 F.3d at 971-973; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

[164] *Id*.

[165] *See, e.g*., *AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca*., 950 F.2d at 1417; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d at 593-594, 605-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I),* 6 F.3d at 1009, 1012 (3d. Cir. 1993); *Kossman Contracting Co., Inc., v. City of Houston,* 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf,* 2001 WL 150284 (unpublished opinion), aff'd 345 F.3d 964.

[166] *See, e.g., H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf,* 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559;. *see also, Kossman Contracting Co., Inc. v. City of Houston,* 2016 WL 1104363 (W.D. Tex. 2016).

[167] *Coral Constr*., 941 F.2d at 925.

[168] *See, e.g., Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.,* 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.,* 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al*., 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of*

2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, and the state of Washington, apply intermediate scrutiny to gender-conscious programs.[169]

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both "sufficient probative" evidence or "exceedingly persuasive justification" in support of the stated rationale for the program; and

2. Substantially related to the achievement of that underlying objective.[170]

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.[171]

Intermediate scrutiny, as interpreted by the federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the

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Montana, Montana DOT, et al., 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT,* 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"); *Dunnet Bay Construction Co. v. Illinois DOT*, et. al. 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay,* 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.,* 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida,* 544 F. Supp.2d 1336 (S.D. Fla. 2008).

[169] *See e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195 (9th Cir. 2013); *H. B. Rowe,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnat*i, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n,* 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *Geyer Signal, Inc., 2014* WL 1309092; *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. Coria*, 839 P.2d 890 (S.Ct. Wash.1992); *State v. Carter*, 823 P.2d 523 (Ct. App. Wash. 1992).

[170] *See e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. Coria*, 839 P.2d 890 (S.Ct. Wash.1992); *State v. Carter*, 823 P.2d 523 (Ct. App. Wash. 1992).

[171] *Id*. The Seventh Circuit Court of Appeals, however, in *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender-based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

objective.[172] 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.[173]

Certain courts have 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."[174]

The Tenth Circuit in *Concrete Works,* stated with regard evidence as to woman-owned business enterprises as follows:

> "We do not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. *See* Contractors Ass'n, 6 F.3d at 1009–11 (reviewing case law and noting that "it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary"). Nevertheless, Denver's data indicates significant WBE underutilization such that the Ordinance's gender classification arises from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." Mississippi Univ. of Women, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school)."

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[175]

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit."[176] The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against woman-owned contractors.[177] The Court in *Contractors Ass'n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in

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[172] *See e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006) (We apply **intermediate scrutiny** if the individual is a member of a "semisuspect" class or the state action threatens "important" rights); *State v. Coria*, 839 P.2d 890 (S.Ct. Wash.1992); *State v. Carter*, 823 P.2d 523 (Ct. App. Wash. 1992).

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

[174] 122 F.3d at 929 (internal citations omitted.)

[175] 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

[176] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

[177] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.[178]

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding woman-owned construction businesses were insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for woman-owned construction businesses in City contracting, such as that presented for minority-owned businesses.[179] Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.[180] But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.[181] The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.[182] This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.[183] When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.[184]

Courts in applying the rational basis test generally find that a challenged law is upheld "as long as there could be some rational basis for enacting [it]," that is, that "the law in question is rationally related to a legitimate

[178] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

[179] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); s*ee also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *see, Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[184] *See, Heller v. Doe*, 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass'n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *see, e.g. Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

government purpose."[185] As long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.[186]

"[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."[187] Moreover, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality."[188]

Under a rational basis review standard, a legislative classification will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[189] Because all legislation classifies its objects, differential treatment is justified by "any reasonably conceivable state of facts."[190]

Under the federal standard of review a court will presume the "legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest."[191]

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[185] *See, e.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *see, e.g., Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[186] *Id.; Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (*citing FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *see, e.g., Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[187] *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 189 (2012) (*citing Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted) *see, e.g, Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[188] *Heller v. Doe*, 509 U.S. 312, 321 (1993) *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *see, e.g., Redlich v. City of St. Louis,* 550 F.Supp.3d 734 (E.D. Mo. 2021); *Missouri National Education Association v. Missouri,* 623 S.W.3d 585 (Mo. banc 2021); *Glossip v. Missouri Dept. of Transp. and Highway Patrol***,** 411 S.W.3d 796 (Mo. banc 2013).

[189] *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see, e.g., Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012) *see, e.g., Thornock v. Lambo***,** 468 P.3d 1074 (Ct. App. Wash. 2020); *State v. Osman*, 139 P.3d 334 (S.Ct Wash. 2006); *State v. McClinton,* 448 P.3d 101 (Ct. App. Wash. 2019*); State v. Manussier,* 921 P.2d 473 (S.Ct. Wash. 1996*).*

[190] *Id.*

[191] *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *see also Lawrence v.*

A fairly recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations ("FAR").[192]

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration ("TSA") issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: "Government anticipates an overall Small Business goal of 40 percent," and that "[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent."[193]

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.[194] The court stated it "cannot say that the agency's approach is clearly unlawful, or that the approach lacks a rational basis."[195]

The court found that "an agency may rationally establish aspirational small business subcontracting goals for prospective offerors …." Consequently, the Court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovate ways to structure and maximize small business subcontracting within their proposals.[196] The court, in an exercise of judicial restraint, found the "40 percent goal is a rational expression of the Government's policy of affording small business concerns…the maximum practicable opportunity to participate as subcontractors …."[197]

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

There are pending cases and certain recent decisions of interest in the federal and state courts at the time of this report involving challenges to MBE/WBE/DBE type programs and that may potentially impact and be instructive to the study, and key recent orders from cases that are informative to the study, including the following:

(i) ***Christian Bruckner et al. v. Joseph R. Biden Jr*****. et al.,** U.S. District Court for the Middle District of Florida, 2023 U.S. Dist. LEXIS 57189 (March 31, 2023), Case No. 8:22-cv-01582.

Texas, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster." (internal citations and quotations omitted)) (O'Connor, J., concurring); *Gallagher v. City of Clayton,* 699 F.3d 1013, 1019 (8th Cir. 2012) ("Under rational basis review, the classification must only be rationally related to a legitimate government interest.").

[192] 2012 WL 5939228 (Fed. Cl. 2012).

[193] *Id*.

[194] *Id*.

[195] *Id*.

[196] *Id*.

[197] *Id*.

(ii) Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration, 2021 WL 2172181 (6th Cir. May 27, 2021).

(iii) *Faust v. Vilsack*, 2021 WL 2409729, US District Court, E.D. Wisconsin (E.D. Wis. June 10, 2021).

(iv) *Wynn v. Vilsack*, 2021 WL 2580678, (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court for the Middle District of Fla.

(v) *Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration*, et. al., U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.

(vi) *Nuziard, et al. v. MBDA, et al*., 2023 WL 3869323 (N.D. Tex. June 5, 2023), U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278. Complaint filed March 20, 2023.

The following summarizes the above listed pending cases and informative recent decisions**:**

(i) ***Christian Bruckner et al. v. Joseph R. Biden Jr. et al*.,** U.S. District Court for the Middle District of Florida, 2023 U.S. Dist. LEXIS 57189 (March 31, 2023), Case No. 8:22-cv-01582; filed July 13, 2022.

The Complaint filed on July 13, 2022, alleges that on November 15, 2021, President Biden signed into law the "Infrastructure Investment and Jobs Act," a $1.2 trillion spending bill to improve America's infrastructure. As part of this bill, the Complaint alleges Congress authorized $370 billion in new spending for roads, bridges, and other surface transportation projects. The Complaint asserts that Congress also implemented a set aside, or quota, requiring that at least 10% of these funds be reserved for certain "disadvantaged" small businesses. According to the White House, the Complaint alleges, the law reserves more than $37 billion in contracts to be awarded to "small, disadvantaged business contractors."

The Complaint asserts that the Plaintiff Bruckner cannot benefit from the program and compete for the projects because of his race and gender, that the $37 billion fund is reserved for small businesses owned by certain minorities and women, and that Bruckner is a white male.

The Complaint alleges the Infrastructure Act sets an unlawful quota based on race and gender because at least 10% of all contracts for certain infrastructure projects must be awarded based on race and gender, that this quota is unconstitutional, that Defendants have no justification for the Act's $37 billion race-and-gender quota, and therefore the court should declare this alleged quota unconstitutional and enjoin its enforcement, "just as other courts have similarly enjoined other race-and-gender-based preferences in the American Rescue against $28.6 billion Restaurant Revitalization Fund priority period); Faust v. Vilsack, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (injunction against $4 billion Farmer Loan Forgiveness program Plan Act. E.g., Vitolo v. Guzman, 999 F.3d 353 (6th Cir. 2021) (injunction)."

The Complaint alleges that Congress attempted to justify these race-and-gender classifications through findings of "race and gender discrimination" in the Infrastructure Act, "but none of these findings establish that Congress is attempting to remedy a specific and recent episode of intentional discrimination that it had a hand in." The Complaint alleges that "because he is a white male, Plaintiff Bruckner and his business, PMC, cannot compete on an equal footing for contracts under the Infrastructure Act with businesses that are owned by women and certain racial minorities preferred by federal law."

The Complaint alleges that the racial classifications under Section 11101(e)(2) & (3) of the Infrastructure Act are unconstitutional because

they violate the equal protection guarantee in the United States Constitution, and that these racial classifications in the Infrastructure Act are not narrowly tailored to serve a compelling government interest. The Complaint alleges that the gender-based classification under Sections 11101(e)(2) & (3) of the Infrastructure Act is unconstitutional because it violates the equal protection guarantee in the United States Constitution. The Complaint asserts this gender-based classification is not supported by an exceedingly persuasive objective, and the discriminatory means employed are not substantially related to the achievement of that objective.

The Complaint requests the court:

A. Enter a preliminary injunction removing all unconstitutional race and gender-based classification in Section 11101(e)(3) of the Infrastructure Act;

B. Enter a declaratory judgment that the race and gender-based classifications under Section 11101(e)(3) of the Infrastructure Act are unconstitutional; and

C. Enter an order permanently enjoining Defendants from applying race and gender-based classifications when awarding contracts under Section 11101(e)(3) of the Infrastructure Act.

The Plaintiffs filed in July 2022 an Amended Motion for Preliminary Injunction, which is pending. The federal Defendants filed a Reply in Opposition to the Motion for Preliminary Injunction on August 29, 2022. On September 27, 2022, the federal Defendants filed a Motion to Dismiss the Complaint.

November 21, 2022 Order regarding the Federal DBE Program. The court issued an Order on November 21, 2022, requesting the parties to address certain listed questions describing the administration and implementation process of the Federal DBE Program. In particular, the court requested the parties submit supplemental briefing describing the authorization of funds by Congress and explain how state and local recipients award federally funded contracts.

The court ordered the Plaintiffs may clarify whether the complaint challenges the Federal DBE Program as it applies to direct contracting with the federal government. And, the court ordered the Defendants may file a statement certifying whether there are localities or federal agencies receiving funding from the Infrastructure Act that have set a DBE goal of 0%.

The parties responded on December 2, 2022. Bruckner filed a statement asserting that his complaint "challenges a single sentence in federal law: Section 11101(e)(3) of the Infrastructure Investment and Jobs Act, P.L. 117-58" and that his "requested remedy is therefore narrow and precise: an injunction preventing Defendants from enforcing and implementing this one sentence." Plaintiffs' Verified Complaint only challenges Section 11101(e)(3), which contains a $37 billion race-and-gender preference.

The Defendants submitted a supplemental briefing describing the administration and implementation process of the Federal DBE Program, and filed Declarations of DOT personnel attesting to the goals implemented by recipients. The Defendants also addressed: (a) how the DOT calculates and assesses whether recipients are fulfilling their DBE goals; (b) whether a recipient's DBE goal influences the amount of federal funds awarded under the Act; (c) the race neutral means used by recipients that employ only neutral means to award contracts; (d) whether recipients and prime contractors are aware of a bidder's DBE status when determining whether to award a contract where a

jurisdiction exclusively uses neutral means; (e) whether a subcontractor knows before bidding if the recipient or prime contractor is employing race and gender conscious or neutral means to award subcontracts; and (f) the certification process.

March 31, 2023 Order. The district court on March 31, 2023 issued an Order that granted the Federal Defendants' Motion to Dismiss and denied the Plaintiffs' Motion for Preliminary Injunction without prejudice. Judgment was issued in favor of Defendants by the court on April 3, 2023.

Lack of standing. The court held that although the Plaintiffs "raise compelling merits arguments" based on the preliminary-injunction-stage record, they fail to demonstrate an injury-in-fact to satisfy Article III standing. The court found that some recipients of the Infrastructure Act's Funds do not employ race- and gender-conscious means when awarding contracts. Others, the court noted, employ discriminatory means only with respect to some contracts. Because the Plaintiffs do not identify which contracts they intend to bid on, the court held that Plaintiffs' alleged harm is speculative and they fail to allege facts demonstrating a "certainly impending" "direct exposure to unequal treatment.

In this case, because States and localities sometimes award contracts without considering the contractor's race or gender, the court said that Plaintiffs fail to allege an injury in fact. The court stated that a party does not suffer an injury if he is only ready and able to bid on contracts that do not use discriminatory means. And because the Plaintiffs fail to demonstrate that they are ready and able to bid on an identified contract, or set of contracts, that use discriminatory means, the court found they only allege the possibility of future harm, not an actual or imminent one, which will not suffice for purposes of Article III standing. By refusing to identify which contracts that discriminate based on race and gender that Bruckner and PMC are ready and able to compete for, the court found that Plaintiffs fail to allege facts demonstrating that they will be denied equal treatment.

Conclusion. The court concluded that because the Plaintiffs fail to allege facts clearly demonstrating that they are able and ready to compete in a discriminatory scheme, the Plaintiffs fail to demonstrate standing. Accordingly, the court held Defendants' motion to dismiss is Granted, and the action is Dismissed without prejudice. The court then held that Plaintiffs' motion for a preliminary injunction is denied as moot.

(ii) ***Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021)**, on appeal to Sixth Circuit Court of Appeals from decision by United States District Court, E.D. Tennessee, Northern Division, 2021 WL 2003552, which District Court issued an Order denying plaintiffs' motion for temporary restraining order on 5/19/21, and Order denying plaintiffs' motion for preliminary injunction on 5/25/21. The appeal was filed in Sixth Circuit Court of Appeals on May 20, 2021. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021).

Background and District Court Memorandum Opinion and Order. On March 27, 2020, § 1102 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") created the Paycheck Protection Program ("PPP"), a $349 billion federally guaranteed loan program for businesses distressed by the pandemic. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act appropriated an additional $310 billion to the fund.

The district court in this case said that PPP loans were not administered equally to all kinds of businesses, however. Congressional investigation revealed that minority-owned and woman-owned businesses had more difficulty accessing PPP funds relative to other kinds of business (analysis noting that Black-owned businesses were more likely to be denied PPP loans than white-owned businesses with similar application profiles due to outright lending discrimination, and that funds were more quickly disbursed to businesses in predominantly white neighborhoods). The court stated from the testimony to Congress that this was due in significant part to the lack of historical relationships between commercial lenders and minority-owned and woman-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and woman-owned businesses tended to be in more financially precarious situations entering the pandemic, rendering them less able to weather an extended economic contraction of the sort COVID-19 unleashed.

Against this backdrop, on March 11, 2021, the President signed the American Rescue Plan Act of 2021 (the "ARPA"). H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated $28,600,000,000 to a "Restaurant Revitalization Fund" and tasked the Administrator of the Small Business Administration with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. See *Id*. § 5003. Under the ARPA, the Administrator "shall award grants to eligible entities in the order in which applications are received by the Administrator," except that during the initial 21-day period in which the grants are awarded, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

On April 27, 2021, the Small Business Administration announced that it would open the application period for the Restaurant Revitalization Fund on May 3, 2021. The Small Business Administration announcement also stated, consistent with the ARPA, that "[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals."

Antonio Vitolo is a white male who owns and operates Jake's Bar and Grill, LLC in Harriman, Tennessee. Vitolo applied for a grant from the Restaurant Revitalization Fund through the Small Business Administration on May 3, 2021, the first day of the application period. The Small Business Administration emailed Vitolo and notified him that "[a]pplicants who have submitted a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days."

On May 12, 2021, Vitolo and Jake's Bar and Grill, LLC initiated the present action against Defendant Isabella Casillas Guzman, the Administrator of the Small Business Administration. In their complaint, Vitolo and Jake's Bar and Grill assert that the ARPA's twenty-one-day priority period violates the United States Constitution's equal protection clause and due process clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Based on allegations in the complaint and averments made in Vitolo's sworn declaration dated May 11, 2021, Vitolo and Jake's Bar and Grill request that the Court enter: (1) a temporary restraining order prohibiting the Small Business Administration from paying out grants from the Restaurant Revitalization Fund, unless it processes applications in the order they were received without regard to the race or gender of the applicant; (2) a temporary injunction requiring the Small Business Administration to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under § 5003 of the ARPA are unconstitutional; and (4) an order permanently enjoining the Small

Business Administration from applying race- and gender-based classifications in determining eligibility and priority for grants under § 5003 of the ARPA.

Strict scrutiny. The parties agreed that this system is subject to strict scrutiny. Accordingly, the district court found that whether Plaintiffs are likely to succeed on the merits of their race-based equal-protection claims turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. Here, the Government asserts that it has a compelling interest in "remedying the effect of past or present racial discrimination" as related to the formation and stability of minority-owned businesses.

Compelling interest found by District Court. The court found that over the past year, Congress has gathered myriad evidence suggesting that small businesses owned by minorities (including restaurants, which have a disproportionately high rate of minority ownership) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the Government's early attempts at general economic stimulus—i.e., the Paycheck Protection Program ("PPP") — disproportionately failed to help those businesses directly because of historical discrimination patterns. To the extent that Plaintiffs argue that evidence racial disparity or disparate impact alone is not enough to support a compelling government interest, the court noted Congress also heard evidence that racial bias plays a direct role in these disparities.

At this preliminary stage, the court found that the Government has a compelling interest in remediating past racial discrimination against minority-owned restaurants through § 5003 the ARPA and in ensuring public relief funds are not perpetuating the legacy of that discrimination. At the very least, the court stated Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

The court cited the Supreme Court decision in *Croson*, 488 U.S. at 492 ("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."); and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000)("The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied."); *DynaLantic Corp v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 258–262 (D.D.C. 2012)(rejecting facial challenge to the Small Business Administration's 8(a) program in part because "the government [had] presented significant evidence on race-based denial of access to capital and credit").

The court said that the PPP—a government-sponsored COVID-19 relief program—was stymied in reaching minority-owned businesses because historical patterns of discrimination are reflected in the present lack of relationships between minority-owned businesses and banks. This, according to the court, caused minority-owned businesses to enter the pandemic with more financial precarity, and therefore to falter at disproportionately higher rates as the pandemic has unfolded. The court found that Congress has a compelling interest in remediating the present effects of historical discrimination on these minority-owned businesses, especially to the extent that the PPP disproportionately failed those businesses because of factors clearly related to that history. Plaintiff, the court held, has not rebutted this initial showing of a compelling interest, and therefore has not shown a likelihood of success on the merits in this respect.

Narrow Tailoring found by District Court. The court then addressed the "narrow tailoring" requirement under the strict scrutiny analysis, concluding that: "Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'"

Section 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by women and socially and economically disadvantaged individuals because Congress, the court concluded, had evidence before it showing that those businesses were inadequately protected by earlier COVID-19 financial relief programs. While individuals from certain racial minorities are rebuttably presumed to be "socially and economically disadvantaged" for purposes of § 5003, the court found Defendant correctly points out that the presumption does not exclude individuals like Vitolo from being prioritized, and that the prioritization does not mean individuals like Vitolo cannot receive relief under this program. Section 5003 is therefore time-limited, fund-limited, not absolutely constrained by race during the priority period, and not constrained to the priority period.

And while Plaintiffs asserted during the TRO hearing that the SBA is using race as an absolute basis for identifying "socially and economically disadvantaged" individuals, the court pointed out that assertion relies essentially on speculation rather than competent evidence about the SBA's processing system. The court therefore held it cannot conclude on the record before it that Plaintiffs are likely to show that Defendant's implementation of § 5003 is not narrowly tailored to the compelling interest at hand.

In support of Plaintiffs' motion, they argue that the priority period is not narrowly tailored to achieving a compelling interest because it does not address "any alleged inequities or past discrimination." However, the court said it has already addressed the inequities that were present in the past relief programs. At the hearing, Plaintiffs argued that a better alternative would have been to prioritize applicants who did not receive PPP funds or applicants who had "a weaker income statement" or "a weaker balance sheet." But, the court noted, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," only "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest. The Government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.

Accordingly, the court stated the race-neutral approach that the Government found to be tainted did not further its compelling interest in ensuring that public funds were not disbursed in a manner that perpetuated racial discrimination. The court found the Government not only considered but actually used race-neutral alternatives during prior COVID-19 relief attempts. It was precisely the failure of those race-neutral programs to reach all small businesses equitably, that the court said appears to have motivated the priority period at issue here.

Plaintiffs argued that the priority period is simultaneously overinclusive and underinclusive based on the racial, ethnic, and cultural groups that are presumed to be "socially disadvantaged." However, the court stated the race-based presumption is just that: a presumption. Counsel for the Government explained at the hearing, consistent with other evidence before the court, that any individual who felt they met § 5003's broader definition of "socially and economically disadvantaged" was free to check that box on the application. ("[E]ssentially all that needs to be done is that you need to self-certify that you fit within that standard on the application, ... you check that box"). For the sake of prioritization, the court noted there is no distinction between those who were presumptively disadvantaged and those who self-certified as such.

Accordingly, the court found the priority period is not underinclusive in a way that defeats narrow tailoring.

Further, according to the court, the priority period is not overinclusive. Prior to enacting the priority period, the Government considered evidence relative to minority-business owners generally as well as data pertaining to specific groups. It is also important to note, the court stated, that the Restaurant Revitalization Fund is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.

The inclusion in the presumption, the court pointed out for example, of Alaskan and Hawaiian natives is quite logical for a program that offers relief funds to restaurants in Alaska and Hawaii. This is not like the racial classification in *Croson*, the court said, which was premised on the interest of compensating Black contractors for past discrimination in Richmond, Virginia, but would have extended remedial relief to "an Aleut citizen who moves to Richmond tomorrow." Here, the court found any narrowly tailored racial classification must necessarily account for the national scale of prior and present COVID-19 programs.

The district court noted that the Supreme Court has historically declined to review sex-or gender-based classifications under strict scrutiny. The district court pointed out the Supreme Court in *Craig v. Boren*, 429 U.S. 190, 197-204 (1976), held, "[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objective and must be substantially related to achievement of those objectives ...." "[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Miss. University for Women v. Hogan*, 458 U.S. 718, 728 (1982). However, remedying past discrimination cannot serve as an important governmental interest when there is no empirical evidence of discrimination within the field being legislated.

Intermediate scrutiny applied to woman-owned businesses found by District Court. As with the strict-scrutiny analysis, the court found that Congress had before it evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. Accordingly, the court held that Defendant has identified an important governmental interest in protecting woman-owned businesses from the disproportionately adverse effects of the pandemic and failure of earlier federal relief programs. The district court therefore stated it cannot conclude that Plaintiffs are likely to succeed on their gender-based equal-protection challenge in this respect.

To be constitutional, the court concluded, a particular measure including a gender distinction must also be substantially related to the important interest it purports to advance. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."

Here, as above, the court found § 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by veterans, women, and socially and economically disadvantaged individuals because Congress had evidence before it showing that those businesses were disproportionately exposed to harm from the COVID-19 pandemic and inadequately protected by earlier COVID-19 financial relief programs. The prioritization of woman-owned businesses under § 5003, the court found, is substantially related to the problem Congress sought to remedy because it is directly aimed at ameliorating the funding gap between woman-owned and man-owned businesses that has caused the former to suffer from the COVID-19 pandemic at disproportionately higher rates. Accordingly, on the

record before it, the district court held it cannot conclude that Plaintiffs are likely to succeed on the merits of their gender-based equal-protection claim.

The court stated: "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." However, the district court did not conclude that Plaintiffs' constitutional rights are likely being violated. Therefore, the court held Plaintiffs are likely not suffering any legally impermissible irreparable harm.

The district court said that if it were to enjoin distributions under § 5003 of the ARPA, others would certainly suffer harm, as these COVID-19 relief grants—which are intended to benefit businesses that have suffered disproportionate harm—would be even further delayed. In the constitutional context, the court found that whether an injunction serves the public interest is inextricably intertwined with whether the plaintiff has shown a likelihood of success on the merits. Plaintiff, the court held, has not demonstrated a likelihood of success on the merits.

The district court found that therefore it cannot conclude the public interest would be served by enjoining disbursement of funds under § 5003 of the ARPA.

Denial by District Court of Plaintiffs' Motion for Preliminary Injunction. Subsequently, the court addressed the Plaintiffs' motion for a preliminary injunction. The court found its denial of Plaintiffs' motion for a TRO addresses the same factors that control the preliminary-injunction analysis, and the court incorporated that reasoning by reference to this motion.

The court received from the Defendant additional materials from the Congressional record that bear upon whether a compelling interest justifies the race-based priority period at issue and an important interest justifies the gender-based priority period at issue. Defendant's additional materials from the Congressional record the court found strengthen the prior conclusion that Plaintiffs are unlikely to succeed on the merits.

For example, a Congressional committee received the following testimony, which linked historical race and gender discrimination to the early failures of the Paycheck Protection Program (the "PPP"): "As noted by my fellow witnesses, closed financial networks, longstanding financial institutional biases, and underserved markets work against the efforts of women and minority entrepreneurs who need capital to start up, operate, and grow their businesses. While the bipartisan CARES Act got money out the door quickly [through the PPP] and helped many small businesses, the distribution channels of the first tranche of the funding underscored how the traditional financial system leaves many small businesses behind, particularly women- and minority-owned businesses."

There was a written statement noting that "[m]inority and women-owned business owners who lack relationships with banks or other financial institutions participating in PPP lacked early access to the program"; testimony observing that historical lack of access to capital among minority- and women-owned businesses contributed to significantly higher closure rates among those businesses during the COVID-19 pandemic, and that the PPP disproportionately failed to reach those businesses; and evidence that lending discrimination against people of color continues to the present and contemporary wealth distribution is linked to the intergenerational impact of historical disparities in credit access.

The court stated it could not conclude Plaintiffs are likely to succeed on the merits. The court held that the points raised in the parties' briefing on Plaintiff's motion for preliminary injunction have not impacted the court's analysis with respect to the remaining preliminary injunction

factors. Accordingly, for the reasons stated in the court's memorandum opinion denying Plaintiff's motion for a temporary restraining order, a preliminary injunction the court held is not warranted and is denied.

Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the court's decision to the Sixth Circuit Court of Appeals. Vitolo had asked for a temporary restraining order and ultimately a preliminary injunction that would prohibit the government from handing out grants based on the applicants' race or sex. Vitolo asked the district court to enjoin the race and sex preferences until his appeal was decided. The district court denied that motion too. Finally, the district court denied the motion for a preliminary injunction. Vitolo also appealed that order.

Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021). The Sixth Circuit stated that this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants. The Court held that it cannot, and thus enjoined the government from using "these unconstitutional criteria when processing" Vitolo's application.

Standing and mootness. The Sixth Circuit agreed with the district court that Plaintiffs had standing. The Court rejected the Defendant Government's argument that the Plaintiffs' claims were moot because the 21-day priority phase of the grant program ended.

Preliminary Injunction. Application of Strict Scrutiny by Sixth Circuit. Vitolo challenges the Small Business Administration's use of race and sex preferences when distributing Restaurant Revitalization Funds. The government concedes that it uses race and sex to prioritize applications, but it contends that its policy is still constitutional. The Court focused its strict scrutiny analysis under the factors in determining whether a preliminary injunction should issue on the first factor the is typically dispositive: the factor of Plaintiffs' likelihood of success on the merits.

Compelling Interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination. But, the Court notes, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

The government's asserted compelling interest, the Court found, meets none of these requirements. First, the government points generally to societal discrimination against minority business owners. But it does not identify specific incidents of past discrimination. And, the Court said, since "an effort to alleviate the effects of societal discrimination is not a compelling interest," the government's policy is not permissible.

Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. Indeed, the schedule of racial preferences detailed in the government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all.

When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government, according to the Court, are not nearly enough. But when it comes to general social disparities, the Court stated, there are too many variables to support inferences of intentional discrimination.

Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. When opposing the plaintiffs' motions at the district court, the government identified statements by members of Congress as evidence that race- and sex-based grant funding would remedy past discrimination. But rather than telling the court what Congress learned and how that supports its remedial policy, the Court stated it said only that Congress identified a "theme" that "minority-and women-owned businesses" needed targeted relief from the pandemic because Congress's "prior relief programs had failed to reach" them. A vague reference to a "theme" of governmental discrimination, the Court said is not enough.

To satisfy equal protection, the Court said, government must identify "prior discrimination by the governmental unit involved" or "passive participa[tion] in a system of racial exclusion." An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out is no evidence at all that the government enacted or administered those policies in a discriminatory way. For these reasons, the Court concluded that the government lacks a compelling interest in awarding Restaurant Revitalization Funds based on the race of the applicants. And as a result, the policy's use of race violates equal protection.

Narrow tailoring rejected by Sixth Circuit. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory disbursement of Restaurant Revitalization Funds is not narrowly tailored to further that interest. For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.

Here, the Court found that the government could have used any number of alternative, nondiscriminatory policies, but it failed to do so. For example, the court noted the government contends that minority-owned businesses disproportionately struggled to obtain capital and credit during the pandemic. However, the Court stated an "obvious" race-neutral alternative exists: The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.

Or, the Court said, consider another of the government's arguments. It contends that earlier coronavirus relief programs "disproportionately failed to reach minority-owned businesses." But, the Court found a simple race-neutral alternative exists again: The government could simply grant priority consideration to all small business owners who have not yet received coronavirus relief funds.

Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. Aside from the existence of race-neutral alternatives, the government's use of racial preferences, according to the Court, is both overbroad and underinclusive. The Court held this is also fatal to the policy.

The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage."

However, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not. The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court said, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

The government's policy, the Court found, is "plagued" with other forms of under inclusivity. The Court considered the requirement that a business must be at least 51% owned by women or minorities. How, the Court asked, does that help remedy past discrimination? Black investors may have small shares in lots of restaurants, none greater than 51%. But does that mean those owners did not suffer economic harms from racial discrimination? The Court noted that the restaurant at issue, Jake's Bar, is 50% owned by a Hispanic female. It is far from obvious, the Court stated, why that 1% difference in ownership is relevant, and the government failed to explain why that cutoff relates to its stated remedial purpose.

The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. For example, the Court pointed out the government attempts to defend its policy by citing a study showing it was harder for Black business owners to obtain loans from Washington, D.C., banks. Rather than designating those owners as the harmed group, the Court noted, the government relied on the Small Business Administration's 2016 regulation granting racial preferences to vast swaths of the population. For example, individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. The Court held this "scattershot approach" does not conform to the narrow tailoring strict scrutiny requires.

Woman-owned businesses. Intermediate scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of woman-owned restaurants. Like racial classifications, sex-based discrimination is presumptively invalid. government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." To meet this burden, the government must prove that (1) a sex-based classification serves "important governmental objectives," and (2) the classification is "substantially and directly related" to the government's objectives. The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing woman-owned restaurants serves an important governmental interest. The government claims an interest in "assisting with the economic recovery of women-owned businesses, which were 'disproportionately affected' by the COVID-19 pandemic." But, the Court stated, while remedying specific instances of past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.

Instead, the Court said, to have a legitimate interest in remedying sex discrimination, the government first needs proof that discrimination occurred. Thus, the government must show that the sex being favored "actually suffer[ed] a disadvantage" as a result of discrimination in a specific industry or field. Without proof of intentional discrimination against women, the Court held, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.

Additionally, the Court found, the government's prioritization system is not "substantially related to" its purported remedial objective. The priority system is designed to fast-track applicants hardest hit by the

pandemic. Yet under the Act, the Court said, all woman-owned restaurants are prioritized—even if they are not "economically disadvantaged." For example, the Court noted, that whether a given restaurant did better or worse than a male-owned restaurant next door is of no matter—as long as the restaurant is at least 51% woman-owned and otherwise meets the statutory criteria, it receives priority status. Because the government made no effort to tailor its priority system, the Court concluded it cannot find that the sex-based distinction is "substantially related" to the objective of helping restaurants disproportionately affected by the pandemic.

Ruling by Sixth Circuit. The plaintiffs are entitled to an injunction pending appeal. Since the government failed to justify its discriminatory policy, the plaintiffs will win on the merits of their constitutional claim. And like in most constitutional cases, that is dispositive here.

The Court ordered the government to fund the Plaintiffs' grant application, if approved, before all later-filed applications, without regard to processing time or the applicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. The Court held the preliminary injunction shall remain in place until this case is resolved on the merits and all appeals are exhausted. Dissenting Opinion. One of the three Judges filed a dissenting opinion.

Amended Complaint and Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The Plaintiffs on June 1, 2021, filed an Amended Complaint in the district court adding Additional Plaintiffs. Additional Plaintiffs' who were not involved in the initial Motion for Temporary Restraining Order, on June 2, 2021, filed a Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The Court in its Order issued on June 10, 2021, found based on evidence submitted by Defendants that the allegedly wrongful behavior harming the Additional Plaintiffs cannot reasonably be expected to recur, and therefore the Additional Plaintiffs' claims are moot.

The court thus denied the Additional Plaintiffs' motion for temporary restraining order and preliminary injunction. The court also ordered the Defendant Government to file a notice with the court if and/or when Additional Plaintiffs' applications have been funded, and SBA decides to resume processing of priority applications.

The Sixth Circuit issued a briefing schedule on June 4, 2021 to the parties that requires briefs on the merits of the appeal to be filed in July and August 2021. Subsequently on July 14, 2021, the Plaintiffs-Appellants filed a Motion to Dismiss the appeal voluntarily that was supported and jointly agreed to by the Defendant-Appellee stating that Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

(iii) ***Faust v. Vilsack, Secretary of U.S. Dep't of Agriculture*, 2021 WL 2409729, US District Court, E.D. Wisconsin (E.D. Wis. June 10, 2021)**. This is a federal district court decision that on June 10, 2021, granted Plaintiffs' motion for a temporary restraining order holding the federal government's use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the US Constitution.

Background. Twelve white farmers, who resided in nine different states, including Wisconsin, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial

classifications violated equal protection. Plaintiffs/Farmers filed a motion for temporary restraining order.

The district court granted the motion, and at the time of this report is considering the Plaintiffs' Motion for a Preliminary Injunction.

The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, "Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA." It advises that, in June 2021, the FSA will begin to process signed letters for payments, and "about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20% of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt."

Application of strict scrutiny standard. The court noted Defendants assert that the government has a compelling interest in remedying its own past and present discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. "The government has a compelling interest in remedying past discrimination only when three criteria are met." (*Citing Vitolo*, 999 F.3d at 353 (6th Cir. 2021), 2021 WL 2172181, at *4; *see also: City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion).

The court stated the Sixth Circuit recently summarized the three requirements as follows:

"First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." *J.A. Croson Co.*, 488 U.S. at 498, 109 S.Ct. 706."

"Second, there must be evidence of intentional discrimination in the past. *J.A. Croson Co.*, 488 U.S. at 503, 109 S.Ct. 706. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination ...."

"Third, the government must have had a hand in the past discrimination it now seeks to remedy. If the government "shows that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of a local industry," then the government can act to undo the discrimination. *J.A. Croson Co*., 488 U.S. at 492, 109 S.Ct. 706. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles."

The court found that "Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry…. But Defendants cannot rely on a 'generalized assertion that there has been past discrimination in an entire industry' to establish a compelling interest." *Citing, J.A. Croson Co.,* 488 U.S. at 498*; see also Parents Involved*, 551 U.S. at 731, (plurality opinion) ("remedying past societal discrimination does not justify race-conscious government action"). The court pointed out "Defendants' evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities."

The court concluded that: "Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies

and pandemic relief efforts." "An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way." *Citing, Vitolo*, 999 F.3d at 353 (6th Cir. 2021), 2021 WL 2172181, at *5. The court held "Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications."

In addition, the court found "Defendants have not established that the remedy is narrowly tailored. To do so, the government must show "serious, good faith consideration of workable race-neutral alternatives." *Citing, Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, "they have not shown that Congress engaged "in a genuine effort to determine whether alternative policies could address the alleged harm" here. *Citing, Vitolo*, 993 F. 3d 353, 2021 WL 2172181, at *6.

The court stated: "The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin."

The court found "Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race." On this record, the court held, "Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests."

Conclusion. The court found a nationwide injunction is appropriate in this case. "To ensure that Plaintiffs receive complete relief and that similarly situated nonparties are protected, a universal temporary restraining order in this case is proper."

This case remains pending at the time of this report. The court on July 6, 2021, issued an Order that stayed the Plaintiffs' motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (see below), granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary; but the court left open the possibility of reconsidering the motion depending on the results of the Wynn case. For the same reason, the court dissolved the temporary restraining order and stayed the motion for a preliminary injunction.

Subsequently, the Defendants filed a Motion to Stay Proceedings, and the court granted the motion on August 20, 2021, requiring the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which is a class action.

As a result of the federal government's recent repeal of ARPA Section 1005 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties filed a Stipulation of Dismissal, and the case very recently in September 2022 has been dismissed by the Court.

The Plaintiffs are seeking attorney's fees and costs of the litigation, which request is pending at the time of this report.

(iv) ***Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture*, 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (M.D. Fla. June 23, 2021)**is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (N.D. Wis. June 10, 2021) case pending in district court in Wisconsin. The court in *Faust* granted the Plaintiffs' Motion for Temporary Restraining Order and the court in *Wynn* granted the Plaintiff's Motion for Preliminary Injunction holding: "Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court."

Background. In this action, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), which provides debt relief to "socially disadvantaged farmers and ranchers" (SDFRs). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120% of the indebtedness, as of January 1, 2021, of an SDFR's direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section 1005 incorporates 7 U.S.C. § 2279's definition of an SDFR as "a farmer of rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). A "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are "Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander." See also U.S. Dep't of Agric., American Rescue Plan Debt Payments, https://www.farmers.gov/americanrescueplan. White or Caucasian farmers and ranchers do not.

Plaintiff is a white farmer in Jennings, Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the United States Department of Agriculture (USDA) and head of the FSA, in their official capacities. In his two-count Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA) (Count II). Plaintiff seeks (1) a declaratory judgment that Section 1005's provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys' fees and costs.

Application of strict scrutiny test: compelling interest. The court, similar to the court in *Faust*, applied the strict scrutiny test and held that on the record presented, the court expresses serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action. The statistical and anecdotal evidence presented, the court said, appears less substantial than that deemed insufficient in *Eng'g Contractors v. Metro-Dade County* case (11th Cir. 1997), which included detailed statistics regarding the governmental entity's hiring of minority-owned businesses for government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts.

The Government states that its "compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other)

programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination." In cases applying strict scrutiny, the court notes the Eleventh Circuit has instructed: "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." *Citing, Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994).

Thus, to survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. *Id*. at 1565. The law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.*, the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained:

"A 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. However, 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." Here, to establish the requisite evidence of discrimination, the court said the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress' request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress. This evidence consists of substantial evidence of historical discrimination that predates remedial efforts made by Congress and, to a lesser extent, evidence the Government contends shows continued discrimination that permeates USDA programs.

The court pointed out that to the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the GAO Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to White farmers.

The court decided that nevertheless, "at this stage of the proceedings, the Court need not determine whether the Government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation. This is because, assuming the Government's evidence establishes the existence of a compelling governmental interest warranting some form of race-based relief, Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest."

Narrow tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court holds that Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. The narrow tailoring requirement ensures that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493 (plurality opinion). "The essence of the 'narrowly

tailored' inquiry is the notion that explicitly racial preferences ... must be only a 'last resort' option." *Eng'g Contractors*, 122 F.3d at 926.

In determining whether a race-conscious remedy is appropriate, the Supreme Court instructs courts to examine several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

Here, the court found, "little if anything about Section 1005 suggests that it is narrowly tailored." As an initial matter the court notes that the necessity for the specific relief provided in Section 1005—debt relief for all SDFRs with outstanding qualifying farm loans as of January 1, 2021—is unclear at best. The court states that as written, "Section 1005 is tailored to benefit only those SDFRs who succeeded in receiving qualifying farm loans from USDA, but the evidence of discrimination provided by the Government says little regarding how this particular group of SDFRs has been the subject of past or ongoing discrimination. … Thus, the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident."

More importantly, the court found, "Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group11 who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120% debt relief—and no one else receives any debt relief." Although the Government argues that Section 1005 is narrowly tailored to reach small farmers or farmers on the brink of foreclosure, the court finds it is not. "Regardless of farm size, an SDFR receives up to 120% debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120% debt relief. Yet a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005."

The Government cited the Eleventh Circuit decision in *Cone Corp. v. Hillsborough Cnty.*, 908 F.2d 908, 910 (11th Cir. 1990). The court in *Cone Corp*. pointed to several critical factors that distinguished the county's MBE program in that case from that rejected in *Croson*:

"(1) the county had tried to implement a less restrictive MBE program for six years without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in Croson, the county's program did not benefit "groups against whom there may have been no discrimination," instead its MBE program "target[ed] its benefits to those MBEs most likely to have been discriminated against . . . ." *Id*. at 916-17.

The court found that "Section 1005's inflexible, automatic award of up to 120% debt relief only to SDFRs stands in stark contrast to the flexible, project by project *Cone Corp.* MBE program." The court noted that in *Cone Corp.*, although the MBE program included a minority participation goal, the county "would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses." In this way the Court in *Cone Corp.* observed the county's MBE program "had been carefully crafted to minimize the burden on innocent third parties." (*Citing Cone Corp.*, 908 F.2d at 911).

The court concluded the "120% debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the Cone Corp. MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in *Croson* and other similar cases."

Additionally, on this record, the court found it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. "It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship." The court found "Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination."

Finally, the Court concluded there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005. "The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy USDA's discrimination against SDFRs…. However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately to White farmers." However, the court stated, "the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race."

Thus, on the current record, the court held, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, Plaintiff is likely to show that Congress "failed to give serious good faith consideration to the use of race and ethnicity-neutral measures" to achieve the compelling interest supporting Section 1005. *Ensley Branch*, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a "last resort," but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the court is not persuaded that the Government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest.

The court holds "it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or irradicate the evils of discrimination that remain following Congress' prior efforts to remedy the same." Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.

Conclusion. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this

Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.

The Defendants filed a Motion to Stay Proceedings and a Motion to Stay Administratively Timely Deadlines. The court on August 2, 2021, denied the Motion to Stay Proceedings.

As a result of the federal government's recent repeal of ARPA Section 1005 in September 2022 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties have filed a Stipulation of Dismissal, and the case was very recently dismissed in September 2022 by the Court.

The Plaintiffs sought attorney's fees and costs of the litigation. The court on September 26, 2023, issued an order granting Plaintiff's unopposed motion to withdraw bill of costs and directed that all pending motions be terminated, and the file be closed.

(v) *Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.*, 2023 WL 4633481 (E.D. Tenn. July 19, 2023), U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW. Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants filed a Motion to Dismiss asserting inter alia that the court does not have jurisdiction. Plaintiff has filed written discovery, which was stayed pending the outcome of the Motion to Dismiss.

The court on March 31, 2021, issued a Memorandum Opinion and Order granting in part and denying in part the Motion to Dismiss. The court held plaintiffs had standing to challenge the constitutionality of the Section 8(a) Program as violating the Fifth Amendment, and held plaintiff's claim that the Section 8(a) Program is unconstitutional because it discriminates on the basis of race is sufficient to state a claim. The court also granted in part defendants' Motion to Dismiss holding that plaintiff's 42 U.S.C. Section 1981 claims are dismissed as that

section does not apply to federal agencies. Thus, the case proceeds on the merits of the constitutionality of the Section 8 (a) Program.

The court on April 9, 2021, entered a Scheduling Order providing that defendants file an Answer by April 28, 2021 and set a Bench Trial for 10/11/2022 with Dispositive Motions due by 6/6/2022. Defendants filed their Answer to the Complaint on April 28, 2021. Plaintiffs on May 20, 2021, filed a Motion to Amend/Revise Complaint, Defendants filed their Response to Motion to Amend on June 4, 2021, and Plaintiffs filed on June 8, 2021, their Reply to the Response. The Motion was denied by the court.

Dispositive motions for summary judgment have been filed by the parties in June and July 2022.

December 8, 2022 Order requesting parties to address whether Supreme Court's decision expected in June 2023 would impact this case: The court conducted a status conference in the instant case on August 3, 2022, at the parties' request. During that conference, the parties explained that they did not believe a trial necessary because the Court could resolve all disputed issues based on the parties' pending motions. Therefore, the court ordered that the case is stayed pending the resolution of the parties' motions for summary judgment.

The court on December 8, 2022 issued an Order requesting the parties address whether a potential decision by the Supreme court overruling the *Grutter v. Bollinger*, 539 U.S. 306 (2003) case in the pending Harvard and University of North Carolina (UNC) admission cases would impact the issues in this case and, if so, whether this matter should remain stayed until the Supreme Court releases its decision in the Harvard and UNC (SFFA) cases challenging the use of race-conscious admissions processes.

The parties filed on December 22, 2022 their responses to the court's Order both agreeing that the court should not stay its decision in this case, but differing on the impact of the SFFA cases: The Federal Defendants stating a decision by the Supreme Court overruling *Grutter* in the SFFA cases would not impact this case because they involve fundamentally different issues and legal bases for the challenged actions. The Plaintiffs responded by saying it may or may not impact this case depending on the nature of the decision by the Supreme Court.

The court on May 2, 2023, issued an Order denying both parties' motions to exclude expert testimony and reports by their experts.

July 19, 2023 Opinion and Order on Motions for Summary Judgment. On July 19, 2023, the district court issued its Order that granted in part and denied in part Plaintiffs' Motion for Summary Judgment, and denied Defendants' Motion for Summary Judgment.

The court stated the case concerns whether, under the Fifth Amendment's guarantee of equal protection, Defendants the United States' Department of Agriculture ("USDA") and the Small Business Administration ("SBA") may use a "rebuttable presumption" of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups.

Defendant SBA also applies a rebuttable presumption of social disadvantage to individuals of certain minority groups applying to the 8(a) program . The rebuttable presumption treats certain minority groups as socially disadvantaged, and it applies to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, "and members of other groups designated from time to time by [Defendant] SBA." *Id.* To qualify for the presumption, members of those groups must hold themselves out as members of their group. Individuals who qualify for the rebuttable

presumption do not have to submit evidence of social disadvantage through an individual process for those who are not members of these groups.

The court citing Supreme Court precedent stated that certain classifications are subject to strict scrutiny—meaning they are constitutional "only if they are [(1)] narrowly tailored measures that further [(2)] compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). When examining racial classifications, courts apply strict scrutiny. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989)(applying strict scrutiny to the city of Richmond's racial classification); *Adarand Constructors, Inc.*, 515 U.S. at 224 (plurality holding that racial classifications are subject to strict scrutiny).

Ultima argued that the rebuttable presumption in the Section 8(a) program cannot survive strict scrutiny because Defendants cannot show that the rebuttable presumption is Narrowly tailored to achieve a compelling governmental interest. The Court addressed each prong of the strict scrutiny test, beginning with the compelling-interest prong.

Lack of a compelling governmental interest. To satisfy the compelling interest prong, the court held the government "must both identify a compelling interest and provide evidentiary support concerning the need for the proposed remedial action. *See Croson*, 488 U.S. at 498–504; *see also Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000)(citing *Croson* for the proposition that the government must establish either that it "discriminated in the past" or "was a passive participant in private industry's discriminatory practices"). The Supreme Court has held that the government has a compelling interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162). Additionally, the government must present goals that are "sufficiently coherent for purposes of strict scrutiny." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166."

Defendants assert that their use of the rebuttable presumption in the 8(a) program is to remedy the effects of past racial discrimination in federal contracting. But, the court stated Defendant USDA admits it does not maintain goals for the 8(a) program. And Defendant SBA admits that it does not require agencies to have goals for the 8(a) program. Defendants also do not examine whether any racial group is underrepresented in a particular industry relevant to a specific contract in the 8(a) program. The court found that without stated goals for the 8(a) program or an understanding of whether certain minorities are underrepresented in a particular industry, Defendants cannot measure the utility of the rebuttable presumption in remedying the effects of past racial discrimination. In such circumstances, the court said, Defendants' use of the rebuttable presumption "cannot be subjected to meaningful judicial review." The lack of any stated goals for Defendants' continued use of the rebuttable presumption, the court concluded does not support Defendants' stated interest in "remediating specific, identified instances of past discrimination[.]" Quoting *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162. If the rebuttable presumption were a tool to remediate specific instances of past discrimination, the court noted, Defendants should be able to tie the use of that presumption to a goal within the 8(a) program.

The court stated the Sixth Circuit addressed a challenge similar to the one Ultima raises here in *Vitolo*, 999 F.3d at 361 (6th Cir. 2021). The court said: "The Sixth Circuit held that "[t]he government has a compelling interest in remedying past discrimination only when three criteria are met." *Id.* at 361. First, the government's policy must "target a specific episode of past discrimination [and] .... cannot rest on a generalized assertion that there has been past discrimination in an entire industry." *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 498–99)."

The court found that: "Defendants do not identify a specific instance of discrimination which they seek to address with the use of the rebuttable presumption. Defendants instead rely on the disparities faced by MBEs nationally as sufficient to justify the use of a presumption that certain minorities are socially disadvantaged. …" "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," and the court concluded Defendants' reliance on national statistics shows societal discrimination rather than a specific instance.

Second, the court pointed out that the Sixth Circuit explained that the government must support its asserted compelling interest with "evidence of *intentional* discrimination in the past." *Vitolo*, 999 F.3d at 361 (quoting *J.A. Croson Co.*, 488 U.S. at 503) (emphasis in original). According to the Sixth Circuit, the court noted, "statistical disparities alone are insufficient but can be used with other evidence to establish intentional discrimination." The Sixth Circuit, the court said, reasoned that when the government uses a race-based policy, it must operate with precision and support the policy with "data that suggest intentional discrimination." *Id.* The court also stated that the Sixth Circuit further reasoned that evidence of general social disparities are insufficient because "there are too many variables to support inferences of intentional discrimination" when there are multiple decision makers "behind the disparity." *Id.* at 362.

Here, the court concluded, Defendants primarily offer evidence of national disparities across different industries. They do not offer further evidence to show that those disparities are tied to specific actions, decisions, or programs that would support an inference of intentional discrimination that the use of the rebuttable presumption allegedly addresses. Moreover, the court said that Plaintiffs' expert noted that Defendants' evidence did not eliminate other variables that could explain the disparities on which they rely. Defendants cannot affirmatively link those disparities to intentional discrimination because they also cannot eliminate all variables that could account for the disparities. The court stated that the Sixth Circuit in *Vitolo* did not equivocate, cautioning that "broad statistical disparities ... are not nearly enough" to show intentional discrimination. *Id.*

Third, the court pointed out, the Sixth Circuit reasoned that the government must show that it participated in the past discrimination it seeks to remedy, such as by demonstrating it acted as a "passive participant in a system of racial exclusion practiced by elements of [a] local ... industry[.]" *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492) (internal quotations omitted). It explained that the government must identify "prior discrimination by the governmental unit involved" or "passive participation in a system of racial exclusion." *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492) (alteration adopted)."

The court noted that additionally, in her opinion in *J.A. Croson Co.*, Justice O'Connor reasoned that the government could show passive participation in discrimination by compiling evidence of marketplace discrimination and then linking its spending practices to private discrimination. *J.A. Croson Co.*, 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J).

Although the Court does not doubt the persistence of racial barriers to the formation and success of MBEs, Defendants' evidence does not show that the government was a passive participant in such discrimination in the relevant industries in which Ultima operates. As evidence of passive participation, Defendants note that Congress found MBEs lacked access to "capital, bonding, and business opportunities" because of discrimination. Defendants further note that Congress found that MBEs faced "outright blatant discrimination directed at disadvantaged and minority businesspeople by majority companies, financial institutions, and government at every level." Those examples, however, relate broadly to the federal government's actions in different areas of the national economy. They do not show that the federal

government allowed discrimination to occur in the industries relevant to Ultima.

The court found that because the court must determine whether the use of racial classifications is supported with precise evidence, "examples of the federal government's passive participation in areas other than the relevant industries do not support Defendants' use of the rebuttable presumption here. *See Vitolo*, 999 F.3d at 361." Accordingly, the court held that Defendants have failed to show a compelling interest for their use of the rebuttable presumption as applied to Ultima. Even if Defendants could establish a compelling interest, the court found the rebuttable presumption is not narrowly tailored to serve the asserted interest.

Rebuttable presumption is not narrowly tailored. To determine whether the government's use of a racial classification is narrowly tailored, the court examines several factors, including the necessity for the race-based relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. The court noted the Supreme Court in *Croson* held that courts also should consider whether the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications, the program does not presume discrimination against certain minority groups and, if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified.

a. Whether the 8(a) Program is flexible and limited in duration. The court states that the Sixth Circuit in *Vitolo* noted, "'[because] proving someone else has *never* experienced racial or ethnic discrimination is virtually impossible, this 'presumption' is dispositive.'" *Vitolo*, 999 F.3d at 363 (emphasis in original). Individuals who do not receive the presumption must show both economic disadvantage *and* discrimination that have negatively impacted their advancement in the business world and caused them to suffer chronic and substantial social disadvantage. In effect, the court said, individuals who do not receive the presumption must put forth double the effort to qualify for the 8(a) program.

The court cites to the decision in *Drabik*, in which the Sixth Circuit held that as an aspect of narrow tailoring, a race-conscious government program "must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate." *Drabik*, 214 F.3d at 737–38 (quoting *Adarand*, 515 U.S. at 238. The court then points out that recently, the Supreme Court reaffirmed that racially conscious government programs must have a "'logical end point.'" *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170 (quoting *Grutter*, 539 U.S. at 342).

It is noteworthy that the court in footnote 8 states the following: "The facts in *Students for Fair Admissions, Inc.* concerned college admissions programs, but its reasoning is not limited to just those programs. *See Adarand Constructors, Inc.*, 515 U.S. at 215 (applying the reasoning in *Bolling*, 347 U.S. at 497, which discussed school desegregation, to a federal program designed to provide highway contracts to disadvantaged business enterprises)."

Defendants concede, the court stated, that "the 8(a) program has no termination date," necessarily meaning there is no temporal limit on the use of the rebuttable presumption. The court found that such a "boundless use of a racial classification exceeds the concept of narrow tailoring as explained by Sixth Circuit and Supreme Court precedents."

b. Whether the 8(a) Program is necessary. Defendants acknowledge that the program lacks a remedial objective. Th court found that the lack of a specific objective shows that Defendants are not using the rebuttable presumption in a narrow or precise manner. And the Sixth

Circuit has held, according to the court, that Defendants must present "the most exact connection between justification and classification. Here, the court said, Defendants admit that they do not have any specific objectives linked to their use of the rebuttable presumption, and such unbridled discretion counsels against a racial classification being narrowly tailored.

c. Whether the 8(a) Program is both over and underinclusive. Defendant SBA determines which groups receive the rebuttable presumption of social disadvantage. Some of those groups match the groups listed in the statute enacting the 8(a) program. But, the court found that Defendant SBA has added more groups since that time that appear underinclusive when compared with groups that do not receive the rebuttable presumption.

The court stated that Defendants "arbitrary line drawing for who qualifies for the rebuttable presumption shows that the "'categories are themselves imprecise in many ways.'" *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2167. Thus, the court held that the determination of which groups of Americans are presumptively disadvantaged compared with others "necessarily leads to such a determination being underinclusive because certain groups that could qualify will be left out of the presumption."

Conversely, the court found the rebuttable presumption "sweeps broadly by including anyone from the specified minority groups, regardless of the industry in which they operate." The court said that Defendant SBA is not making specific determinations as to whether certain groups in certain industries have faced discrimination. The court noted that it instead applies Congress's nationwide findings to all members of the designated minority groups. Thus, the court held that such "an application of the presumption proves overinclusive by failing to consider the individual applicant to the 8(a) program and the industries in which they operate."

d. Whether Defendants considered race-neutral alternatives to the rebuttable presumption. For a policy to survive narrow-tailoring analysis, the court stated the government must show "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest but need not exhaust every conceivable race neutral alternative. *Grutter*, 539 U.S. at 333, 339 (citing *Croson*, 488 U.S. at 507; But, the court said that in *Vitolo*, "the Sixth Circuit reasoned that 'a court must not uphold a race-conscious policy unless it is 'satisfied that no workable race-neutral alternative' would achieve the compelling interest.'" *Vitolo*, 999 F.3d at 362 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013)).

The court found that Defendant SBA has not revisited the use of the rebuttable presumption since 1986 and insists that the presumption remains workable under the Supreme Court's precedents. The court held that because of Defendant SBA's "failure to review race-neutral alternatives in the wake of the Supreme Court's precedents, the Court cannot conclude that "'no workable race-neutral alternative would achieve the compelling interest.'" *Vitolo*, 999 F.3d at 362.

e. Whether the rebuttable presumption impacts third parties. The court rejected Defendants' assertion that the rebuttable presumption presents only a slight burden on third parties and Ultima because a minor amount of all national federal contracting dollars is eligible for small businesses. Ultima operates within a specific set of industries and the Mississippi contract, as well as others like it, represent a substantial amount of revenue. The court found that national statistics do not lessen the burden that the rebuttable presumption places on Ultima. Defendants, the court held, have failed to show that the use of the rebuttable presumption in the 8(a) program is narrowly tailored.

Conclusion. The court held as follows: Ultima's Motion for Summary Judgment is granted in part and denied in part, and Defendants' Motion for Summary Judgment is denied. The Court declared that Defendants'

use of the rebuttable presumption violates Ultima's Fifth Amendment right to equal protection of the law. The court ordered that Defendants are enjoined from using the rebuttable presumption of social disadvantage in administering Defendant SBA's 8(a) program. The court reserved ruling on any further remedy subject to a hearing on that issue.

The court held a hearing on the issue of any potential further remedies on August 31, 2023. The court issued an Order on September 1, 2023, that provides "the only pending issues are: (1) Plaintiff's request for an injunction precluding Defendants from reserving Natural Resources Conservation Service contracts for administrative and technical support; and (2) Defendants' compliance with the injunction issued in the Memorandum Opinion and Order." The parties agreed to a final round of briefing to address these issues, which the court scheduled to conclude in October 2023. Plaintiffs filed in September 2023 a Motion for Permanent Injunction and additional equitable relief.

Subsequently, Plaintiff Ultima filed its Motion for Permanent Injunction and Additional Equitable Relief and the Federal Defendants filed their Response to Ultima's Motion. Ultima's Motion is pending at the time of this report.

(vi) ***Nuziard, et al. v. MBDA, et al.*, 2024 WL 965299 (N.D. Tex. March 5, 2024)**, granting Plaintiffs' motion for summary judgment and ordering a permanent injunction; Order and Opinion issued on March 5, 2024; and 2023 WL 3869323 (N.D. Tex. June 5, 2023), granting Plaintiffs' motion for preliminary injunction; Order and Opinion issued on June 5, 2023; U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act ("Infrastructure Act"), creating the newest federal agency: the Minority Business Development Agency ("MBDA").

Plaintiffs allege this agency is dedicated to helping only certain businesses based on race or ethnicity.

Plaintiffs assert that because it relies on racial and ethnic classifications to help some individuals, but not others, the MBDA violates the Constitution's core requirement of equal treatment under the law.

Plaintiffs allege they are small businesses interested in finding new ways to grow their business and would value the advice, grants, consulting services, access to programs and other benefits offered by the MBDA. However, Plaintiffs assert that agency will not help them because of their race.

Plaintiffs state that MBDA's statutes, regulations, and website all speak a clear message of discrimination: Defendants refuse to help white business owners like Plaintiffs, as well as many other businesses owned by other non-favored ethnicities.

Plaintiffs claim that they therefore seek an order declaring the MBDA to be unconstitutional and an injunction prohibiting Defendants from discriminating against business owners based on race or ethnicity.

Plaintiffs seek the following relief:

A. Enter a judgment declaring that the Minority Business Development Agency is unconstitutional and in violation of 5 U.S.C. § 706(2)(B) to the extent it provides Business Center Program services or other benefits and services based on race or ethnicity; and

B. Enter a preliminary and then permanent injunction prohibiting Defendants from imposing the racial and ethnic classifications defined in 15 U.S.C. §9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. §1400.1 and/or as otherwise applied to the MBDA Business Center Program and other MBDA programs and

services, and additionally enjoining Defendants from using the term "minority" to advertise or reference their statutorily authorized programs and services.

Plaintiffs filed a Motion for Preliminary Injunction. The court issued an Order and Opinion on June 5, 2023, as follows:

The Constitution demands equal treatment under the law. Any racial classification subjecting a person to unequal treatment is subject to strict scrutiny. To withstand such scrutiny, the government must show that the racial classification is narrowly tailored to a compelling government interest. In this case, the Minority Business Development Agency's business center program provides services to certain races and ethnicities but not to others. The court held that "because the Government has not shown that doing so is narrowly tailored to a compelling government interest, it is preliminary enjoined from providing unequal treatment to Plaintiffs."

Subsequently, the court noted the Agency took steps to comply with the preliminary injunction last October by clarifying the pathway to benefits for applicants not on the Agency's racial listing. See MINORITY BUS. DEV. AGENCY, GUIDANCE TO MBDA BUSINESS CENTER OPERATORS 2 (Oct. 23, 2023) ("An individual does not need to identify as a member of one of [the listed groups] to be a socially or economically disadvantaged individual eligible to receive Business Center services under the MBDA Act. An individual may meet the definition if their membership in a group has resulted in their subjection to racial or ethnic prejudice or cultural bias or impaired their ability to compete in the free enterprise system."). As discussed later, the court indicated this post-suit policy change has no bearing on the present dispute.

The Parties moved for summary judgment in October 2023. Plaintiffs argued the Agency's race-based programming is unlawful under the Constitution and the Administrative Procedure Act ("APA"). For their constitutional claim, Plaintiffs apply the Supreme Court's holding in *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) ("SFFA"), arguing the Agency's racial presumption violates the equal protection guarantees of the Fifth Amendment's Due Process Clause. Their APA claim does not articulate an independent theory. Rather, it asked the Court to "hold unlawful and set aside" any unconstitutional agency actions under 5 U.S.C. § 706(2)(B). Defendants "leaning on" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), argued the MBDA is constitutional because it remedies past discrimination in which the government "passively participated." Defendants further contend summary judgment is warranted because, merits aside, Plaintiffs lack standing to bring this lawsuit.

As explained below, the court on March 5, 2024, holds in favor of Plaintiffs and denied the Agency's Motion. But only Nuziard and Bruckner conclusively established standing. Because reasonable jurors could doubt Piper's standing, the Court granted summary judgment for Nuziard and Bruckner but denied it for Piper. The Court granted summary judgment on Plaintiffs' equal protection claim. The Court denied summary judgment on Plaintiffs' APA claim, favoring remedies more clearly established than vacatur. Finally, the Court entered a permanent injunction prohibiting further implementation of the MBDA's unconstitutional statutory presumption.

The discussion below begins with the court's June 5, 2023 opinion and order granting a preliminary injunction. The discussion then follows that Order and Opinion with the court's Order and Opinion issued on March 5, 2024 granting plaintiffs' motion for summary judgment and entering a permanent injunction.

June 5, 2023 Order and Opinion

A. Defendants lack a compelling interest. Defendants contend that it has a compelling interest in remedying the effects of past discrimination faced by minority-owned businesses.

The court stated that the government may establish a compelling interest in remedying racial discrimination if three criteria are met: "(1) the policy must target a specific episode of past discrimination, not simply relying on generalized assertions of past discrimination in an industry; (2) there must be evidence of past intentional discrimination, not simply statistical disparities; and (3) the government must have participated in the past discrimination it now seeks to remedy." *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at *8 (N.D. Tex. July 1, 2021)(O'Connor, J.) (*citing Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021)(summarizing U.S. Supreme Court precedents). The court found the Government's asserted compelling interest meets none of these requirements.

First, the court said that the Government "points generally to societal discrimination against minority business owners." *Vitolo,* 999 F.3d at 361. Defendants, the court stated, point to congressional testimony on the effects of redlining, the G.I. Bill, and Jim Crow laws on black wealth accumulation as evidence of a specific episode of discrimination. But, the court noted the Program does not target black wealth accumulation. It targets some minority business owners. The court found Defendants also identify no specific episode of discrimination for any of the other preferred races or ethnicities. The court concluded instead that they point to the effects of societal discrimination on minority business owners. But ''an effort to alleviate the effects of societal discrimination is not a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996).

Second, the court held the "Government fails to offer evidence of past intentional discrimination. The Government offers no evidence of discrimination faced by some preferred races and ethnicities. And for those it does, the Government relies on studies showing broad statistical disparities with business loans, supply chain networks and contracting among some minorities. "These studies, according to the court, do not involve all of Defendants' preferred minorities or every type of business. But even if they did, the court said: "statistical disparities don't cut it."(*quoting Vitolo*, 999 F.3d at 361).

Because the court concluded: "when it comes to general social disparities, there are simply too many variables to support inferences of intentional discrimination." (*quoting Vitolo,* 999 F.3d at 362. "While the Court is mindful of these statistical disparities and expert conclusions based on those disparities, '[d]efining these sorts of injuries as 'identified discrimination' would give . . . governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.'" (*quoting Greer's Ranch Café*, 540 F. Supp. 3d at 650 (*quoting City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 499 (1989)).

Third, the court found the Government "has not shown that it participated in the discrimination it seeks to remedy." (*quoting Vitolo*, 999 F.3d at 361). The court pointed out that the government can show that it participated in the discrimination it seeks to remedy either actively or passively. However, Defendants provide no argument on how they participated in the discrimination it seeks to remedy.

The court noted that "perhaps the argument could be made that the Government passively discriminated by failing to address the economic inequities among minority business owners. But to be a passive participant, it must be a participant." See *Croson*, 488 U.S. at 492 (government awarding contracts to those who engaged in private discrimination). But, the court held there "is no evidence that the

Government passively participated advanc[ing] the evil of private prejudice" faced by minority-owned businesses.

In sum, the court found: "the Government has failed to show that the Program targets a specific episode of discrimination, offer evidence of past intentional discrimination, or explain how it participated in discrimination against minority business owners. The Government thus lacks a compelling interest in remedying the effects of past discrimination faced by some minority-owned businesses."

B. The Program is not narrowly tailored. Even if the Government had shown a compelling state interest in remedying some specific episode of discrimination, the court held the Program is not narrowly tailored to further that interest for at least two reasons.

First, the court stated the Government has not shown "that 'less sweeping alternatives—particularly race neutral-ones—have been considered and tried.'" *Walker*, 169 F.3d at 983. This requires the government to show that "'no workable race-neutral alternative' would achieve the compelling interest." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013).

Defendants contend that "absent race-based remedies, 'the needle did not move' in efforts to remedy the effects of discrimination on the success outcomes of minority business owners." To support this statement, the court said, "defendants rely on a single review of various disparity studies. See U.S. Dep't of Commerce, Minority Business Development Agency, Contracting Barriers and Factors Affecting Minority Business Enterprise: A Review of Existing Disparity Studies (Dec. 2016)."

The court found this review, "cuts against the Government. It 'emphasize[s] the need for both race-neutral and race-conscious remedial efforts' to move the needle and states that the disparity studies 'fail to detail the extent to which agencies have actually implemented and measured the success or failure of these recommendations.' … Thus, the review of contracting disparities Defendants rely on does not show that race-neutral alternatives 'have been considered and tried.'" *See Walker*, 169 F.3d at 983. "Nor has the Government shown a 'serious, good faith consideration of workable race-neutral alternatives' in any other business context." *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

Second, the court concluded, the Program is not narrowly tailored "because it is underinclusive and overinclusive in its use of racial and ethnic classification." *See Croson*, 488 U.S. at 507–08; Gratz, 539 U.S. at 273–75. It is underinclusive because it arbitrarily excludes many minority-owned business owners — such as those from the Middle East, North Africa, and North Asia. For example, the court noted the Program excludes those who trace their ancestry to Afghanistan, Iran, Iraq, and Libya. But it includes those from China, Japan, Pakistan and India. The court found the Program is also underinclusive because it "excludes every minority business owner who owns less than 51% of their business. 'This scattershot approach does not conform to the narrow tailoring strict scrutiny requires.'" (*quoting Vitolo*, 999 F.3d at 364).

The Program, the court stated, is also overinclusive. "It helps individuals who may have never been discriminated against. *See Croson*, 488 U.S.at 506–08 (holding that a minority business plan is overinclusive because it includes ethnicities in which there is no evidence of discrimination)." And, the court said that it "also helps all business owners, not just those in which disparities have been shown."

The Program, the court found, is thus not narrowly tailored to the Government's asserted interest.

Because the Government has not shown a compelling interest or a narrowly tailored remedy under strict scrutiny, the court held that Plaintiffs are likely to succeed on the merits.

Conclusion of June 2023 Order. The Court granted Plaintiffs' Motion for Preliminary Injunction and enjoined Defendants, the Wisconsin MDBA Business Center, the Orlando MBDA Business Center, the Dallas-Fort Worth MBDA Business Center and the officers, agents, servants and employees and anyone acting in active concert or participation with them from imposing the racial and ethnic classifications defined in 15 U.S.C. § 9501 and implemented in 15 U.S.C.§§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. § 1400.1 against Plaintiffs or otherwise considering or using Plaintiffs' race or ethnicity in determining whether they can receive access to the Center's services and benefits.

March 5, 2024 Order and Opinion

The Parties moved for summary judgment in October 2023. The following discussion summarizes the court's Opinion and Order issued on March 5, 2024.

A. Nuziard and Bruckner establish Article III Standing. The analysis differs for each Plaintiff. Nuziard met all posted criteria for the Agency's services except for race/ethnicity. Bruckner is more challenging because he did not meet all the criteria. The court said at issue for both is whether any race-neutral criteria came from the MBDA or from third-party operators. Piper's largest challenge was establishing standing, as he never contacted his local Business Center. For Piper, the issue is whether he sufficiently manifested intent to apply or if a "futility exception" excuses his inaction. Importantly, the court found the record contained no evidence suggesting race-neutral criteria are enforced with equally demanding rigor for MBEs. As Plaintiffs observed, the court noted: "Defendants have offered no evidence even suggesting that minority applicants for MBDA Programming are subjected to such an inflexible, rigorous, post hoc application of non-statutory requirements."

The court found that Dr. Nuziard and Mr. Bruckner established standing when they suffered injuries-in-fact when they were denied an equal shot at MBDA benefits because of their race. The Agency caused their injuries. A favorable ruling would redress them.

Accordingly, the court held Nuziard and Bruckner have Article III standing, and the Court denied the Agency's Motion on this point. The court did not find that Piper had standing.

B. The MBDA Statute is Unconstitutional. The court stated that this is a case about presumptions. The court found that Plaintiffs all encountered the same obstacle when they sought MBDA programming. Because they are not on the Agency's list, the court pointed out the Agency presumes they are not disadvantaged. *See* 15 U.S.C. § 9501(15)(B); 15 C.F.R. 1400.1.

The court, citing the recent Supreme Court decision in *SFFA v. Harvard, et al*., holds that any exceptions to the Equal Protection Clause "must survive a daunting two-step examination known as strict scrutiny." *SFFA*, 600 U.S. at 206; *see Adarand*, 515 U.S. at 227 (noting "all racial classifications" must pass "strict scrutiny" by being "narrowly tailored measures that further compelling governmental interests"). As noted in *Adarand*, the court stated the rubric has two parts. First, the Court asks if the racial classification "further[s] compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Second, the Court asks if the classification is "narrowly tailored" to achieve those interests. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013). The burden to establish both rests with the government. *Id.*

The court concluded it is hornbook law that strict scrutiny applies to race-based classifications. A compelling governmental interest is

essential. An action is narrowly tailored if its "necessary" to achieve the interest. The court cites to the *SFFA* case determining that for racial classifications to be narrowly tailored, they must be "sufficiently focused" on obtaining "measurable objectives warranting the use of race." (*quoting SFFA*, 600 U.S. at 230). And the "twin commands of the Equal Protection Clause" dictate that "race may never be used as a 'negative' and . . . may not operate as a stereotype."(*quoting SFFA.* at 218.) Finally, the contested classification must have a "logical endpoint."(*quoting SFFA* at 212 (*quoting Grutter*, 539 U.S. at 342)).

The court, following the *SFFA* case, pointed out that courts "have identified only two compelling interests that permit [a] resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute [and] [t]he second is avoiding imminent and serious risks to human safety in prisons, such as a race riot."(*quoting SFFA*, 600 U.S. at 207.)

The Parties in this case agree strict scrutiny applies. The MBDA Statute lists certain races that are presumptively entitled to benefits. *See* 15 U.S.C. § 9501(15)(B). Those not on the list can make an "adequate showing" of disadvantage. 15 C.F.R. § 1400.1(b). Those on the list don't have to. Thus, in presuming listed groups are "socially or economically disadvantaged," the MBDA Statute presumes *un*listed groups are *not* "socially or economically disadvantaged." While they can take steps to show they are, that is their burden to bear. Yet, the Agency assumes otherwise.

The Agency says this presumption helps "remedy[] '[t]he unhappy persistence . . . of racial discrimination against minority groups in this country.'" (quoting *Adarand*, 515 U.S. at 237). Plaintiffs say the presumption is too vague, applying considerations from *SFFA*. Plaintiffs further argue the presumption is "*not tailored at all*." The Agency disagrees, arguing the presumption is narrowly tailored because it is (1) necessary, (2) flexible, (3) neither over- nor under-inclusive and (4) minimally impactful to third parties.

The court stated that racial presumptions are a disfavored solution. As such, the Agency's presumption must pass strict scrutiny. (*citing SFFA*, 600 U.S. at 206; *Adarand*, 515 U.S. at 227). A failure on either prong is terminal.

1. The Agency's only compelling interest concerns discrimination in government contracting. The Agency argues its presumption remedies myriad effects of discrimination. But, the court said, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *(quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996)). Thus, the Agency's brief posits two specific examples: 1) discrimination in access to credit and 2) discrimination in private contracting markets. To determine if either is compelling, the court pointed out the Supreme Court asks two questions. First, did specific acts of historic discrimination cause these problems? (*citing SFFA*, 600 U.S. at 207). Second, if the problems arise in private-sector contexts and are not tied to discrete incidents of historic discrimination, did the government "passively participate" in causing them? (*citing Croson*, 488 U.S. at 492).

The court stated that both inquiries call for specifics. The Agency cannot refer to general social ills and rely on these conclusions. Rather, it must identify the "who, what, when, where, why, and how" of relevant discrimination. (*citing Croson and Greer's Ranch Café v. Guzman*, 540 F. Supp. 3d 638, 650 (N.D. Tex. 2021) (O'Connor, J.) (noting an "industry-specific inquiry [is] needed to support a compelling interest for a government-imposed racial classification")). Otherwise, the court noted, any race-based program could be justified considering the country's history of race-based discrimination. "[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." (*quoting Croson*, 488 U.S. at 506.

However, the court states that discrimination is "good at hiding." Accordingly, "significant statistical disparit[ies]" can support "an inference of discrimination." (*quoting Croson*, at 509; collecting cases). Yet, without more evidence, "statistical disparities don't cut it." *(quoting Vitolo*, 999 F.3d at 361; and *Croson*, 488 U.S. at 499, 500–02). Moreover, not all disparity studies are created equal. The court addressed the Plaintiffs argument that "[s]tatistical studies that do not control for . . . capacity factors . . . do not prove intentional discrimination." The court also stated that even the best empirics can only prove so much. Statistical disparities support an *inference* of discrimination. (*citing Croson*, 488 U.S. at 509). Without concrete examples, the court concluded, an inference alone will not pass strict scrutiny.

The court noted the Supreme Court's discussion of *Wygant* in *Croson* demonstrates when a party must show government participation. (*citing Croson,* 488 U.S. at 485–88, 491–92). The court stated that the Supreme Court rejected two extremes. On one hand, it rejected the Fourth Circuit's reading of *Wygant* that required "prior discrimination by the government" for a program to pass strict scrutiny. (*quoting Croson* at 485). Conversely, the court rejected the appellant's argument that the City of Richmond could "define and attack the effects of prior discrimination" wherever they exist. (*quoting Croson* at 486.) Rather, *Croson* framed the analysis around specificity. If the government actively participated in past discrimination, it can use race to remedy the effects. (*citing Croson* at 486, 491–92). Interpreting *Croson*, the court concluded that to remedy private sector disparities, the government must identify discrimination with pinpoint accuracy. The court holds this is satisfied by showing government participation in the relevant discrimination. (*citing Croson*, 488 F.3d at 492).

Therefore, the court noted, government participation is not always necessary, but it is sufficient. The court found that if the Agency identifies specific historic incidents it seeks to redress, it need not show government participation. But, without evidence of government participation, the Agency cannot use race to remedy broad statistical disparities in private-sector contexts. The court said the common theme is clear: "a generalized assertion of past discrimination" won't suffice "because it 'provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.'" (*quoting Hunt*, 517 U.S. at 909 (quoting *Croson*, 488 U.S. at 498)). While the government need not furnish formal findings of discrimination at the start, it must "when a remedial program is challenged." (*quoting Dean*, 438 F.3d at 455).

The MBDA has been challenged, so the Agency must now establish a "strong basis in evidence" for its presumption. If it also seeks to remedy private sector structural disparities rather than particular historic discrimination, the court holds that it must furnish evidence of government participation. (*citing Croson*, 488 U.S. at 492, 503; *Wygant*, 476 U.S. at 274; *SFFA*, 600 U.S. at 260 (Thomas, J., concurring); *Dean*, 438 F.3d at 455; *Vitolo*, 999 F.3d at 361). Anything less fails strict scrutiny.

a. Discrimination in credit access. The court stated that for its first interest, the Agency observed that "evidence before Congress" shows MBEs "have far less access to capital and credit" than white-owned business "due to racial discrimination in lending markets." The court noted that the record validates the Agency's observation, but the question is not whether it is difficult for MBEs to get credit. Rather, the court pointed out the question is 1) did specific incidents of historic discrimination cause this problem, and 2) if the problem is instead rooted in private sector disparities, did the government participate in causing it? Based on these questions, the court holds the Agency's first interest is not compelling.

i. Specific, identified instances of past discrimination. To show a compelling interest, the Agency must identify "specific, identified

instances of past discrimination that violated the Constitution or a statute." *(quoting SFFA*, 600 U.S. at 207). The court found the Agency failed to do so. The evidence shows "[n]ationwide, 'minority businesses are two to three times more likely to be denied a loan'" and "'receive less funding and pay higher interest rates on loans they do receive.'"

The court stated this practice is undeniably problematic, but it cannot be a compelling government interest unless the Agency identifies concrete acts of past discrimination that caused it. (*citing SFFA*, 600 U.S. at 207). The court also found the Agency's cited studies speak only to the phenomenon itself, not contributing factors. The court stated that none of the studies address causal factors, much less "specific, identified instances of past discrimination that violated the Constitution or a statute." (*quoting SFFA*, 600 U.S. at 207).

Without more granularity, the court concluded the Agency cannot establish a compelling interest. Further, the Agency extrapolates too much from the data, as nothing shows the studies controlled for other variables that stymie MBEs seeking credit. One of the Agency's reports noted that "identifiable indicators of capacity are themselves impacted by and reflect discrimination." However, the court found that does not give the Agency carte blanche to justify its presumption from generalized findings without explaining the causal nexus.

While the Agency identified a few concrete examples of past discrimination, most of the cited studies do not. The court noted the record also failed to trace those few examples to specific disparities *today*. The court stated that past discrimination may cause modern disparities without longitudinal studies to reflect causation. However, according to the court, the Agency must accomplish that task to justify its presumption, and it cannot rely on "various decades-old sources or rationale[s] for supporting a compelling interest *today*" (emphasis added). The court stated the cited evidence is overall insufficient to pass strict scrutiny. Further, the Agency's first interest is not compelling because it concerns private-sector credit disparities, and the record does not show government participation contributed to such disparities.

ii. Government participation. The court holds that the government must identify relevant government participation to use race in remedying private sector disparities. According to the court, the record does not establish this element for the Agency's first interest. The court noted that in many respects, the Agency conflates quantitative and qualitative merit. The record shows evidence of MBEs' credit struggles, but it contains no evidence tying this problem to specified government participation. The court found that the Agency's reports do not identify government participation in the discrimination detailed.

The court stated that to be a passive participant, the government must *be* a participant. Precedent requires specifics to prove even passive participation. The court concluded the record contains no concrete evidence of government "induction, encouragement, or promotion" of credit discrimination. Not only does the record fail to reflect government participation for this interest, it affirmatively suggests other causal factors are relevant.

The court stated the issue is not that non-government players were involved. As explained in Croson, the government can use race if it was "a 'passive participant' in a system of racial exclusion practices" in the private sector. The problem, the court found, is that the record identifies other causes and fails to show government participation. Additionally, the evidence that purports to show passive participation concerns failed federal policy, not actual participation in discrimination.

The court stated there is a big difference between participating in discrimination and simply taking actions that increase difficulty for MBEs. Remedying "what the Federal Government is not doing" is not a compelling interest. Rather to pass strict scrutiny, the Agency must

show government participation "with the particularity required by the Fourteenth Amendment."

The court concluded that if the Agency cannot show participation, it lacks "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary." While the government may have a role in remedying MBEs' credit problems, the court found the evidence does not show it had a role in causing them — at least not as a participant. The court holds that any policies aimed at fixing these issues may not use race-based classifications, and the government's first interest is not compelling.

b. Discrimination in private contracting markets. The Agency's second interest concerns discrimination in private contracting markets. Asking the same two inquiries as discussed above, the court found the Agency's second interest is not compelling. However, the court concluded evidence specific to government contracting reveals that a "subinterest" is.

i. Specific, identified instances of past discrimination. The court initially set aside government contracting to examine the Government's other evidence and found it failed to support a compelling interest because the cited sources were either: 1) too generalized or 2) too limited in temporal or geographic scope. To the extent the sources contained specifics, those specifics concern government contracting. The court discusses the three expert reports presented by the government and concluded they illustrate this issue.

The court found the Agency takes evidence probative for a specific context and uses it to over-justify certain actions. The reports touch on other contexts, but they do so generally. The court addressed the Plaintiffs note: "The reports simply claim discrimination in an 'entire industry,' and that 'the government' participates in this 'industry.'" The court stated the Plaintiffs note here is correct, and rejects the Agency's "simplistic syllogism" that "discrimination exists in the American economy, and the government participates in the American economy, therefore, the government participates in discrimination."

The court said that these problems only implicate "ill-defined," "exclusionary networks." The court noted many private contracting sectors operate under the "good ol' boys club." Good ol' boys clubs place importance on social connections and closed networks over a business's merit. The record shows MBEs underperform in these situations due to biases of those in the "ingroup." The court stated this is a prime example of a compelling societal interest that is not, as a matter of law, a compelling *governmental* interest. But, the court found, many such exclusionary networks arise in government contracting. If constrained to that context, the Agency's evidence supports a compelling interest. The court concluded the record contains "evidence of disparities in federal contracting consistent with discrimination."

The Agency said these findings "justify the use of race-conscious remedial measures through the MBDA Act." The court holds the reports identify instances of discrimination in this context, and so does the record as a whole. Thus, the court said, carving away the Agency's broader interest, the record shows remedying historic discrimination in public procurement/prime contracting is a compelling government interest.

ii. Government participation. The court noted the Agency pointed to three categories of empirical evidence to support an inference of government-linked discrimination: 1) utilization indices, 2) regression analyses, and 3) aggregations of anecdotal evidence. The court stated "[i]t is well established that disparities between a locality's utilization of ... MBEs and their availability in the relevant marketplace [can] provide evidence for the consideration of race-conscious remedies." Plaintiffs critique the Agency's evidence but do not explain how it is critically deficient.

The court found the cited studies show significant disparity ratios for MBEs in prime contracting, and that such disparities support an "inference of discriminatory exclusion." Because the government itself is the bidder on such contracts, that inference also implicates government participation.

The court noted that through regression analysis, studies show whether race is a statistically significant predictor of the disparate outcome at a 95 percent confidence level, and thus indicate "whether the disparate outcomes between racial/ethnic minorities and white male business owners could have occurred by chance." Pooling data from various sources, the studies of record produced logit models showing MBE exclusion in prime contracting nationwide. The court stated the numbers are unexplainable without considering race. The court found Agency's regression analyses support an "inference of discriminatory exclusion" in government procurement/prime contracting, which necessarily suggests government participation.

In sum, the court stated the record showed several examples of historic discrimination in which the government participated. Alone, historic discrimination is insufficient. The record also showed statistical analyses and disparity studies that raise an inference of government-linked discrimination. Alone, studies and analyses are also insufficient. However, the court concluded that combining the concrete examples with the robust empirics, the court found remedying past discrimination in government contracting is a compelling governmental interest.

2. The MBDA's racial presumption is not narrowly tailored. Having established a compelling sub-interest, the Agency must show its race-based presumption is narrowly tailored to further that interest. To do so, the Agency must show a "close fit" between the means (its presumption) and the end (remedying historic discrimination in government contracting). This fit must be so close that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The court examined the several factors that determine the narrow tailoring inquiry, and holds the MBDA statute failed under these considerations.

a. Under- and over-inclusivity. The court found the MBDA's race-based presumption is both under- and over-inclusive. An under-inclusive presumption excludes necessary groups to further the identified interest; an over-inclusive presumption includes unnecessary groups for that interest.

The court stated the Agency's presumption is under-inclusive because it "arbitrarily excludes" many MBEs, including those owned by individuals from "the Middle East, North Africa, and North Asia." Such inconsistencies come with the territory of "racial taxonomies in a multiracial nation." The court found inconsistencies in which groups from certain countries are included or excluded. Further, nothing in the government's history provided a rationale for which countries are included or excluded. The court concluded the absence of a clear regulatory framework for including or excluding certain groups means the MBDA Statute is immune from meaningful judicial review.

The court holds the MBDA's inclusion and exclusion approach does not conform to the narrow tailoring strict scrutiny requires.

The court found the Agency failed to explain why its presumption is necessary to remedy the effects of discrimination in public, and the record contained no evidence of systemic exclusion from public contracting for many groups entitled to presumptive disability under the MBDA Statute. Without clear evidence tracing each of the groups in 15 U.S.C. § 9501(15)(B) to concrete discrimination in this context, the Agency's presumption is not narrowly tailored

The court concluded the Agency seeks to justify a ramshackle presumption without concrete evidence establishing why certain groups make the list and others do not.

The court determined the Agency's over-inclusive presumption is akin to many other federal statutes without any empirical justification and without close scrutiny. According to the court, because the Agency includes many individuals without inquiring into individual applicants belonging to those groups have experienced discrimination, it is facially over-inclusive and thus fails strict scrutiny. The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is both under- and over-inclusive, and thus it is not narrowly tailored and does not pass strict scrutiny.

b. Stereotyping. The court stated that most of the above issues stem from stereotypes underlying the Agency's presumption. There is not anything inherently race-conscious about serving "socially or economically disadvantaged individual[s]." 15 U.S.C. § 9501(15). But the MBDA Statute defines "social or economic disadvantage" in racial terms. Nor does a business owner's race inherently suggest anything about disadvantage. Yet, the MBDA Statute defines "minority owned business enterprise" in terms of "social or economic disadvantage."

The court stated that the Agency uses race as a reliable proxy for disadvantage, at least with respect to the listed groups. If a business owner belongs to an enumerated group, he or she is entitled to services without regard to their life circumstances, financial performance or any social or economic metrics of "disadvantage." The inverse is also true. No matter how disadvantaged an entrepreneur may be, the Agency presumes otherwise if they are not on the list. The court states the federal courts have rejected "such illogical stereotypes."

As far as the Agency is concerned, the court found that race presumptively determines disadvantage — but only for those listed in 15 U.S.C. § 9501(15)(B). The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is based on racial stereotypes. As such, it is not narrowly tailored and does not pass strict scrutiny.

c. Logical endpoint. The court found the MBDA's presumption in 15 U.S.C. § 9501(15)(B) has no logical endpoint. Thus, the court holds, it is not narrowly tailored and does not pass strict scrutiny.

d. Other relevant factors. The court addressed the main factors applied in the *SFFA v. Harvard* case, and held the Agency's presumption does not satisfy the narrow tailoring requirement. It addresses other relevant factors in its decision**.**

i. Necessity and available alternatives. The court found the MBDA's racial presumption is unnecessary for the stated interest and was not crafted after first considering alternatives. The only surviving interest is remedying past discrimination in government procurement/prime contracting. According to the court, the record does not show the Agency's presumption is necessary for that interest. But even if the Agency's broader interests were compelling, the court stated nothing suggests the race-based presumption in 15 U.S.C. § 9501(15)(B) is necessary to fix the credit struggles and exclusionary networks documented in the record.

The court found that nothing in the record indicated the MBDA considered race-neutral alternatives before endorsing the presumption in 15 U.S.C. § 9501(15)(B). The Agency attempted to avoid this inquiry, noting that the federal government has operated race-neutral business-assistance programs for decades, and still racial disparities exist. However, the court stated although there is evidence that other agencies applied other solutions to different issues does not carry the Agency's burden. Additionally, the court said the Agency alone bears the burden of showing race-neutral alternatives were considered.

The court noted the Agency's problem is not merely that race-neutral alternatives would suffice. Rather, the court holds MBDA's fatal flaw is that no evidence suggests it considered such alternatives before resorting to its race-based presumption. Without such evidence, the Agency failed to show the meticulous "connection between justification and classification" required for its presumption to survive. MBDA's presumption in 15 U.S.C. § 9501(15)(B), the court concluded, is unnecessary and was created without first considering race-neutral alternatives. Thus, it is not narrowly tailored and does not pass strict scrutiny.

ii. Flexibility and duration. Second, a narrowly tailored program is flexible and durationally limited. The court discussed the primary inquiry when analyzing a remedy's flexibility is whether its requirements may be waived. The court found nothing in the MBDA Statute says its presumption is waivable or otherwise elastic. While applicants not on the Agency's list can attempt to demonstrate disadvantage, the underlying presumption cannot be waived. The racial presumption, the court noted, is baked into countless facets of MBDA programming. The Agency cannot relax its preferences in granting a finite good (MBDA benefits) because: 1) the statute itself contains no waiver provision and thus precludes that option, and 2) the "applicant pool" is not geographically constrained and is thus effectively limitless.

The Agency's presumption is also unlimited in duration. It continues to grow, the court stated, and offers increasingly expansive programming pursuant to its racial presumption. If the current trend continues, the court determined the MBDA's presumption appears to never expire. The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is neither flexible nor durationally limited. Thus, it is not narrowly tailored and does not pass strict scrutiny.

iii. Impact on third parties. Third, a narrowly tailored program minimally impacts third parties. The court pointed out the MBDA presumes certain races are entitled to benefits, giving them an effective monopoly on its services. The court noted that precedent has long recognized that "[t]he badge of inequality and stigmatization conferred by racial discrimination" is itself an impactful harm. Those not covered by 15 U.S.C. § 9501(15)(B) are not invited to participate, unless they make an "adequate showing" that they should be. The court found that even if those not covered can access business-development services from other programs, that presumption is per se impactful to third parties. The court holds the Agency's presumption in 15 U.S.C. § 9501(15)(B) failed the other narrow tailoring factors and thus failed strict scrutiny.

Holding. The MBDA's statutory presumption, codified at 15 U.S.C. § 9501, is unconstitutional. The Agency grants or withholds programming based upon a threshold satisfaction of 15 U.S.C. § 9501(15)(B), or alternatively, an "adequate showing" that an unlisted group is "socially or economically disadvantaged" under 15 C.F.R. § 1400.1(b). Any provision of the MBDA Statute that is contingent on the presumption in 15 U.S.C. §9501(15)(B) is also unconstitutional. Accordingly, the court granted summary judgment on Plaintiffs' equal protection claim and found the following provisions of the MBDA Statute unconstitutional: 15 U.S.C. §§9501, 9511, 9512, 9522, 9523, 9524.

Plaintiffs satisfy the requirements for injunctive relief, though not for the broader injunction sought. Accordingly, the Court ordered that the MBDA, along with its officers, agents, servants and employees and/or anyone acting in active concert therewith, be permanently enjoined from imposing the racial and ethnic classifications defined in 15 U.S.C. § 9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. §1400.1, or otherwise considering or using an applicant's race or ethnicity in determining whether they can receive Business Center programming.

Note: Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 S. Ct. 2141 (June 29, 2023)

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (June 29, 2023) ("*SFFA*"), the Supreme Court held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment the admissions systems used by Harvard College and the University of North Carolina. The Court referenced, cited and applied the Supreme Court decisions in *Croson* and *Adarand,* including the strict scrutiny standard, to the university admissions systems in these cases.

It is noteworthy that subsequent to the Supreme Court decision in *SFFA v. Harvard et al.,* Attorney Generals from 13 states sent a letter, dated July 13, 2023, to "Fortune 100 CEOs" in which, among other statements, they urged businesses, to "immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices."

On July 19, 2023, Attorneys General from twenty states sent a letter to "Fortune 100 CEOs" in which they responded to and opposed the statements in the July 13, 2023, letter sent by the Attorneys General from the 13 states. The letter provides support for corporate efforts to recruit diverse workforces and create inclusive work environments, and states that these efforts and corporate diversity programs are legal and reduce corporate risk for claims of discrimination. Among the state Attorneys General signing the letter was the State of Washington Attorney General.

Note: Washington State Civil Rights Act: RCW 49.60.400.

Initiative Measure No. 200 was approved by the State of Washington voters in 1998. Initiative 200 is an Act relating to "prohibiting government entities from discriminating or granting preferential treatment based on race, sex, color, ethnicity, or national origin…;" and adding new sections to Chapter 49.60 RCW.

RCW 49.60.400 is known as the Washington State Civil Rights Act. RCW 49.60.400(1) provides that the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[198] The Washington State Civil Rights Act (the "Act") was amended in 2013 to add provisions regarding providing the Act does not prohibit schools under chapter 28A.715 RCW from implementing a policy of Indian preference in employment or prioritizing the admission of tribal members in certain circumstances.

Significantly, the Act also provides a federal program exception as follows: "This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state."[199] For purposes of this section of the Act, the term "state" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.[200]

198 RCW 49.60.400(1).

199 RCW 49.60.400(6).

200 RCW 49.60.400(7).

Referendum 88 (Initiative 1000) was rejected by Washington voters in 2019. That Referendum sought to allow affirmative action policies in public employment, contracting and education. Referendum 88 requested voters to approve the Washington state legislature's passage of Initiative 1000, which curtailed the state's 1998 prohibition on preferential treatment based on race or gender. The Referendum would have amended the Act (RCW 49.60.400) that prohibits the state from granting preferential treatment to an individual or group based on certain characteristics in public employment, public education, and public contracting. The rejection of the Referendum means that RCW 49.60.400 stays in place as it was adopted in 1998 and amended in 2013.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE programs, or race-, ethnicity-, or gender-neutral programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds, including public agencies, commissions, and authorities. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

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

1. *Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al*., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019)

Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), moved for a summary dismissal of all the claims.

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

Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of "Black American" and "Native American" are void for vagueness. The district court dismissed' the claims that the definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations'

requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor's claims against Acting Director of the USDOT's Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor's discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color or state law" as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor's claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor's claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well-founded reason" to question Taylor's membership claims, and that Taylor did not qualify as a "socially and economically disadvantaged individual." Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor's equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al*., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, *dismissing in part, reversing in part and remanding* the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014)

Note: The Ninth Circuit Court of Appeals Memorandum provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes

to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana's DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq*.

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.,* MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all "relevant" minority groups were underutilized in "professional services" and Asian Pacific Americans and Hispanic Americans were underutilized in "business categories combined," but it also concluded that all "relevant" minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are "significantly overrepresented" in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana's transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in Mountain West applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in AGC, *San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Mountain West*, 2014 WL 6686734 at *2, *quoting Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, *quoting AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in Mountain West also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 997-999.

MDT Study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id*. at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent

in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id*. In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts 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.* USDOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id*. Mountain West brings an as-applied challenge to Montana's DBE program. *Id*.

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, San Diego v. California DOT, 713 F.3d 1187, 1196, stated that under the two-prong test established in Western States, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. Mountain West, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court holding in 2014 and the appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even

if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id*. at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see,* 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting, Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West's expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id*. at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana's actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. W. States Paving, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results Mountain West, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that "some of the population samples were very small and the result may not be significant statistically." 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State's transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 ("If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination."); *Id*. at 1001 ("The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs."). *Id*.

The Ninth Circuit also cited to the USDOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, U.S. Dep't of Transp., *Western States Paving Co. Case* Q&A (Dec. 16, 2014) ("In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.").

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum,

May 16, 2017, at 10, *quoting, Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."); and *quoting, Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."). *Id*.

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11.

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business initial Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and woman-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies Western States Paving Co. v. Washington State DOT decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id*. Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of

the federal statute and the federal regulations (the Federal DBE Program) but struck down Washington DOT's program because it was not narrowly tailored. *Id*., citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

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

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id*. 1191, citing Western States Paving Co., 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id*. at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id*. The Court noted that disparity analysis involves making a comparison between the availability of minority- and woman-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 woman-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 woman-owned firms, including female minorities, showing substantial disparities in the utilization of all woman-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 woman-owned firms. *Id*. The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id*.

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

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

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

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

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

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id*. at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id*. at 1195-1200.

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

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

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

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id*. at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997–99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id*. at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id*. at *7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id*. (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id*. (quoting *Western States Paving,* 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id*. at 1196. The Court noted that

the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and woman-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 woman-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id*. at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id*. The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and woman-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 woman-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for

construction and engineering contracts, as prime *and* subcontractors." *Id.*

Consideration of race–neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id*. at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id*.

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger,* 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California. Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id*. at 1200.

Application of program to mixed state- and federally funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id*. at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for 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*.

4. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id*.

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id.* at 1182. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id*. DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id.* at 1182.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id*. at 1183.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185*. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id*.

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id*.

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186.* The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id.* at 1187. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186.*

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id*. at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id*. at 1187.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id*. The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). *Id*.

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id*. at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id*. The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id*. TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id*.

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal:

1. the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and

2. the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id*. at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id*. (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*,

between Hispanics, blacks, and women). *Id*. at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id*. (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id*. (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id*. (citing regulation).

A prime contractor must use "good faith efforts" to satisfy a contract's DBE utilization goal. *Id*. (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id*. (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff's bid in favor of a higher bidding minority-owned subcontracting firm. *Id*. at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id*. The prime contractor expressly stated that he rejected the plaintiff's bid due to the minority utilization requirement. *Id*.

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id*. The district court rejected both of plaintiff's challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id*. at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id*. Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id*.

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id*. at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it "would not yield a different result." *Id*. at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in "ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." *Id*. at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* ("*Adarand VII*"), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that "[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination." *Id*. at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id*. However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence

of discrimination in the transportation contracting industry to justify TEA-21. *Id*. The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id*. at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id*.

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. *Id*. at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id*. The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id*. at 996; see also Br. for the United States at 28 (April 19, 2004) ("DOT's regulations … are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id*. at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id*. However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id*. The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id*. (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id*. at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id*. However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id*. Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id*. at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id*. at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id*. at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id*. at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id*. In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id*., *citing Monterey*

Mechanical, 125 F.3d at 714. The court found that other courts are in accord. *Id*. at 998-99, *citing Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id*. at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id*. WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id*. WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id*. Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id*. at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id*. WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id*.

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id*. at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id*.

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id*. It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id*. The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id*. The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id*. The court also found the State conceded as much to the district court. *Id*.

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id*. The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id*. However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id*.

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id*. at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id*. The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to

certify that they had been victims of discrimination in the contracting industry. *Id*. Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id*. at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

6. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of an MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the *California Polytechnic State University* (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id*. The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id*.

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme '[did] not involve racial or gender quotas, set-asides or preferences,'" the University did not need a disparity study. *Id*. at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. *Id*. The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id*.

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id*. at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id*. at 709. The court held that contrary to the district court's finding, such a difference was not de minimis. *Id*.

The defendants also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id*. at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." *Id*. The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas … [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Id*. at 710-11 (internal citations and quotations omitted). The

court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id*. at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although "worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness." *Id*. The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (e.g., advertising) to MBE/WBE firms. *Id*. at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id*. at 712-13. The court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id*. at 713. The court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (e.g., inclusion of Aleuts). *Id*. at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co*., 488 U.S. 469, 505-06 (1989). The court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Id*. at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

7. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id*. The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed $14 million. *Id*.

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id*. at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id*. at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interesting in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id*. at

1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id*. at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id*. at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id*. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id*. And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id*. at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id*. at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id*. at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id*. Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id*. For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id*. The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id*. at 1414, *citing* to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id*. at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id* at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id*. The court found that such a "combination of convincing anecdotal and statistical evidence is potent." *Id*. at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id*. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its

contracting processes considered only MBEs located within the City of San Francisco. *Id*.

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id*. at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id*. at 1416. Second, the plan should avoid the use of "rigid numerical quotas." *Id*. According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id*. Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id*. Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id*. at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative … however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." *Id*. at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id*. at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id*. at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id*. at 1417. The court pointed out that there were no goals, quotas, or set asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id*. at 1417.

The court rejected the argument of *AGCC* that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id*. at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id*. at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id*. at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 1418, *quoting Coral Construction*, 941

F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. *Id*. 1418.

8. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id*. The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id*. at 918, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id*. at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id*. at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id*.

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id*. at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id*. at 919, *quoting International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id*. at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id*. at 919. The court addressed

whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id*. at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id*. Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id*. Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id*.

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a "propelling government interest" for King County's adopting the MBE Program. *Id*. at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id*. at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id*. at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program-imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id*.

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id*. at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id*. Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id*.

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id*. at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id*. at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id*. Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id*. The court noted in this case the County considered alternatives but determined that they were not available as a matter of law. *Id*. The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id*.

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting

one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id*. at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id*. The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id*.

A second indicator of a program's narrow 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.

9. *Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al*., 2017 WL 3387344 (W.D. Wash. 2017)

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as an MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id*. Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id*. Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification**.** The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a "member of a designated disadvantaged group," the court stated Mr. Taylor "must demonstrate social and economic disadvantage on an individual basis." *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and "articulated a rational connection between the facts found and the choices made." *Id*. at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE "program requires states to extend benefits only to those who are actually disadvantaged." *Id., citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was "actually disadvantaged" or when it denied Plaintiff's application. *Id.*

The USDOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12*, citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations "weigh adversely and disproportionately upon" mixed-race individuals, like Mr. Taylor. *Id*. This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal defendants, according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim**.** Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *Id.* at *14, *citing, Midwest Fence Corp. v. United States Dep't of Transp.*,

840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at *14. "Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to "arbitrary" decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of "Native American" was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of "Native Americans" now "includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian." *Id., citing,* 49 C.F.R. § 26.5. This definition, the court said, provides an objective criterion based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because "Title VI itself prohibits only intentional discrimination." *Id.* at *17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

10. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al*., 2013 WL 4774517 (D. Mont.) (2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id*.

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id*. at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id*. at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id*. at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id*.

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana

highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately $26 million, and that MDT had $50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id*.

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id*. The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id*. The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id*. The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id*.

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id*. at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that it was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id*. at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id*.

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBEs 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.

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id*. at 42. Accordingly, the race-conscious component of the Caltrans DBE

program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id*.

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id*. at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination…," and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed

that the program would not meet the goals of the federally funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id*. at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id*. at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id*. at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id*. at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id*. at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id*. at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

12. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City nor 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.

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions

1. *Mark One Electric Company, Inc. v. City of Kansas City, Missouri*, 2022 WL 3350525 (8th Cir. 2022)

In 2020, the court stated that Kansas City began restricting participation in its Minority Business Enterprises and Women's Business Enterprises Program to those entities whose owners satisfied a personal net worth limitation. Mark One Electric Co., a woman-owned business whose owner's personal net worth exceeded the limit, appealed the dismissal of its lawsuit challenging the Kansas City Program as unconstitutional because of the personal net worth limitation. The court held that under its precedent, the Program's personal net worth limitation is a valid narrow tailoring measure, and therefore the court affirmed the district court's dismissal. In 2016, the court pointed out that the City conducted a disparity study to determine whether the MBE/WBE Program followed best practices for affirmative action programs and whether the Program would survive constitutional scrutiny. The 2016 Disparity Study analyzed data from 2008 to 2013 and provided quantitative and qualitative evidence of race and gender discrimination. The court said the study concluded that the City had a compelling interest in continuing the program because "minorities and women continue to suffer discriminatory barriers to full and fair access to [Kansas City] and private sector contracts." The study also provided recommendations to ensure the program would be narrowly tailored, including: adding a personal net worth limitation like the net worth cap in the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) program.

The court stated the City enacted a new version of the MBE/WBE Program based on the 2016 Disparity Study on October 25, 2018. The amended Program incorporated a personal net worth limitation, as recommended by the study, which would require an entity to establish that its "owner's or, for businesses with multiple owners, each individual owner's personal net worth is equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE program." See Kan. City, Mo. Code of General Ordinances ch. 3, art. IV, § 3-421(a)(34), (47) (2021).

On the day after the personal net worth limitation took effect, the court said that Mark One Electric initiated an action against the City under 42 U.S.C. § 1983, challenging the personal net worth limitation. Mark One had been certified as a WBE since 1996, but based on the new personal net worth threshold, it would lose its certification despite otherwise meeting the requirements of the WBE Program.

Mark One, the court noted, acknowledged that, based on the 2016 Disparity Study, there was a strong basis in evidence for the City to take remedial action, but alleged the study's recommendation that the City consider adding a personal net worth limitation was not supported by either qualitative or quantitative analysis. Mark One, the court stated, claimed that the personal net worth limitation is not narrowly tailored to remedy past discrimination and that the program as a whole is not narrowly tailored because of the personal net worth limitation.

The court pointed out that Mark One asserted, "[T]he City has adopted an arbitrary and capricious re-definition of who qualifies as a women [sic] or minority and seeks to remedy a discrimination of which there is no evidence." According to Mark One, the personal net worth limitation is "not specifically and narrowly framed to accomplish the city's purpose," and therefore the program is unconstitutional.

The City moved to dismiss the complaint, arguing that the personal net worth limitation is a valid measure to narrowly tailor the MBE/WBE program.

The district court granted the City's motion, finding that the personal net worth limitation was permissible as a matter of law.

The court found that race-based affirmative action programs designed to remediate the effects of discrimination toward minority-owned subcontractors, such as Kansas City' s, are subject to strict scrutiny, meaning that the program is constitutional "only if [it is] narrowly tailored to further compelling governmental interests." (*Citing Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 968–69 (8th Cir. 2003); (*quoting Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The court pointed out that although Mark One is a woman-owned business and not a minority-owned business, neither party contests review of the Program under the strictest scrutiny.

The court stated the legal standard: "To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest," such as stopping perpetuation of racial discrimination and remediating the effects of past discrimination in government contracting. (*Citing Sherbrooke Turf*, 345 F.3d, at 969. The City must: "demonstrate a 'strong basis in the evidence' supporting its conclusion that race-based remedial action [is] necessary to further that interest." *Id*. (*citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). The court found Mark One does not dispute that the City has a compelling interest in remedying the effects of race and gender discrimination on City contract opportunities for minority- and woman-owned businesses. And Mark One, the court said, has conceded the 2016 Disparity Study provides a strong basis in evidence for the MBE/WBE Program to further that interest.

Second, the City's program must be narrowly tailored, which requires that "the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose." *Id. citing Sherbrooke*, at 971. The plaintiff, according to the court, has the burden to establish that an affirmative action program is not narrowly tailored. In determining whether a race-conscious remedy is narrowly tailored, the court looks 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." (*citing Sherbrooke*, at 971; *United States v. Paradise*, 480 U.S. 149, 171, 187, (1987)).

The court stated that Mark One attacked the personal net worth limitation from two angles. Mark One first argued that the personal net worth limitation in the City's Program should be independently assessed under strict scrutiny, separately from the Program as a whole, and asks the court to find the provision unenforceable through the Program's severability clause. Mark One argued under strict scrutiny the personal net worth limitation is unconstitutional in its own right because it was implemented by the City without a strong basis in evidence and excludes a subset of women and minorities based on a classification unrelated to the discrimination MBEs and WBEs face.

The court found that Mark One offers no authority for the premise that an individual narrow tailoring measure which differentiates between individuals or businesses based on a non-suspect classification, such as net worth, is subject to strict scrutiny in isolation. The court pointed out the MBE/WBE Program as a whole must be premised on a strong basis in evidence under strict scrutiny review. However, the court held the City is not required to provide a separate individual strong basis in evidence for the personal net worth limitation because this limitation, on its own, is subject only to rational basis review.

Mark One also challenged the overall narrow tailoring of the MBE/WBE Program, claiming that the personal net worth limitation makes the Program unconstitutional because it excludes MBEs and WBEs that have experienced discrimination. The court held that under its precedent, this argument is unavailing. The court said that it has previously found

the USDOT DBE personal net worth limitation—the limitation the City adopted for the Program—to be a valid narrow tailoring measure that ensures flexibility in an affirmative action program and reduces the impact on third parties by introducing a race- and gender-neutral requirement for eligibility. *See Sherbrooke Turf,* 345 F.3d, at 972–73 (finding the federal DBE program narrowly tailored on its face in part because "wealthy minority owners and wealthy minority-owned firms are excluded" through the personal net worth limitation, so "race is made relevant in the program, but it is not a determinative factor").

The court found that Mark One had not plausibly alleged that the $1.32 million personal net worth limitation in the City's MBE/WBE Program is different, or serves a distinguishable purpose, from the personal net worth limitation in the federal program such that it is not likewise a valid narrow tailoring measure here.

Mark One claimed that its exclusion from the Program despite its status as a woman-owned business shows that the Program is unlawful. The court noted that it did not minimize the fact that individuals and businesses may experience race- and gender-based discrimination in the marketplace regardless of wealth, and that a minority- or woman-owned enterprise may be excluded from the Program based solely on the owner's personal net worth, despite having experienced discrimination in its trade or industry and regardless of the revenue of the enterprise itself or the financial status of any of its minority and women employees.

But, the court found that the City does not have a constitutional obligation to make its Program as broad as may be legally permissible, so long as it directs its resources in a rational manner not motivated by a discriminatory purpose. Though Mark One argued that the personal net worth limitation is "arbitrary and capricious because the city *chose to discriminate against* the very minorities and women its [MBE]/WBE Program was designed to help," the court stated there was no allegation in the operative complaint that the City was motivated by a discriminatory purpose when it implemented the personal net worth limitation.

The court concluded that under *Sherbrooke Turf,* 345 F.3d, at 972-73, the City may choose to add this limitation in its Program as a rational, race- and gender-neutral narrow tailoring measure.

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

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial

groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id*.

The Court found that the North Carolina statutory scheme "largely mirrored the federal Disadvantaged Business Enterprise ("DBE") program, with which every state must comply in awarding highway construction contracts that utilize federal funds." 615 F.3d 233 at 236. The Court also noted that federal courts of appeal "have uniformly upheld the Federal DBE Program against equal-protection challenges." *Id*., at footnote 1, *citing*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id*.

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to "establish annual aspirational goals, not mandatory goals, … for the overall participation in contracts by disadvantaged minority-owned and woman-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. Estepp, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." *Id., quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting*, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion).

The Court significantly noted that: "There is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense,* 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State's evidence of discrimination "must be evaluated on a case-by-case basis." *Id*. at 241. (internal quotation marks omitted).

The Court held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. "Instead, a state may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id*. at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we "further require that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'" *Id*. at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state's showing of a strong basis in evidence for the necessity for remedial action. *Id*. at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state's evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id*. at 242 (citations omitted). However, the Court stated "that mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. *Id*. at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state's statutory scheme must also be "narrowly tailored" to serve the state's compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply "intermediate scrutiny" to statutes that classify on the basis of gender. *Id*. at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id., quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does "the most exacting" strict scrutiny standard of review. *Id*. at 242. The Court found that its "sister circuits" provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure "can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-

conscious program." *Id*. at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes "something less" than a 'strong basis in evidence,' the courts, … also agree that the party defending the statute must 'present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,…the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on "reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions." *Id*. at 242 *quoting Hogan*, 458 U.S. at 726.

Plaintiff's burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff "has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance." *Id*. at 243, quoting West Virginia v. U.S. Department of Health & Human Services, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State's statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and woman-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 woman-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 woman-

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 the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id*. The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id*. For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id*. The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id*.

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id*.

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id*.

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and

women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id*. These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id*.

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id*. The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id*. at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id*. at 246-247, *citing Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id*. The Court concluded plaintiff did not offer any contrary evidence. *Id*.

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. *Id*. at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id*. at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id*. at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis

for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." *Id*. at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination."). The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id*. at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id*. at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id*.

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id*. at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id*.

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id*. at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id*. at 249. The Court rejected plaintiffs'

argument that the study oversampled representatives from minority groups and found that surveying more non-minority men would not have advanced the inquiry. *Id*. at 249. It was noted that the samples of the minority groups were randomly selected. *Id*. The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id*. at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id*. at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id*. at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id*.

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id*. The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id*. at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id*. The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id*. at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [ ] … every conceivable

race-neutral alternative." 615 F.3d 233 at 252, *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id*. at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id*. at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id*.

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these "persistent disparities indicate the necessity of a race-conscious remedy." 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program's inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id*. at 253, *citing* *Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program's goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program's participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id*.

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id*. The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id*. The Court found there was a lenient standard and flexibility of the "good faith" requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id*.

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id*.

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id*.

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id*. at 254.

Woman-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that woman-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 woman-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 again 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.

3. *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 benchmarks or levels of participation for the targeted minorities groups. *Id*. at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id*. at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id*. The VOP further imposes obligations on the City with respect to vendor contracts. *Id*. The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id*. The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id*. The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id*.

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id*. at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id*. The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id*. at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id*. at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id*. at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly funded contracts. *Id*. at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id*.

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id*. at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id*. The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id*.

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers, and the City is not required to defend the alleged bad acts of others. *Id*. Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id*. at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id*. at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id*. Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id*. at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id*.

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a

subcontract, or showed any case where their bids were rejected on the basis of race. *Id*. The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id*.

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id*. at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id*. at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id*.

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009) (unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

4. *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 an 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.

5. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc*., the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an "entitlement" in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. ("Durham"), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. ("Rapid Test"), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a Black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine

whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

6. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down an MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id*.

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id*. On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id*.

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id*. The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id*. Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community." *Id*. The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id*.

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id*. The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id*.

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. *Id*. The Board also implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. *Id*. at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id*. Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id*. Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id*. In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id*. In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected based upon his qualifications, but because the "District was only looking for 'Black-owned firms.'" *Id*. Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id*.

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id*. at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id*. Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id*.

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id*. at 267. The court first questioned whether the identified government interest was compelling. *Id*. at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id*.

The court held the MVP was not narrowly tailored for two reasons. *Id*. First, because no evidence existed that the District considered race-neutral alternatives to "avoid unwitting discrimination." The court found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake." *Id*., *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id*. at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id*. at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id*. "[R]ace conscious … policies must be limited in time." *Id*., *citing Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id*. at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id*. Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id*. at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id*.

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals and affirmed the district

court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id*. at 270.

7. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)

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 woman-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 woman-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 woman-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 woman-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 woman 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, unrebutted 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.

8. *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 an 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.

9. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program, and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference

between the applicable standards has become "vanishingly small." *Id*. The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action …" and, realistically, the law can ask no more of race-based remedies either." 256 F.3d at 644, *quoting* in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the "paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes." 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and woman's "set aside programs," the women's program the court determined must clear the same "hurdles" as the minority program." 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is "to be expected that there would be more soliciting of these contractors on public than on private projects." *Id*. Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County "conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance." 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a "public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy." 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry "tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County." 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id*. The court noted that "[I]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit … to be entitled to take remedial action." *Id*. But, the court found "of that there is no evidence either." *Id*.

The court stated that if the County had been complicit in discrimination by prime contractors, it found "puzzling" to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would "flunk the constitutional test" by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against Blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id*. Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id*. "Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons." *Id*. The court, therefore, held that the ordinance was not "narrowly tailored" to the wrong that it seeks to correct. *Id*.

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at

647. The court held that the list of "favored minorities" included groups that have never been subject to significant discrimination by Cook County. *Id*. The court found it unreasonable to "presume" discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id*. Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case — "that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project." 256 F.3d at 647-648.

10. *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. Pena* (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, 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 "over inclusiveness." *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*.

Also, 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).

11. 11. *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999)

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted an 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 provides 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 an 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.

12. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). *Id*. The plaintiffs challenged the application of the program to County construction contracts. *Id*.

For certain classes of construction contracts valued over $25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id*. at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County Commission would make the final determination and its decision was appealable to the County Manager. *Id*. The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id*.

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. *Id*. at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." *Id*. Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs and failed to demonstrate an "important interest" necessary to support the WBE program. *Id*. The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id*. The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id*. at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a "strong basis in evidence" to justify the existence of the BBE and HBE programs;

3. Whether the district court erred in finding the County lacked a "sufficient probative basis in evidence" to justify the existence of the WBE program; and

4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve. *Id*. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id*. at 906. Under this standard, "an affirmative action program must be based upon a 'compelling government interest' and must be 'narrowly tailored' to achieve that interest." *Id*. The Eleventh Circuit further noted:

"In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest." *Id*. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." *Id*., *citing Croson*, 488 U.S. at 500). The requisite "'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" *Id*. at 907, *citing Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (*citing* and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired … and the proportion of minorities willing and able to do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." *Id*. (internal citations omitted).

Notwithstanding the "exceedingly persuasive justification" language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id*. at 908. Under this standard, the government must provide "sufficient probative evidence" of discrimination, which is a lesser standard than the "strong basis in evidence" under strict scrutiny. *Id*. at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical "anecdotal" evidence. *Id*. at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially "post-enactment" evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id*. However, "such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." *Id*. at 912. A district court should not "speculate about what the data *might* have shown had the BBE program never been enacted." *Id*.

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id*. In summary, the Eleventh Circuit held that the County's statistical evidence (described more fully below) was subject to more than one interpretation. *Id*. at 924. The district court found that the evidence was "insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the

County's stated rationale for imposing a gender preference." *Id*. The district court's view of the evidence was a permissible one. *Id*.

County contracting statistics. The County presented a study comparing three factors for County non-procurement Construction contracts over two time periods (1981-1991 and 1993):

1. the percentage of bidders that were MWBE firms;
2. the percentage of awardees that were MWBE firms; and
3. the proportion of County contract dollars that had been awarded to MWBE firms. *Id*. at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no "consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate 'share' … when the bidder percentages are used as the baseline." *Id*. at 913. For the WBE statistics, the bidder/awardee statistics were "decidedly mixed" as across the range of County construction contracts. *Id*.

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating "disparity indices" for each program and classification of construction contract. The Eleventh Circuit explained:

> *"[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent." Id. at 914. "The utility of disparity indices or similar measures … has been recognized by a number of federal circuit courts." Id.*

The Eleventh Circuit found that "[i]n general … disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination." *Id*. The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination." *Id*., *citing* 29 CFR § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." *Id*., *citing Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id*. at 914. "The standard deviation figure describes the probability that the measured disparity is the result of mere chance." *Id*. The Eleventh Circuit had previously recognized "[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Id*.

The statistics presented by the County indicated "statistically significant underutilization of BBEs in County construction contracting." *Id*. at 916. The results were "less dramatic" for HBEs and mixed as between favorable and unfavorable for WBEs. *Id*.

The Eleventh Circuit then explained the burden of proof:

> *"[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored." Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a "neutral explanation" by:

"(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id*. (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced "sufficient evidence to establish a neutral explanation for the disparities." *Id*.

The plaintiffs alleged that the disparities were "better explained by firm size than by discrimination … [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id*. at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id*. at 917. The Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id*.

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id*. The expert stated:

> *The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. Id.*

The Eleventh Circuit then summarized:

> *Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id*. A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id*. (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id*.

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id*. The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract

awarded. *Id*. The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id*.

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id*. at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id*. The Eleventh Circuit held that this decision was not clearly erroneous. *Id*.

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id*. The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id*.

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id*. However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id*. The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id*.

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity for one type of construction contract in the 1993 period. *Id*. The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id*. The Eleventh Circuit held the district court permissibly found that this evidence was not "sufficiently probative of discrimination." *Id*.

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id*. at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) "the County's own expert testified as to the utility of examining the disaggregated data 'insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another." *Id*.

Additionally, the district court noted, and the Eleventh Circuit found that "the aggregation of disparity statistics for non-heterogeneous 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 (emphasis added). 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 woman-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 with 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 (emphasis added) (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 (emphasis added).

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 the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

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

The court considered whether the City and County of Denver's race- and gender-conscious public contract award program complied with the Fourteenth Amendment's guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. ("Concrete Works") appealed the district court's summary judgment order upholding the constitutionality of Denver's public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance ("Ordinance") to enable certified racial minority business enterprises ("MBEs") and woman-owned business enterprises ("WBEs") to participate in public works projects "to an extent approximating the level of [their] availability and capacity." *Id*. at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id*. at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id*. Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC's findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id*.

In 1993, and after extensive discovery, the district court granted Denver's summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id*. With respect to the merits, the court held that Denver's program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id*.

Standing. At the outset, the Tenth Circuit on appeal considered Denver's contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance's constitutionality. *Id*. at 1518. The court concluded that Concrete Works demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and woman-owned prime contractors. *Id*.

Specifically, the unequal nature of the bidding process lied in the Ordinance's requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id*. In contrast, minority and woman-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id*. Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id*. at 1519.

In addition to demonstrating "injury in fact," Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver's race- and gender-conscious contract program. *Id*.

Equal Protection Clause standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance's race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id*. Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id*.

Permissible evidence and burdens of proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling

interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id. citing Croson* at 492.

A. Geographic scope of the data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued Croson would allow Denver only to use data describing discrimination within the City and County of Denver. *Id*. at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id*. at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id*.

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id*. The record revealed that over 80 percent of Denver Department of Public Works ("DPW") construction and design contracts were awarded to firms located within the Denver MSA. *Id*. at 1520. To confine the permissible data to a governmental body's strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id*.

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver's contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id*. at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id*.

B. Anecdotal evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and woman-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id*.

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id*. at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id*. The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions is often particularly probative. *Id*. Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id*.

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id*. at 1520, *quoting International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the

majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id*. at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id*.

C. Post–enactment evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id*. In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief." *Id*. at 1521, *quoting, Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id*.

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id*. at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id*. This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id*.

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id*. at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal treatment is necessary. *Id*. Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id*.

D. Burdens of production and proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id*. at 1521, *citing, Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments "must identify that discrimination ... with some specificity before they may use race-conscious relief." *Id., citing Croson*, at 504. The court said that the Supreme Court's benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation was whether there exists a "*strong basis in evidence* for [the government's] conclusion that remedial action was necessary." *Id*., *quoting, Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id*. at 1521, *citing, Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id*. at 1522, *citing, Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Id*. at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum

of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id*. That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality's showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id*. at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id*. Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality's evidentiary support for its program. *Id*.

Notwithstanding the burden of initial production that rests with the municipality, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id*. at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver's evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id*. at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver's Ordinance would be appropriate. *Id*.

E. Evidentiary predicate underlying Denver's Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid–1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id*. at 1523.

1. Discrimination in the award of public contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid-1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id*. at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id*. at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal agency reports of discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id*. at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id*.

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting

out in business." *Id*. at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id*. In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id*. Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("USDOT") to the Mayor of the City of Denver, describing the USDOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id*. at 1524. USDOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id*.

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, 7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id*. at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of USDOT's allegations. *Id*. Concrete Works, the court said, failed to introduce evidence refuting the substance of USDOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id*. at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the USDOT's report. *Id*. In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id*.

(b) Denver's reports of discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id*. at 1525. A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id*. Based on this Report's description of the approximately $85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id*. The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id*.

To undermine this data, Concrete Works alleged that the DPW Report contained "no information about the number of minority or women owned firms that were used" on these bond projects. *Id*. at 1525. However, the court concluded the Report's description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id*. Thus, the court said this line of attack by Concrete Works was unavailing. *Id*.

Concrete Works also advanced expert testimony that Denver's data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id*. Denver responded by pointing out that because federal and city affirmative action programs

were in place from the mid–1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id*. at 1526. Based on its contention that the overall DPW data was therefore "tainted" and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. "non-goals public projects." *Id*.

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id*. Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id*. at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services ("DGS") contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id*. at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id*. For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id*. For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said, showed greater than full participation and the former demonstrating underutilization. *Id*.

The court noted that it did not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. Nevertheless, the court concluded Denver's data indicated significant WBE underutilization such that the Ordinance's gender classification arose from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Id*. at 1526, n.19, *quoting, Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id*. at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id*. But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id*. Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id*. The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id*. Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id*.

Empirical data. The third evidentiary item supporting Denver's contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id*. at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id*.

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id*. From 1985 to

1988 (prior to the 1989 modification of Denver's program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id*. However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id*. at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id*.

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id*. at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id*. This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id*.

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id*. at 1528. Although Denver's data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id*. The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id*.

The court agreed with the other circuits which had at that time interpreted *Croson* impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id*. at 1527 *citing, Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp*., 908 F.2d at 916 (showing statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id*. at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id*.

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id*. The court concluded, however, once credible information about the size or

capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id*.

Denver presented several responses. *Id*. at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id*. DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id*. at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id*. Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id*.

The court held all the back-and-forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id*. at 1529.

(c) Evidence of private discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id*. at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id*.

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id*. The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id*. This pre-enactment evidence of the overall Denver MSA construction market—i.e., combined public and private sector utilization of MBEs and WBEs— the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id*.

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id*. at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id*. But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from "financ[ing] the evil of private prejudice." *Id., quoting*, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id*. at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id*.

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id*. The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced

by elements of the local construction industry." *Id*. at 1529, *quoting, Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. *Id*. at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id*. at 1530.

(d). Anecdotal evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id*. at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id*.

The court indicated again that anecdotal evidence about minority- and woman-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id*. at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id*.

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id*. at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id*. at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id*.

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id*. at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id*. The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id*. Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly tailored response to specifically identified discrimination. *Id*. Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id*.

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id*. at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data

demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id*. The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id*. In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id*. at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard—i.e., that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id*. at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id*. at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

14. *Contractor's Association of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996)

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court's judgment declaring that the City's DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City's Ordinance sought to increase the participation of "disadvantaged business enterprises" (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51% owned by "socially and economically disadvantaged" persons. "Socially and economically disadvantaged" persons are, in turn, defined as "individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition "includes only individuals who are both victims of prejudice based on status and economically deprived." Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than $5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation "goals" for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance's participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the "lowest responsible, responsive contractor" received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed "the highest goals" of DBE participation at a "reasonable price" did not exert good faith efforts, and the contract was awarded to the "lowest, responsible, responsive contractor" who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural history. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court's ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id., citing, Contractors II,* 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did "not provide a sufficient evidentiary basis" for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id. citing*, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the "strict scrutiny" standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance's preferences for Black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against Black contractors and no data from which a Council person could find that specific discrimination against Black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no "strong basis in evidence" for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was "not 'narrowly tailored' to even the perceived objective declared by City Council as the reason for the Ordinance." *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of persuasion. The Court held affirmative action programs, when challenged, must be subjected to "strict scrutiny" review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a "passive participant;" race-based preferences cannot be justified by reference to past "societal" discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not "fit" the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity

that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City's expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting." *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be "cursory," Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts

during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City's Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer's log. The court found Mr. Macklin's testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin's testimony:

Macklin went to the contract files and looked for contracts in excess of $30,000.00 that in his view appeared to provide opportunities for subcontracting. *Id.* at 13. With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. *Id.* Macklin did not look at every available project engineer log. *Id.* Rather, he looked at a random 25 to 30 percent of all the project engineer logs. *Id.* As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. *Id.* Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered "it is a very good possibility." 893 F.Supp. at 434. *Id.* at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins ("Gaskins"), former general counsel to the General and Specialty Contractors Association of Philadelphia ("GASCAP") and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City's "standard requirements warn [would-be prime contractors] that discrimination will be deemed a 'substantial breach' of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due." Like the Supreme Court in *Croson*, the Court stated the district court found significant the City's inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to Black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court's conclusion that the record provides no

firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of "extremely low" membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must "link [low MBE membership] to the number of local MBEs eligible for membership." *Id.* at 601.

The City's expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert

calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against Black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id., citing,* 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the Black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was

confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of Black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven Black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study "mixed data," the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He "mixed" this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for Black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of Black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to Black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of $667,501, which represented the total amount going to all MBEs. If minorities other than Blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court's suggestion that the extensive participation of Black firms in federally-assisted projects, which were also procured through the City's Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted

projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market "was a close call." *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly tailored. The Court said that strict scrutiny review requires it to examine the "fit" between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made "necessary" by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City's program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a "sheltered market" basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for Black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to Black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-Black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated "[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms." *Id.* at 606, *citing*, 488 U.S. at 502 . Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire Black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City's Procurement Department against Black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the

subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia's program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set–aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race–neutral or less burdensome to non–minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by Black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race-neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for Black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

15. *Contractor's Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 996 (3d Cir. 1993)

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for "disadvantaged business enterprises" owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of

Pennsylvania, 735 F.Supp. 1274 (E.D. Phila. 1990), granted summary judgment for the contractors 739 F.Supp. 227, and denied the City's motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, 945 F.2d 1260 (3d. Cir. 1991), affirmed in part and vacated in part the district court's decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id*. at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 (E.D.Pa.1990). In an earlier opinion, the Third Circuit affirmed the district court's ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. Contractors Association v. City of Philadelphia, 945 F.2d 1260 (3d Cir.1991). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and woman-owned businesses. Phila. Code § 17–500. *Id*. The Ordinance established "goals" for the participation of "disadvantaged business enterprises." § 17–503. "Disadvantaged business Disadvantaged business enterprises" (DBEs) were defined as those enterprises at least 51 percent owned by "socially and economically disadvantaged individuals," defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id*. at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17–501(11)(a), but that a business which has received more than $5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17–501(10). *Id*. at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for woman-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17–503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17–501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the

merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing,* 735 F.Supp. at 1283 & n. 3.

Turning to the merits of the Contractors' equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id*. Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson,* the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id*. at 995, *quoting,* 735 F.Supp. at 1295–98. The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id*. at 995; 735 F.Supp. at 1298–99. The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id*. at 995 *citing,* 735 F.Supp. at 1299–1309.

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d Cir.1991). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id*. at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Id*. at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id*. at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id*. at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id*. at 999. Because under equal protection analysis classifications based

on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id*. Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance's classification scheme is spelled out in its definition of "socially and economically disadvantaged. *Id*. The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition's economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id*. Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982). *Id*. at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is "narrowly tailored" to a "compelling government interest." *Id.* at 999. Under intermediate scrutiny, a law must be "substantially related" to the achievement of "important government objectives." *Id.*

The Court agreed with the district court that the definition of "socially and economically disadvantaged individuals" included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those "whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged." *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City's argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance's gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id*. at 1000, *citing*, *Hogan* 458 U.S. at 728. The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, *Coral Constr. Co. v. King County,* 941 F.2d 910, 930 (9th Cir.1991), *cert. denied,* 502 U.S. 1033 (1992); *Michigan Road Builders Ass'n, Inc. v. Milliken,* 834 F.2d 583, 595 (6th Cir.1987), *aff'd mem.,* 489 U.S. 1061(1989); *Associated General Contractors of Cal. v. City and County of San Francisco,* 813 F.2d 922, 942 (9th Cir.1987); *Main Line Paving Co. v. Board of Educ.,* 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson,* which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County,* 908 F.2d 908 (11th Cir.), *cert. denied,* 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id*. at 1000, *citing* 735 F.Supp. at 1307. That standard validates the classification if it is "rationally related to a legitimate governmental purpose." *Id*. at 1001, *citing* Cleburne, 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons. *Id*.

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance's racial and ethnic preferences, the Court stated it may only uphold them if they are "narrowly tailored" to a

"compelling government interest." *Id*. at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." *Id*. at 1002, *quoting*, 488 U.S. at 492, 509. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id*. at 1002, quoting, 488 U.S. at 492.

In the Supreme Court's view, the "relevant statistical pool" was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing* 488 U.S. at 502.

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," *Id*. at 1002, *quoting,* 735 F.Supp. at 1298. As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting,* 1295–98.

In a footnote, the Court pointed out the district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. 735 F.Supp. at 1295. The Court said this reading overlooked the statement in *Croson* that a City can be a "*passive participant*" in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice." *Id*. at 1002, n. 10, *quoting*, 488 U.S. at 492.

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id*. at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors*." Id., quoting*, 488 U.S. at 480.

Although the district court acknowledged the minority contractors' testimony was relevant under *Croson,* it discounted this evidence because "other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers." *Id*. at 1002, *quoting,* 735 F.Supp. at 1296.

The Third Circuit held, however, given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id*. at 1003, *quoting, Coral Constr.,* 941 F.2d at 919 ("anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson,* it is insufficient here. *Id*. But because the

combination of "anecdotal and statistical evidence is potent," *Coral Constr.,* 941 F.2d at 919, the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by the City Council before it enacted the Ordinance in 1982 (the "pre-enactment" evidence), and evidence developed by the City on remand (the "post-enactment" evidence). *Id*. at 1003.

Pre–enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id*. at 1003. Under *Croson*, available minority-owned businesses comprise the "relevant statistical pool." *Id*. at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post–enactment statistical evidence. The "post-enactment" evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the "relevant statistical pool" needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id*. at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id*. at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson. Id.* at 1004*.* Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the "disparity index." The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the "population" of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id*. at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*'s evidentiary burden is satisfied. *Id*. Disparity indices are highly probative evidence of discrimination because they ensure that the "relevant statistical pool" of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly

worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, *citing, Cone Corp.,* 908 F.2d at 916 (10.78 disparity index); *AGC of California,* 950 F.2d at 1414 (22.4 disparity index); *Concrete Works,* 823 F.Supp. at 834 (disparity index "significantly less than" 100); *see also Stuart,* 951 F.2d at 451 (disparity index of 10 in police promotion program); *compare O'Donnell,* 963 F.2d at 426 (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id*.

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that "[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program." *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. *Id*. Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id*. at 1006. *Croson*'s reference to an "inference of discriminatory exclusion" based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City's statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a "neutral explanation" for the disparity, "showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data." *Id.* at 1007. A *fortiori,* this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors' objections to the study were properly presented to the trier of fact. *Id*. Accordingly, the Court found the City's statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian–Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian–American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian–American, Pacific–Islander, and "other" minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the "significant statistical disparity". *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian–American descent. *Id.* at 1008. The district court found "there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts," *Id*. at 1008, *quoting,* 735 F.Supp. at 1299, and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian–American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian–American, or Native American persons based on more concrete evidence of discrimination. *Id*. In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly tailored. The Court then decided whether the Ordinance's racial preference was "narrowly tailored" to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id*. at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective "race-neutral measures," such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id*.

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition's programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City's prior consideration of race-neutral programs to withstand summary judgment. *Id*. at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It

exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses "to ensure adequate competition and an expectation of reasonable prices on bids or proposals," and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after "a good faith effort to comply with the goals for DBE participation." *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won $5 million in city contracts. *Id.* Also unlike the Richmond program, the City's program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs "within the Philadelphia Standard Metropolitan Statistical Area." *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance's fifteen percent goal. The City's data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id. Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond's 30 percent goal inappropriately assumed "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." *Id., quoting,* 488 U.S. at 507.

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id*. Given the strength of the Ordinance's showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was "narrowly tailored." *Id*.

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was "substantially related to an important governmental objective." Id, at 1009.

The City contended the gender preference was aimed at the "important government objective" of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that "[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one." *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that woman-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against woman-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.* But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id*. at 1011.

The Court concluded the evidence offered by the City regarding woman-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for woman-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id*. at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the 2-percent preference for businesses owned by handicapped persons. *Id*. at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id*., citing 735 F.Supp. at 1308. The Court stated that a classification will pass the rational basis test if it is "rationally related to a legitimate government purpose," *Id*., citing, Cleburne, 473 U.S. at 440.

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in *Heller v. Doe,* 509 U.S. 312–43 (1993), indicating that "a [statutory] classification" subject to rational basis review "is accorded a strong presumption of validity," and that "a state ... has no obligation to produce evidence to sustain the rationality of [the] classification." *Id.* at 1011. Moreover, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id*. at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against

handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negativing every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian–American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

a. Recent District Court Decisions

16. *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 woman-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 woman-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 woman-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 ("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 r

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 un-remediated, 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 woman-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.

17. *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 an MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If

not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C .Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race-neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d

587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id*. at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project-by-project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

18. *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 the purpose 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.

19. *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 .3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id*. at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id*. The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id*. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id*. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id*. at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." *Id*.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id*. at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated, "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id*. at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then 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 info USA, 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 woman-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id*.

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id*. The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id*. The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id*.

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against Blacks to support the BBE program. *Id*. at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id*. at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id*. at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id*. The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id*. at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id*.

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id*. (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id*.

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id*. at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id*. at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished … it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." *Id*.

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id*. Instead, the Commissioners voted to continue the HBE program. *Id*. The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id*. at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id*. However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id*. Under either scenario, the HBE program could not be narrowly tailored. *Id*.

The court found the waiver provisions in the HBE program inflexible in practice. *Id*. Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id*. The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id*. at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id*. at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." *Id*. at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id*.

The court held that the County was liable for any compensatory damages. *Id*. at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known … Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional." *Id*. at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave

them fair warning that their application of the MBE/WBE programs … were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id*. at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id*. Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id*. Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id*.

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id*. at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id*. For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs $100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

20. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain

percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were "precatory." The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, "if true," constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as "'simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.'" *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng'g Contractors Ass'n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is "permissive." The court, however, held that "there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute 'induces an employer to hire with an eye toward meeting … [a] numerical target.' *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting an 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.

21. *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).

22. *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.

23. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act ("MBE Act"). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id*. at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both

minority business formation and existing minority businesses. *Id*. at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment's Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id*. at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id*. The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a "passive participant" in a system of racial exclusion practiced by private businesses. *Id*. at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id*.

The district court stated that a "mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice." *Id*. Rather, the court held that the "benchmark for judging the adequacy of a state's factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state's conclusion that remedial action was necessary." *Id*. The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was "a passive participant" in private industry's discriminatory practices. *Id*. at 1240, *citing* to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts." *Id*. at 1240. Thus, the district court found the State admitted that the MBE Act's bid preference "is not based on past discrimination," rather, it is based on a desire to "encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole." *Id*. In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not "compelling" in the absence of evidence of past or present racial discrimination. *Id*.

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id*. at 1241. The district court found that it cannot be

discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id*.

The court also found that the Intervenors' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id*. The district court stated that the Intervenors did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id*. The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id*. at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id*. at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id*. at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id*. at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id*.

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id*. at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id*. at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id*. at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id*. at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand*

VII favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id*. at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id*. at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id*. at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses and can help alleviate the effects of past and present-day discrimination. *Id*. at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id*. at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id*. at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id*. at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id*. Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id*. The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id*.

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id*. Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id*. at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority

participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id*. at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id*. at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id*. at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id*.

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id*. at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id*. In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. *Id*. at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id*. at 1246–1247.

With regard to the impact on third parties' factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id*. at 1247. The district court found the MBE Act's bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id*. The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state's Central Purchasing Act with no time limitation. *Id*.

In terms of the "under- and over-inclusiveness" factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id*. at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id*.

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id*.

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged or has suffered from the effects of past or present discrimination. *Id*. The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id*.

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

24. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

25. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), a'ffd per curium 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id*. at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id*. at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id*.

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id*. at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id*., *citing Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id*. at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id*. at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id*. at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id*. Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id*. The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id*. However, the court found that the Brimmer-Marshall Study contained no such data. *Id*.

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id*. at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id*. The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id*.

The court next considered the County's post-1994 disparity study. *Id*. at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id*. The court explained:

"Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period." Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id*. at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id*. at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id*. at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id*. Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id*. (internal citations omitted).

The court considered the County's anecdotal evidence and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id*. at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them

complained that the County used the M/FBE program to only benefit African Americans. *Id*. The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id*. The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id*.

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id*. at 1380, *citing Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id*. at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id*. The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity …. *Id*.

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id*. The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id*. at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id*.

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id*. The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id*.

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id*. at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id*.

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id*. On appeal, the Eleventh Circuit affirmed per curium, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

26. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District,* 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id*. at 741.

The state defendants appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id*. Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of non-construction-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 *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 MBEs 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.

27. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The

court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation By Local and State Governments 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.

a. Recent Decisions in Federal Circuit Courts of Appeal

1. *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017)

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id*. Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id*. Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.,* 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race– and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.

2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.

3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. Also, 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 the 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 woman-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 the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use

neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the "theoretical possibility of a 'mismatch' could be a problem, but we have no evidence that it actually is." *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* "So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination," according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact "on this point." *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

2. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, *Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.*, 2016 WL 193809 (Oct. 3, 2016).

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgment to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. (*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. 2015 WL 4934560 at *1. '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 *2. 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 *3. 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 *3. 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 *3-1. 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 *5. 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 *5. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at *8, *17. 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 *9, *17. 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 judgment that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgment and denied Dunnet Bay's motion. *Id.* at *9. 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 *31. 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 *10. (*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 *10. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* at *13. 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.*

The court said the absence of complete exclusion from competition with minority- or woman-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at *13. 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 *14. 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 28.

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 *15. 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.*

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 *15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* at *16. 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. 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 *17. 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.* at *17.

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at *17. 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 *17-18.

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 *18. 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 *19, *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 *19. 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 *20. 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 *20. 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 20.

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 *20. 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.*

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 *21. 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 21-22.

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 *22. 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 judgment 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. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2016. The Petition was denied by the Supreme Court.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's *("*IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id*. at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id*. at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id*. The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id*.

IDOT typically adopted a new DBE plan each year. *Id*. at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id*. The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id*. The consultant then determined availability of minority- and woman-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id*. This initial list was corrected for errors in the data by surveying the D&B list. *Id*. In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id*. The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of

discrimination, relative DBE availability would be 27.5 percent. *Id*. IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id*. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id*.

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id*. at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id*. at 720-21, *citing Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government …. If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id*. at 721, *quoting Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id*. The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id*. at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 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 clearer now that compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id*. at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id*. at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id*. First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id*. NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id*.

The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id*. at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id*. (*citing* 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT contracts. *Id*. The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id*. The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id*.

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id*. The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id*. According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id*.

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id*. at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id*. at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id*. According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id*.

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id*.

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state and local government DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Roads,* the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the

federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and *Gross Seed* both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, *Sherbrooke* and *Gross Seed* argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id*. The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id*. Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are

ready, willing, and able to participate as contractors or subcontractors on federally assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id*.; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d) (Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contacting markets. *Id*. at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For

these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and *Gross Seed* also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, citing 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent woman-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id*. The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id*. On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.).

5. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom; *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

> [y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id*. at 1185-1186.

The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id*. The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id*.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id*. at 1187-1188.

b. Recent District Court Decisions

6. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

In a recent criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor,* 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white-collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the

Executive branch in promulgating the federal regulations at issue. Id at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in indictment. The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally funded subcontracts totaling approximately $2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of $1.89 million." *Id.* at 746. These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBEs and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746.

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBEs from obtaining such contracts. *Id.*

Motion to dismiss: challenges to Federal DBE regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id at 754.* Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.*

at 755*, citing,* 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id*. at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)–(2). The phrases industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a "commercially useful function." *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that "[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation." *Id.* at 756, *quoting*, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was "ambiguous" and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved .... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, quoting, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

> *[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. 49 C.F.R. § 26.55(c)(2).*

> *There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a "commercially useful function."*

Id. at 756, *quoting*, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was "fronted" as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant's final argument to dismiss the charges relied upon his unsupported claims that the USDOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government's exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id., citing,* 49 U.S.C. § 322(a) ("The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer."); 23 U.S.C. § 304 (The Secretary of Transportation "should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system."); 23 U.S.C. § 315 ("[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.").

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, "even surviving strict scrutiny review," with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757*, citing*, *Midwest Fence Corp.*, 840 F.3d at 942 (citing *Western States Paving Co. v. Washington State Dep't of Transportation,* 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant's motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of $85,221.21; and a $30,000 fine. The case also was terminated on March 13, 2018.

7. 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, March 24, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al*., 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 2015 WL 1396376 at *7. 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 *7. 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. 2015 WL 1396376 at *7. 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 *8. 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 *9.

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 *9.* 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.

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 *11*. 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 woman-owned businesses, as well as anecdotal evidence, which were completed from 2000 to 2012. *Id. at *11.* 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. at *11*.

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id. at *11.* 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 *12, 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. at *12.*

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 *12.* The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id*. Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id*. at *12. 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*. 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 *13. 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 *13. 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 *13. 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 *13.* 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 *13. 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 *13. 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.* at *13.

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 *14. 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 *14. 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 *14.* 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 *14. 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*. 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 *14, citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting Northern Contracting, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id. at *14*.

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 *14*. 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 *14*. 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 *15. 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*. at *15. The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id*. at *15.

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* 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.* 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 *15. 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.* 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 *15. 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 *15.* 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 woman-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 *16. 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.*

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 *16. 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*. at *16. 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 *16. 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 *16.* Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.* at *16.

IDOT argued that on prime contracts under $500,000, capacity is a variable that makes little difference. *Id.* at *17. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at *17. 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 *17 *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 *17. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id*. at *17. 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*. at *17. 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 *17. 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 *17, *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 *17.

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 *18. 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 *18. 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.

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 *18. 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*. 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 *18.

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 *19. 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 at *19.* 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 *19. 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 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 *19. 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 *19. 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.* at *19. 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 *20. 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.* 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 *20.

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 *20. 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 *20. 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 *20.* 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.* at *21. 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 *21*. 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*.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at *21. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* at *21. 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 *21.

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 *22.* 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 *22. 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 *22.

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 *22.* 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 *22. 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 *22. 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 *22.

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 *23. 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.* 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.* at *23.

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 *23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment.

8. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. 2014), affirmed *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al*., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015)

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id*.

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project , was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general

highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race-neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id*. The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id*. at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id*. at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id*. at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of pass discrimination in the national construction market." *Id*. at *26, *quoting Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded

its federal authority." *Id*. at *26, *quoting Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id*. at *26, *quoting Northern Contracting, Inc.*, 473. F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting. Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting.*" *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The "no-waiver" policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id*.

Thus, the Court held that Dunnet Bay's assertion that IDOT adopted a "no-waiver" policy was unsupported and contrary to the record evidence. *Id*. at *27. The Court found the undisputed facts established that IDOT did not have a "no-waiver" policy, and that IDOT did not exceed its federal authority because it did not adopt a "no-waiver" policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a "judgment call" regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id*. at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id*. The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id*. Accordingly, the Court concluded that IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id*.

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id*. Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id*. at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id*. at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id*. at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id*. at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a "no-waiver policy," such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id*. at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id*. at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on

Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id*. at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id*. Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

9. *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*.

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*.

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 *.

Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id*. *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id*. at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id*.

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id*. at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id*. The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id*.

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id*. at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id*. *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id*. *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id*. at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id*. at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and woman-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and woman-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 woman-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.

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 narrow 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 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 challenge 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*.

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.

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.

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*.

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.

10. 10*. Geod Corporation v. New Jersey Transit Corporation, et al*., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by *NJT* in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id*.

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id*. at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id*.

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id*. at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id*. All groups other than Asian DBEs were found to be underutilized. *Id*.

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id*. at 649. The court found that DBEs are more likely than non-DBEs to be pre-

qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id*.

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." *Id*. at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." *Id*. In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." *Id*. at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT and determined that the geographical marketplace 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 purchase awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id*. at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in comparison to similarly situated non-DBEs. *Id*. The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id*. The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id*.

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id*. at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id*. The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id*.

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id*. at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id*. at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id*. The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id*. at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id*. at 652, *citing Geod v. N.J. Transit Corp*., 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id*. at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying Northern Contracting v. Illinois. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in Northern Contracting, Inc. v. Illinois, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id*. at 652 quoting Northern Contracting, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id*. at 652, citing Northern Contracting, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id*. at 652-653, quoting Northern Contracting, 473 F.3d at 722 and citing also Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id*. at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id*. at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id*. at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id*. at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial

or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id*. at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id*. The court held that NJT followed the goal setting process required by the federal regulations. *Id*. The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id*. at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id*.

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id*. at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id*.

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id*. at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id*. at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id*. at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id*. at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id*. at 654-655.

The court, in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id*. at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id*. at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id*. at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id*. at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id*. at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id*. at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id*. at 655. The methods used by NJT, the court found, also complied with the examples

listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id*. at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id*. at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id*. at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id*. at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id*. at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying Western States Paving. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id. at 656, citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id. at 656*. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id. at 656*. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id*. In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id*.

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id*. at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id*. at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id*. at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good faith consideration of workable race-neutral alternatives. *Id*. at 656, *citing Sherbrook Turf*, 345 F.3d at 972 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id*. at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id*. at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id*. at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to

minimize the burden on non-DBEs. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id*.

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id*. at 657.

11. *Geod Corporation v. New Jersey Transit Corporation, et. seq*., 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id*.

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id*. The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender-based preferences, as without merit. *Id*. The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id*.

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State*

DOT, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id*.

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id*.

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id*. at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id*.

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id*., *citing Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id*.

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id*.

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id*. at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id*. at *6, *citing Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id*. at *6, *citing* 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of

DBEs. *Id*. The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race-neutral alternatives, then adjusted its goal to encompass these characteristics. *Id*. at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id*. Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id*. at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id*. at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id*.

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id*. at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id*. at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as DBE utilization based on race, gender and ethnicity. *Id*. A decomposition analysis was also performed. *Id*.

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id*.

The court also found that NJT took into account race-neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender-neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id*. at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id*.

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id*. at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id*. at *8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past

discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id*. Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

12. *South Florida Chapter of the Associated General Contractors v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337.

The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id*. at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id*. at 1338.

Ninth Circuit Approach: Western States*.* The district court analyzed the Ninth Circuit Court of Appeals approach in Western States Paving and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id*. In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991), then reaffirmed in Northern Contracting, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, *quoting Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id*. The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969

(6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id*.

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

13. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007)

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra.* The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id*. at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id*. (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id*. at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id*.

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis:

1. the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors;

2. the study identified the relevant product markets in which IDOT and its prime contractors contract;

3. the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's Marketplace;

4. the study collected lists of DBEs from IDOT and 20 other public and private agencies;

5. the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and

6. the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id*. at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id*. at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id*.

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id*. at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id*. Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id*.

IDOT considered three reports prepared by expert witnesses. *Id*. at *9. The first report concluded that minority- and woman-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 un-remediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id*. at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id*.

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." *Id*. She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id*. at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id*.

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;

2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);

3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;

4. "Unbundling" large contracts; and

5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit and establishing a mentor-protégé program. *Id*.

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. *Id*. at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id*.

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id*. The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." *Id*. The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id*. A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id*. at *13-14. One witness

acknowledged that all small firms face difficulties in the financing and insurance markets but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." *Id*. at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id*.

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id*. Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." *Id*. A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id*. at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id*. at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a "'strong basis in evidence' to conclude that remedial action was necessary, before it embarks on an affirmative action program … If the government makes such a showing, the party challenging the affirmative action plan bears the 'ultimate burden' of demonstrating the unconstitutionality of the program." *Id*. The court held that challenging party's burden "can only be met by presenting credible evidence to rebut the government's proffered data." *Id*. at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show "that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction." *Id*. at *16.

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id*. at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT." *Id*. The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id*. Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id*.

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id*. at *18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." *Id*. at *19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." *Id*. at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id*. The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This … is [also] supported by the statistical data … which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." *Id*. at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id*. at *21, n. 32.

The court further found:

> *That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-*

> *neutral variables … [DBE] construction firms are generally smaller and less experienced because of industry discrimination.' Id.* at *21, citing Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id*. at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id*. The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "'plausible lower-bound estimate' of DBE participation in the absence of discrimination." *Id*. The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id*.

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id*. The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id*. Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally funded highway contracts. This is a fundamental distinction … [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id*. at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id*. at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id*. The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id*.

The court found "[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures." *Id*. at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id*. The court

found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id*., *citing Adarand Constructors, Inc. v. Slater "Adarand VII,"* 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT's DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

14. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see* above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court, in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of

the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing* and *quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds $750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every 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 exceeds $750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm

owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

15. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part, by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.). The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with the 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*.

16. *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 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

17. *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 and have caused its alleged injuries.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact MBE/WBE/DBE Programs

1. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration*, et al., 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (Oct. 16, 2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, *U.S. Small Business Administration*, et al., 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, *quoting* 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id*. The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id*.

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id* *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions an 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. Department 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 an SDB, became the "lowest" bidder and was awarded the contract. *Id*. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id*. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id*. at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id*. at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id*. at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity

studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id*. at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id*. at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id*. at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id*. The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id*. The court declined to adopt a "bright-line rule for determining staleness." *Id*.

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id*. at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id*. at 839, *quoting 61 Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id*. at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id*. at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were "stale," and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id*. at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id*. at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id*. at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Id*. at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id*. at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id*. at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id*.

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id*. The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id*., *quoting Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and

3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id*. The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id*. The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id*. at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id*.

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id*. at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id*. at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id*. The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the over inclusiveness or under inclusiveness of the racial classification. *Id*.

Compelling interest: strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id*.

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th

Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id*.

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, quoting *Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id*. at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id*. at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the Dean v. City of Shreveport case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors were one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, "[a] disparity ratio less than 0.80" — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F.3d at 1041,

quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id*.

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id*. However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id*. at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id*. The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the

relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id*. at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id*. at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id*. at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id*. The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id*. The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id*.

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id*. The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id*.

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was no 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. Department of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. June 5, 2015), *affirmed on other grounds*, 2016 WL 471909 (D.C. Cir. September 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 is 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 unrebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id*. at *20.

Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the decision of the district court on other grounds. See 836 F.3d. 57, 2016 WL 4719049 (D.C. Cir. September 9, 2016).

4. *DynaLantic Corp. v. United States Dept. of Defense, et al*., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id*. at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id*. at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's

specific industry, defined as the military simulation and training industry. *Id*.

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id*. at *2 *quoting* 15 U.S.C. § 631(f)(1)(B) -(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id*. Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id*. DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 CFR 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5*.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored

measures that further compelling governmental interests." DynaLantic, at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id. quoting Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic*, at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing Western States Paving v. Washington State DOT, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995),* and *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id*. The Court then followed the

10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id*.

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id*.

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for

permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also, in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in

Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different 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 Status 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 M. Review of Procurement Policies and Procedures

Keen Independent examined how the City of Vancouver procures goods, services, architecture & engineering and construction.

Procurement processes for the City are governed by Revised Code of Washington (RCW), Washington Administrative Code (WAC), City Charter Articles 6 and 11 and Vancouver Municipal Code (VMC) 3.05. The City also maintains a Procurement Manual with procurement guidelines and processes.

The City uses a variety of procurement methods based on the size and category of a procurement. Procurement methods include:

- Informal solicitation;
- Quote;
- Invitation to Bid (ITB);
- Request for Proposal (RFP); and
- Request for Qualifications (RFQ).

Figure M-1 on the following page summarizes the different procurement methods that the City uses.

M. Review of Procurement Policies and Procedures

M-1. Summary of City procurement practices

	Goods	Services	Architecture & engineering*	Construction
Bidding thresholds				
Informal solicitation	$10,000 or less	$50,000 or less	N/A	N/A
Quote	$10,001–$50,000; $50,001–$300,000	N/A	N/A	$50,000 or less; $50,001–$300,000
Invitation to Bid (ITB)	$300,001+	$300,001+	N/A	$300,001+
Request for Proposal (RFP)	$50,001–$300,000; $300,001+	$50,001–$300,000; $300,001+	N/A	
Request for Qualifications (RFQ)	N/A	N/A	All A&E contracts require a level of RFQ	N/A
Method of award				
Informal solicitation	Best possible value	Best possible value	N/A	N/A
Quote	Responsive, responsible bidder with lowest price	Responsive, responsible bidder with lowest price	N/A	Responsive, responsible bidder with lowest price
Invitation to Bid (ITB)	Responsive, responsible bidder with lowest price	Responsive, responsible bidder with lowest price	N/A	Responsive, responsible bidder with lowest price
Request for Proposal (RFP)	Proposal most advantageous to City	Proposal most advantageous to City	N/A	Proposal most advantageous to City
Request for Qualifications (RFQ)	N/A	N/A	Most qualified, followed by price negotiations	N/A
Means of public advertising	City Procurement Portal; advertisement in the local and regional newspapers (RFPs and ITBs)	City Procurement Portal; advertisement in local and regional newspapers (RFPs and ITBs)	City Procurement Portal; advertisement in local and regional newspapers (RFQs)	City Procurement Portal; advertisement in local and regional newspapers (RFPs and ITBs)
Other				
Emergency provision where requirements are waived	Yes	Yes	Yes	Yes
Bonding requirements	N/A	N/A	N/A	Public works projects of $300,001+: bid bonds for all bidders (5% of total bid); performance or payment bonds for all projects above $50,000.

Note: *Includes program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping and other related services

M. Review of Procurement Policies and Procedures — Goods and services

Bidding Thresholds

The City sets different bidding requirements based on the size of goods and services procurements.

Informal solicitations. Informal solicitations are used for goods procurements of $10,000 or less and services procurements of $50,000 or less.

Quotes. Quotes are used for goods procurements of more than $10,000 and up to $50,000. Some goods procurements from $50,000 to $300,000 also use quotes. In certain instances, procurements more than $50,000 and up to $300,000 can be bid by issuing an RFP instead of requesting quotes. The Department of Procurement Services reviews the procurement request from the requesting department and determines whether to request quotes or issue an RFP.

Request for Proposals (RFPs). RFPs are issued for some goods procurements of more than $50,000 and up to $300,000 and for some goods and services procurements over $300,000. Goods procurements more than $50,000 and up to $300,000 may be bid by soliciting quotes rather than issuing an RFP. Additionally, goods and services procurements more than $300,000 may be made by issuing an Invitation to Bid (ITB) rather than an RFP.

The Department of Procurement Services reviews the procurement request from the requesting department and determines whether to solicit quotes or an RFP ($50,001–$300,000) or to issue an RFP or an ITB (above $300,000).

Invitations to Bid (ITBs). ITBs are issued for some goods and services procurements over $300,000. Procurements more than $300,000 may also be made by issuing an RFP rather than an ITB. The Department of Procurement Services reviews the procurement request from the requesting department and determines whether to issue an RFP or an ITB.[1]

[1] City of Vancouver Procurement Manual – 2023 Edition 8-7-23 and City of Vancouver Procurement Thresholds and Processes.

Bid Process

The bid process for each bidding category for goods and services procurements is detailed below.

Informal solicitations. Procurements made through informal solicitations do not require competitive bidding. The procuring department must ensure that they make all efforts to find the best possible value for the item or service being procured, including consulting the City's MRSC Consultant Roster[2] for potential consultants for services contracts. The goods or services are then purchased using a purchase order.

Quotes. For goods procurements more than $50,000 and up to $300,000, the requesting department must submit a Commodity Request Form to Procurement Services, which then determines whether the procurement requires quotes or an RFP.

If it determines that the procurement requires quotes, Procurement Services will work with the department project manager to solicit bids and determine the responsive, responsible bidder with the lowest price (which then receives the award). The goods are then purchased using a purchase order.

RFPs. Procurement Services may determine that the goods or services procurement should be made through a Request for Proposals. When using an RFP, the procuring department assembles an evaluation committee to evaluate RFPs and determine which proposal has the highest scoring. The vendor submitting the proposal that receives the highest score is awarded the contract.

ITBs. For goods and services procurements above $300,000, Procurement Services determines whether the procurement requires an ITB or an RFP. If Procurement Services determines that the procurement requires an ITB, Procurement Services will work with the department project manager to solicit bids and determine the responsive, responsible bidder with the lowest price.

All procurements above $300,000. All procurements above $300,000 require that the evaluation committee make a recommendation to the City Council on which bidder or proposer should be awarded the contract. The City Council makes the final decision on contract award.[3]

[2] The MRSC Consultant Roster is a roster of businesses in Washington State that are available for consulting opportunities. The roster can be accessed here: https://mrscrosters.org/

[3] City of Vancouver Procurement Manual – 2023 Edition 8-7-23.

M. Review of Procurement Policies and Procedures — Architecture & engineering

Bidding Thresholds

There are different requirements for each method of procuring architecture and engineering (A&E) services.

Informal solicitations. Procurements of $50,000 or less are made by either making informal solicitations using MRSC Consultant Roster[4] or by issuing an RFQ. Procurement Services reviews the procurement request from a department and determines which procurement method to utilize.

Request for Qualifications (RFQs). RFQs are issued for procurements above $50,000, as well as some procurements of $50,000 or less. For procurements of $50,000 or less, Procurement Services reviews the procurement request from the department and determines whether to utilize the MRSC Consultant Roster or issue an RFQ. All architecture and engineering contracts require some level of RFQ.

Bid Process

The bid process for each method of procurement for A&E procurements is detailed below.

Informal solicitations. When utilizing the Consultant Roster, an evaluation committee assembled by the requesting department selects at least three firms to solicit for qualifications statements. The committee chooses the firm that is most qualified and then negotiates a price for a contract.

RFQs. This method of procurement requires the procuring department to assemble an evaluation committee to evaluate RFQs and determine which firm is most qualified. The City then commences negotiations with the most qualified firm.

Procurements in this category above $300,000 require that the evaluation committee make a recommendation to the City Council on which vendor should be awarded the contract. The City Council makes the final decision on contract award.[5]

[4] The MRSC Small Works Roster is a roster of businesses in Washington State that are available for small public works projects. The roster can be accessed here: https://mrscrosters.org/

[5] City of Vancouver Procurement Manual – 2023 Edition 8-7-23.

M. Review of Procurement Policies and Procedures — Construction

Bidding Thresholds

The City has different bidding requirements based on the size of construction contracts.

Quotes. Quotes for construction procurements of $50,000 or less are solicited using the MRSC Small Works Roster, while procurements above $50,000 and up to $300,000 require formal quotes.

ITBs. ITBs are issued for most construction procurements above $300,000. Procurement Services determines the method to be used.

Bonding

All bidders on public works contracts over $300,000 are required to submit a check or bid bond in the amount of 5 percent of the total bid for the project. As of July 1, 2024, bidders must provide a performance bond and payment bond for contracts over $50,000.[6]

Bid Process

Processes for obtaining bids or proposals vary by procurement method.

Quotes. For procurements that utilize the MRSC Small Works Roster, Procurement Services notifies all contractors within that specific area of interest about the procurement. The procurement is awarded to the responsive, responsible bidder with the lowest bid price.

RFPs. Procurements above $300,000 require the procuring department to submit an RFP Request Form to Procurement Services, which then determines whether the procurement requires an RFP or an ITB. When using an RFP, the procuring department assembles an evaluation committee to evaluate proposals and determine which proposal has the highest scoring.

ITBs. If Procurement Services determines that the construction procurement requires an ITB, they will work with the department project manager to review bids and determine the responsive, responsible bidder with the lowest price. All procurements above $300,000 (RFPs and ITBs) require that the evaluation committee make a recommendation to the City Council on which vendor should be awarded the contract. The City Council makes the final decision on contract award.[7]

[6] Procurement Ordinance 7.26.23 and VMC 3.05 Purchasing and Public Works.

[7] City of Vancouver Procurement Manual – 2023 Edition 8-7-23.

Advertisement

All procurements over $50,000 are posted online using the City Procurement Portal. Procurements that require ITBs, RFPs or RFQs are advertised in the Columbian, a local newspaper.[8]

Procurements over $300,000 are also required to be advertised in the Portland Daily Journal, and procurements over $500,000 must additionally be advertised in the Seattle Daily Journal.[9] The City also uses a rotating list of minority publications for projects that utilize federal funds.

Exceptions to Public Bidding Procedures

There are a few instances when competitive bidding procedures are waived, including emergencies and sole source procurements. These exceptions, as well as a few others, are detailed below.

Emergency procurements. In some instances, competitive bidding procedures can be waived due to an emergency. The City defines an emergency as unforeseen circumstances that either pose a threat to the performance of essential functions or will likely result in loss or damage to property, bodily harm or loss of life if not immediately addressed.

When making emergency purchases, procurement managers must seek approval from the Chief Financial Officer (procurements less than $300,000) or from the City Manager (procurements over $300,000). For emergency goods purchases over $10,000 or emergency professional services purchases over $50,000, no approval is needed.[10]

Sole source. There are three ways in which the City defines a sole source procurement. Sole source procurements exceptions can be made when:

- There is only one source that is capable of supplying the good or service;
- There are special market conditions that results in there being only one source for the good or service; or
- A contract is using federal money and the entity expressly allows noncompetitive proposals.[11]

Competitive bidding requirements can be waived for sole source procurements, but procurement managers must still seek approval from the Financial and Management Services Director (procurements less than $300,000) or from the City Council (procurements over $300,000).[12]

Other exceptions. Some other instances where competitive bidding procedures can be waived include:

- Item required is of specific design;
- Insurance and bonds;
- Securities and investments; and

[8] City of Vancouver Procurement Manual – 2023 Edition 8-7-23.

[9] City of Vancouver Advertising Instructions & Publication Info.

[10] Emergency Procurement Policy – 2023 Final.

[11] Sole Source Policy – 2022 Update – Final.

[12] Ibid.

- Items purchased at auctions. [13]

Bid Protest

Two different types of bid protests are permitted by City rules and guidelines: pre-bid or solicitation phase protests, and pre-award protests. These protests, as well as the appeals process, are detailed below. All bid protests must be submitted in writing and delivered by hand, via mail or via courier.[14]

Pre-bid or solicitation phase protest. This type of protest must be submitted at least five days prior to bid opening, proposal due date or qualifications due date. This type of protest may include issues with:

- Specifications, solicitation, pre-bid or proposal meetings;
- Minimum qualifications in the solicitation;
- Questions not fully or properly addressed by the City; or
- Inadequate information or improper criteria in the solicitation.

The procurement manager must respond within three days of receipt of the protest.[15]

Pre-award protest. This type of protest is made after the receipt of proposals, qualifications or bids, but before the contract award. The protest is due within three days of bid opening. This type of protest may include issues with:

- Bid opening or proposal/qualification due dates;
- Rejection of bid as nonresponsive or not responsible;
- Notice of intent to award; or
- Evaluation of proposals or qualification statements.

The bidder whom the protest is made against has two days to respond, and the procurement manager has ten days to respond.[16]

Appeals. Any appeals may be submitted up to three days after the City's determination. The City Attorney then reviews the case and makes a final decision on the City's behalf within thirty days of the appeal.[17]

Cone of Silence

All bidders and proposers on City contracts must adhere to the Cone of Silence, which mandates that neither bidders and proposers nor lobbyists for bidders and proposers have contract with any City employee from the time a solicitation is released to the public until the time of award. The only exception to the Cone of Silence is the designated staff member contact for any given solicitation.[18]

[13] Procurement Ordinance 7.26.23 and VMC 3.05 Purchasing and Public Works.

[14] Protest Policy – 2022 Update and City of Vancouver Procurement Manual – 2023 Edition 8-7-23.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] City of Vancouver Procurement Manual – 2023 Edition 8-7-23.

M. Review of Policies and Procedures — Other procurement guidelines

Cooperative Purchasing

Some goods and services may be procured through cooperative purchasing, or "piggybacking," with other agencies and cooperative organizations. Procurement Services decides whether the proposed piggyback is in the best interest of the City.

Other requirements for the City to participate in a proposed piggyback include:

- The City must have a cooperative purchasing agreement with the entity;
- The contract must be current;
- The supplier must honor the contract's pricing;
- The solicitation must have been advertised on a website; and
- The City must buy the same good or service as the original specification.

APPENDIX N. Review of City Apprenticeship Program

Keen Independent examined the operation of the City of Vancouver's apprenticeship program and assessed its impact on minority- and woman-owned firms.

For this assessment, Keen Independent estimated the utilization of minority- and woman-owned firms on City construction contracts with and without an apprentice worker utilization requirement and also surveyed firms available for City work about the impact of changes on the apprenticeship program.

The appendix begins by reviewing how the City of Vancouver and other cities in Washington state operate their apprenticeship programs. It also discusses changes to the State of Washington's apprenticeship requirements for local government public works projects.

This appendix includes:

- Review of the City's apprenticeship program;
- Review of other cities' apprenticeship programs in the state of Washington;
- Review of the State of Washington apprenticeship program; and
- Analysis of whether there are impacts on MBE/WBEs.

N. Review of City Apprenticeship Program –Vancouver apprenticeship program requirements

The City established the Apprenticeship Program in 2004. Currently, the program is governed by the City of Vancouver Policy and Procedure COV-300-002, which has been in effect since December 1, 2020.

Overview

The City's policy sets requirements for the share of total labor hours performed by apprentices on individual construction contracts. Utilization requirements follow a graduated scale of 3 to 8 percent based on anticipated size of contract.

The City has established compliance procedures and penalties regarding contractor compliance but allows for modification of requirements on a case-by-case basis, as well as waiver of penalties if the contractor is able to demonstrate good faith efforts to comply with the requirements.

The current City's apprenticeship program will be impacted by House Bill 1050, which extends the 15 percent apprenticeship utilization requirements to municipalities (See State of Washington's apprenticeship program).

Apprenticeship Requirements

Apprenticeship utilization requirements for the City are based on the anticipated value of contracts based on the engineer's estimate. The current requirements for the City's apprenticeship program are as follows:

- Contracts $500,000 or less: No required apprenticeship utilization.
- Contracts between $500,001 – $1.5 million: Three percent apprenticeship utilization.
- Contracts above $1.5 million up to $3 million: 4 percent apprenticeship utilization.
- Contracts above $3 million up to $8 million: 5 percent apprenticeship utilization.
- Contracts above $8 million up to $12 million: 6 percent apprenticeship utilization.
- Contracts above $12 million: 8 percent apprenticeship utilization.[1]

[1] City of Vancouver Policy and Procedure COV-300-002.

N. Review of City Apprenticeship Program –Vancouver apprenticeship program requirements

Compliance

The City flexibly operates the program but can apply penalties.

Waiver or reduction of requirements. The Chief Financial Officer can waive or reduce the required apprenticeship utilization for a given project based on information submitted by the project manager.

Factors that may lead to the CFO waiving or reducing the apprenticeship utilization for a project include a disproportionate ratio of material costs to labor hours and length of the project (projects less than 30 calendar days or working days may have requirements waived or reduced).[2]

Good faith efforts. If a contractor cannot meet the apprenticeship requirements for a project, the contractor must show that they made good faith efforts to meet the requirements. Some factors that may be deemed acceptable for meeting good faith requirements include:

- Apprentice retention issues;
- Apprentice to journeyperson ratio requirements;
- Class training resulting in less hours on the project;
- Added or deleted work affecting apprenticeship participation;
- Possible displacement of members of current workforce; and
- Inability to find available apprentices.[3]

Monitoring contractor compliance. To monitor compliance with apprenticeship requirements, prime contractors must submit a Monthly Utilization Report with their request for payment. This report must include the cumulative delivery of apprenticeship hours to date by trade.[4]

Penalties. At the end of a project, prime contractors must submit a Final Apprenticeship Utilization form that details apprenticeship utilization by trade. If a contractor does not meet the apprenticeship requirements for that project, the City will apply a $100 penalty for each unmet apprenticeship hour and deduct this total from the final payment to the prime contractor. The prime contractor may submit documentation of good faith efforts to have some, or all penalties waived.

After the contractor submits documentation of good faith efforts, the City has five days to review this documentation. All decisions made by the City regarding good faith efforts are final.[5]

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid.

N. Review of City Apprenticeship Program – Other apprenticeship programs in Washington state

Other cities in Washington state, including the cities of Bellevue, Seattle, Tacoma, Kent, Spokane and Bellingham, have already implemented apprenticeship requirements of 15 percent on contracts of $2 million or more, and some have implemented even stricter requirements. A summary of each city's apprenticeship program requirements, including the City of Vancouver, can be found in Figure N-1 on the following page.

City of Bellevue

The City of Bellevue's apprenticeship program is governed by Bellevue Municipal Code Section 4.28.115. The current version of this policy has been in effect since May 22, 2023. The City of Bellevue requires 15 percent apprenticeship utilization on public works contracts of $2 million or more. [6]

City of Seattle

The City of Seattle's apprenticeship program is governed by Seattle Municipal Code 20.38. The most recent version of this policy has been in effect since April 15, 2024. The City requires 15–20 percent apprenticeship utilization on public works contracts of $1 million or more. The City may also set aspirational goals for utilization of apprentices who are women or minorities.[7]

City of Tacoma

The City of Tacoma's apprenticeship program is governed by Tacoma Municipal Code Chapter 1.90. This version of the policy has been in effect since October 10, 2023. Details of the policy follow below.

Apprenticeship utilization requirements. The City of Tacoma's apprenticeship program is a part of the City's wider Local Employment and Apprenticeship Program (LEAP), which seeks to boost employment in the trades in the Tacoma area and has been in effect since 1997. The current program requires 15 percent local apprenticeship utilization for contracts of $1 million or more.

Penalties. The City of Tacoma adjusts the penalty for unmet apprenticeship hours based on the percentage of the apprenticeship requirement that was met for a given contract. [8] See detailed information on penalties in Figure N-1.

City of Kent

The City of Kent's apprenticeship program is governed by City of Kent Ordinance 4312. This version of the policy has been in effect since May 5, 2019. The City requires 15 percent apprenticeship utilization for public works contracts of $1 million or more. [9]

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[6] Bellevue Municipal Code Section 4.28.115. Retrieved from https://bellevue.municipal.codes/BCC/4.28.115?impersonate=public

[7] Seattle Municipal Code 20.38. Retrieved from https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT20PUWOIMPU_SUBTITLE_IIPUWO_CH20.38APPR_20.38.005APUT

[8] Tacoma Municipal Code Chapter 1.90. Retrieved from https://cms.cityoftacoma.org/cityclerk/files/municipalcode/title01-administrationandpersonnel.pdf; City of Tacoma. (n.d.). *Local Employment and Apprenticeship Training Program Abbreviated Program Requirements.* Retrieved from https://cms.cityoftacoma.org/cedd/LEAP/DocsAfter051713/AbbrevProgReq.pdf

[9] City of Kent Ordinance 4312. Retrieved from: https://documents.kentwa.gov/WebLink/DocView.aspx?id=185613&dbid=0&repo=CityofKent

N. Review of City Apprenticeship Program – Other apprenticeship programs in Washington state

N-1. Summary of city-run apprenticeship programs in Washington state

	Utilization requirements	Penalties	Incentives	Good faith effort requirement	Requirement waivers
City of Vancouver	$500,000 or less: none $500,001–$1,500,000: 3% $1,500,001–$3,000,000: 4% $3,000,001–$8,000,000: 5% $8,000,001–$12,000,000: 6% More than $12,000,000: 8%	$100 per unmet hour	None	Yes	Yes
City of Bellevue	$2 million or more: 15%	None	None	Yes	Yes
City of Bellingham	$1 million or more and project at least 70 days long: 15%	Contractor suspension from bidding for one year	None	Yes	Yes
City of Kent	$1 million or more: 15%	$10 per unmet hour	None	Yes	Yes
City of Seattle	$1 million or more: 15–20%	None	None	No	Yes
City of Spokane	$600,000 or more, primes: 15% $100,000 or more, subcontractors: 15%	First violation: 30% of highest paid craft hourly rate per unmet hour Second violation: 60% of highest paid craft hourly rate per unmet hour Third violation: 90% of highest paid craft hourly rate per unmet hour	Credit of 1.1 hours per hour of work performed by an apprentice who is a veteran, woman, minority or resident of a CEZ	Yes	Yes
City of Tacoma	$1 million or more: 15%; must be residents of the Tacoma Public Utilities service area	90-99% archievement: $2 per unmet hour 75-89%: $3.50 per unmet hour 50-74%: $5 per unmet hour 1-49%: $7.50 per unmet hour 0%: $10 per unmet hour	None	No	No

N. Review of City Apprenticeship Program – Other apprenticeship programs in Washington state

City of Spokane

The City of Spokane's apprenticeship program is governed by Spokane Municipal Code Section 07.06.790. This version of the policy has been in effect since April 21, 2018. Details of the policy follow below.

Apprenticeship utilization requirements. The City of Spokane requires 15 percent apprenticeship utilization on public works prime contracts of $600,000 or more, as well as public works subcontracts of $100,000 or more.

Incentives. The City of Spokane has an incentive program for contractors to meet apprenticeship requirements and to hire specific types of apprentices for City public works contracts. The City encourages that 10 percent of apprenticeship hours be completed by veterans, women, minorities or residents of Community Empowerment Zones (CEZs).[10] For every hour of work that is performed by an apprentice that meets this requirement, the City credits the contractor 1.1 hours towards their apprenticeship goal for that contract.

Penalties. For a contractor who has not previously violated the apprenticeship policy for public works contracts in the previous five years, the City levels a penalty in the amount of 30 percent of the highest paid craft hourly rate for each labor hour unmet by apprentice labor. For second-time violators, this penalty is raised to 60 percent and third-time violators pay a penalty of 90 percent.[11]

City of Bellingham

The City of Bellingham's apprenticeship program is governed by Bellingham Municipal Code Section 4.94.010. This version of the policy has been in effect since March 8, 2021. Details of the policy follow below.

Apprenticeship utilization requirements. The City of Bellingham requires 15 percent apprenticeship utilization on public works contracts of $1 million or more that have a contract period of at least 70 working days. This applies to all public works contracts bid on or after January 1, 2023.

Penalties. If a contractor has failed to comply with apprenticeship requirements on two or more public works contracts, the City may choose to suspend that contractor's ability to bid on public works projects for one year.[12]

[10] Community Empower Zones (CEZs) are defined as Census tracts or areas with high levels of poverty and unemployment. See SMC 07.06.790.

[11] Spokane Municipal Code Section 07.06.790. Retrieved from https://my.spokanecity.org/smc/?Section=07.06.790&Find=governmental

[12] Bellingham Municipal Code Section 4.94.010. Retrieved from https://bellingham.municipal.codes/BMC/4.94.010

N. Review of City Apprenticeship Program – Washington State's apprenticeship program

Prior to 2024, the State of Washington apprenticeship program applied to school districts, four-year institutions of higher education, and certain state agencies (such as the Department of Transportation).

In 2023, House Bill (HB) 1050 amended RCW 39.04.320 Public Works Apprenticeship Utilization, expanding apprenticeship utilization requirements to municipalities. The new apprenticeship requirements will go into effect in July 2024.

State of Washington's Apprenticeship Program Requirements

Following HB 1050, the threshold for apprenticeship requirements for city public works contracts will be as follows for the coming years.

July 1, 2024. Public works contracts of $2 million or more advertised for bid on or after July 1, 2024, will require a minimum of 15 percent of labor hours performed by apprentices.

July 1, 2026. Public works contracts of $1.5 million or more advertised for bid on or after July 1, 2026, will require a minimum of 15 percent of labor hours performed by apprentices.

July 1, 2028. Public works contracts of $1 million or more advertised for bid on or after July 1, 2028, will require a minimum of 15 percent of labor hours performed by apprentices.

Incentives and penalties. The State of Washington does not require that municipalities use specific incentives or penalties for apprenticeship utilization compliance. However, each contract must include a specific line item stating that apprenticeship utilization requirements should be met and should include monetary incentives for meeting requirements and monetary penalties for not meeting requirements.[13]

Waiver or reduction of requirements. The State of Washington allows for the waiver or reduction of apprenticeship utilization requirements in some circumstances. These circumstances include:

- Lack of available apprentices in the geographic area;
- Disproportionately high ratio of material costs to labor hours;
- Demonstrated good faith efforts; and
- Other, to be approved by the governor or by the municipality's legislative authority.[14]

Training. The Department of Labor and Industries and the Municipal Research and Services Center are to provide training, information and ongoing technical assistance to municipalities for the apprenticeship program. The Department of Labor and Industries is also tasked with providing help with apprenticeship utilization reporting.

[13] Ibid.

[14] Ibid.

Contractor compliance. The Washington Department of Labor must collect information on contracts with apprenticeship utilization requirements. Information to be collected includes:

- Project name;
- Dollar value;
- Date of notice to proceed;
- Number of apprentices and labor hours worked, categorized by craft or trade; and
- Number, type and rationale of exceptions granted (if applicable).[15]

Apprenticeship Utilization Advisory Committee. The Secretary of Transportation is responsible for establishing an Apprenticeship Utilization Advisory Committee that regularly provides feedback on the State's apprenticeship program and requirements. This committee must include:

- State-wide geographic representation;
- An equal number contractors and laborer representatives; and
- At least one member representing businesses with less than 35 employees.[16]

[15] Ibid.

[16] Ibid.

N. Review of City Apprenticeship Program – Impacts on MBE/WBEs

Keen Independent examined the past and potential future impact of the apprenticeship program on minority- and woman-owned companies. The 2024 availability survey performed in this study included a question about the apprenticeship program. Keen Independent also performed utilization and disparity analyses for past City construction contracts with and without apprenticeship goals.

Results from Surveys

As a part of the 2024 availability survey, Keen Independent asked construction firms indicating qualifications and interest in City work about the City's apprenticeship program.

The 2024 availability survey asked about familiarity with the apprenticeship program itself.

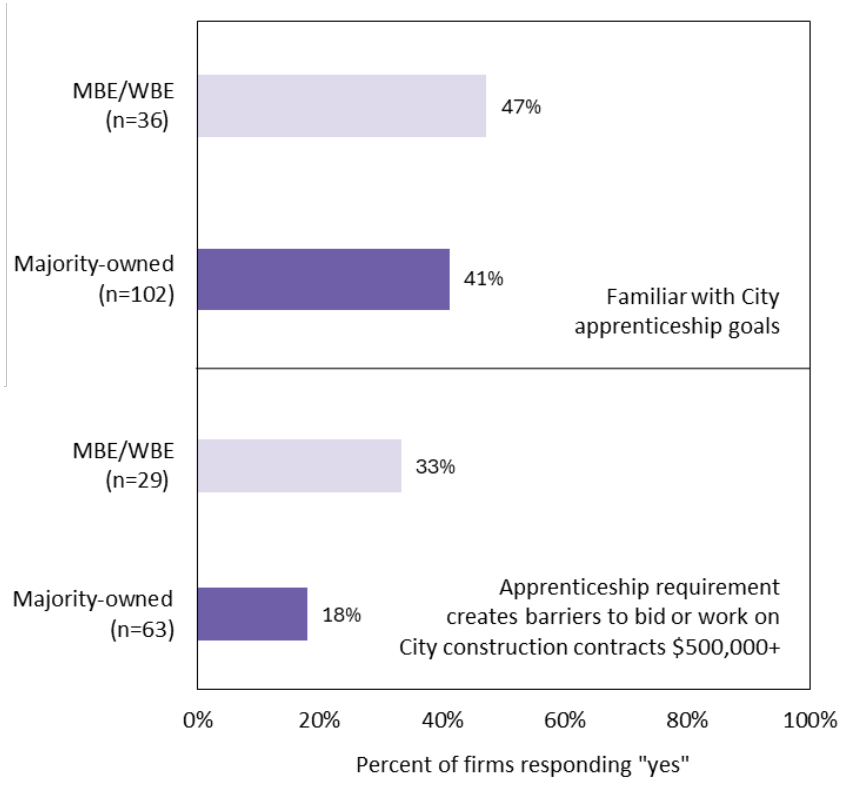
- About one-half of MBE/WBE construction businesses (47%) and almost as high a share of majority-owned construction firms (41%) were familiar with the City's apprenticeship program.

- Keen Independent then asked firms about perceived barriers to bidding or working on City construction contracts over $500,000 with a requirement of 5 percent apprenticeship utilization. (See Appendix C for more information about availability survey questions.)

  One-third of MBE/WBE construction firms reported that such a requirement would create barriers to bidding or working on City construction contracts.

  Only 18 percent of majority-owned firms indicated that this would create barriers.

N-3. Responses to 2024 availability survey questions about the City's apprenticeship program



Source: Keen Independent Research from 2024 availability surveys.

N. Review of City Apprenticeship Program – Impacts on MBE/WBEs

Keen Independent calculated the utilization and availability of minority- and woman-owned firms on past City construction contracts with and without apprenticeship requirements. These analyses follow below.

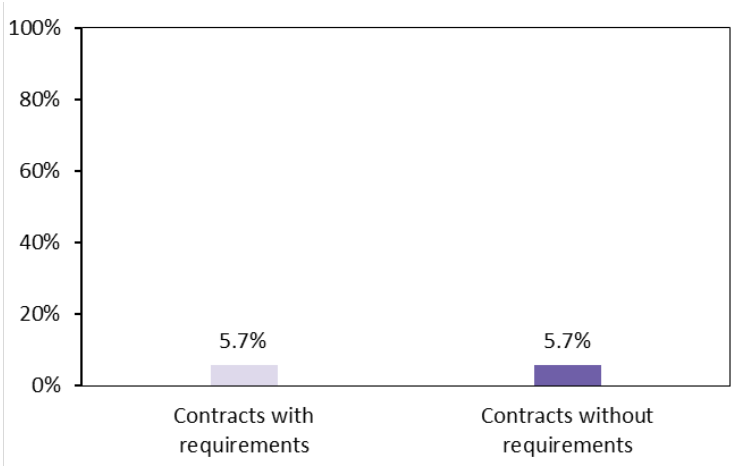
Utilization of Firms on City Construction Contracts with Apprenticeship Requirements

Figure N-4 compares the share of construction contract dollars going to MBE/WBEs for City of Vancouver construction contracts without the apprenticeship utilization requirement and with the utilization requirement (including the portions of construction contracts going to prime contractors and subcontractors).

In total, 5.7 percent of City construction contract dollars went to minority- and woman-owned firms for contracts without the requirement and contracts with the requirement. This suggests that at the previous levels of goals for apprentice hours, there was no difference in MBE/WBE participation with or without the program.

Keen Independent examined whether disparity results differed for MBE/WBEs between contracts with and without the program. They did not. Disparity indices for MBE/WBEs were 21 without the program and 22 with the program for City construction contracts (tables not shown here).

N-4. Share of contract dollars going to MBE/WBEs firms on City construction projects with and without apprenticeship worker requirements, 2015-2022



Source: Keen Independent analysis of City of Vancouver procurement data.

N. Review of City Apprenticeship Program – Conclusions

Keen Independent examined the City of Vancouver's apprenticeship program, similar apprenticeship programs from cities across Washington, and recent extensions of the State of Washington's apprenticeship policy (goal of 15% apprentice workhours) to cities in the state.

City's Current Apprenticeship Program

The City's current requirements set apprenticeship utilization requirements on a graded scale based on anticipated size of contract. These goals range from three to eight percent. The City has set in place a number of compliance procedures and penalties to encourage contractor compliance but allows for modification of requirements on a case-by-case basis, as well as waiver of penalties if the contractor is able to demonstrate good faith efforts made to comply with the requirements.

Other Apprenticeship Programs in Washington State

Other cities across the state of Washington have implemented their own versions of apprenticeship programs, some with similar requirements to the City of Vancouver. Comparison of other cities' programs show that many cities have implemented higher apprenticeship utilization requirements than the City of Vancouver, some with additional goals, requirements or incentives for utilizing apprentices that are women, minorities or economically disadvantaged. The City of Vancouver has the highest penalty for not meeting apprenticeship utilization requirements.

New Washington State Apprenticeship Requirements

As of July 1, 2024, Washington State's newest apprenticeship requirements expand apprenticeship utilization requirements to municipalities across the state, including the City of Vancouver. The State's new requirements will change the City's utilization requirements for its contracts of $2 million and above. The requirement of 15 percent apprenticeship utilization will boost apprenticeship utilization from the City's current rate of 4 to 8 percent for contracts of similar sizes.

Results from the 2024 Availability Survey

As a part of the 2024 availability survey, Keen Independent included two questions regarding the City's apprenticeship program. Responses to the survey indicated that MBEs/WBEs were more likely (33%) than majority-owned firms (18%) to indicate that a change in the apprenticeship utilization requirements would create a barrier to bidding on City contracts.

Utilization and Availability of Firms on Contracts with and without Apprenticeship Requirements

Past City construction projects with apprentice hour goals ranging from 3 to 8 percent showed the same MBE/WBE participation (5.7%) as past projects without the program.