



# **2022 Caltrans FTA Disparity Study**

---

**California Department of Transportation**

**FINAL REPORT**

**FINAL REPORT**

November 10, 2022

# 2022 Caltrans FTA Disparity Study

**Prepared for**

California Department of Transportation  
1120 N Street  
Sacramento, CA 95814

**Prepared by**

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



# Table of Contents

## ES. Executive Summary

A. Analyses in the Disparity Study .....	ES-2
B. Availability Analysis Results.....	ES-3
C. Utilization Analysis Results.....	ES-5
D. Disparity Analysis Results.....	ES-6
E. Overall DBE Goal.....	ES-9
F. Program Implementation .....	ES-12

## 1. Introduction

A. Background .....	1-2
B. Study Scope .....	1-3
C. Study Team Members .....	1-6

## 2. Legal Analysis

A. Legal Standards for Different Types of Measures .....	2-1
B. Seminal Court Decisions.....	2-3
C. Relevant State Law and Regulations .....	2-4
D. Addressing Requirements.....	2-5

## 3. Marketplace Conditions

A. Human Capital.....	3-2
B. Financial Capital .....	3-6
C. Business Ownership .....	3-10
D. Business Success .....	3-12
E. Summary.....	3-14

## 4. Collection and Analysis of Contract Data

A. Overview of Transit-related Contracts.....	4-1
B. Contract Data .....	4-2
C. Vendor Data .....	4-3
D. Relevant Types of Work .....	4-4
E. Agency Review Process .....	4-5

## 5. Availability Analysis

A. Purpose of the Availability Analysis .....	5-1
B. Available Businesses.....	5-2
C. Businesses in the Availability Database.....	5-3
D. Availability Calculations .....	5-4

# Table of Contents

E. Availability Results.....	5-5
F. Base Figure for Overall DBE Goal.....	5-7
<b>6. Utilization Analysis</b>	
A. Overall Results.....	6-1
B. Contract Role.....	6-2
C. Industry .....	6-2
D. Concentration of Dollars.....	6-2
<b>7. Disparity Analysis</b>	
A. Overview .....	7-1
B. Disparity Analysis Results.....	7-2
C. Statistical Significance .....	7-5
<b>8. Program Measures</b>	
A. DBE Certification .....	8-1
B. Race- and Gender-Neutral Measures.....	8-2
C. Race- and Gender-Conscious Measures.....	8-4
<b>9. Overall DBE Goal</b>	
A. Establishing a Base Figure .....	9-1
B. Considering a Step-2 Adjustment.....	9-2
<b>10. Program Implementation</b>	
A. Federal DBE Program .....	10-1
B. Additional Considerations.....	10-9
<b>Appendices</b>	
A. Definitions of Terms	
B. Legal Framework and Analysis	
C. Quantitative Analyses of Marketplace Conditions	
D. Anecdotal Information about Marketplace Conditions	
E. Availability Analysis Approach	
F. Disparity Analysis Results Tables	



# CHAPTER ES.

---

## Executive Summary

# CHAPTER ES.

## Executive Summary

As a recipient of United States Department of Transportation (USDOT) funds, the California Department of Transportation (Caltrans) is required to implement the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to address potential race- and gender-based discrimination in the award and administration of United States Department of Transportation- (USDOT-) funded contracts. As part of the Federal DBE Program, Caltrans is required to set an overall goal for DBE participation in its USDOT-funded contracts every three years.<sup>1</sup> Caltrans uses a combination of *race- and gender-neutral* and *race- and gender-conscious* measures as part of its implementation of the Federal DBE program. Race- and gender-neutral measures are designed to encourage the participation of all businesses in an agency's contracting, regardless of the race/ethnicity or gender of business owners. In contrast, race- and gender-conscious measures are specifically designed to encourage the participation of person of color- (POC-) and woman-owned businesses in an agency's contracting.<sup>2</sup> Caltrans uses race- and gender-conscious contract goals to award individual USDOT-funded contracts.

Caltrans retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its implementation of the Federal DBE Program in encouraging the participation of POC- and woman-owned businesses in its Federal Transit Administration- (FTA-) funded contracts. There are several reasons information from the 2022 Caltrans FTA Disparity Study is potentially useful to Caltrans:

- The study provides information about how well POC- and woman-owned businesses fare in Caltrans' transit-related contracting relative to their availability for that work.
- The study assesses how effective Caltrans' implementation of the Federal DBE Program is in improving outcomes for POC- and woman-owned businesses in the agency's transit-related contracting.
- The study identifies barriers POCs, women, and POC- and woman-owned businesses face in the local marketplace that might affect their ability to compete for Caltrans' transit-related contracts.
- The study provides insights into how to refine contracting processes and program measures to better encourage the participation of POC- and woman-owned businesses in Caltrans' transit-related contracts and help address marketplace barriers.
- An independent review of the participation of POC- and woman-owned businesses is valuable to Caltrans and external groups that monitor the agency's contracting practices.

---

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

<sup>2</sup> "Woman-owned businesses" refers to white woman owned businesses. Information and results for businesses owned by women of color are included along with those of their corresponding racial/ethnic groups.

- Government organizations that have successfully defended their implementations of the Federal DBE Program and other POC- and woman-owned business programs in court have typically relied on information from disparity studies.

BBC summarizes the 2022 Caltrans FTA Disparity Study in six parts:

- A. Analyses in the Disparity Study;
- B. Availability Analysis Results;
- C. Utilization Analysis Results;
- D. Disparity Analysis Results;
- E. Overall DBE Goal; and
- F. Program Implementation.

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

The crux of the 2022 Caltrans FTA Disparity Study was to assess whether there are any differences, or *disparities*, between:

- The percentage of contract dollars Caltrans and subrecipient local agencies awarded to POC- and woman-owned businesses on FTA-funded transit services, professional services, construction, and goods and services contracts between October 1, 2017 and September 30, 2020 (i.e., *utilization*, or *participation*);<sup>3</sup> and
- The percentage of contract dollars POC- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of contracts Caltrans and subrecipient local agencies award (i.e., *availability*).

Along with measuring disparities between the participation and availability of POC- and woman-owned businesses in Caltrans' and subrecipient local agencies' transit-related contracts, BBC also examined various other information related to the agency's implementation of the Federal DBE Program:

- The study team conducted a detailed analysis of relevant federal regulations, case law, state law, and other information to guide the methodology for the disparity study and inform Caltrans' implementation of the Federal DBE Program. (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of the success of POCs, women, and POC- and woman-owned businesses in the California transportation contracting industry. BBC compared business outcomes for POCs, women, and POC- and woman-owned businesses to outcomes

---

<sup>3</sup> Caltrans acts as a pass-through agency that provides funding to subrecipient local agencies to administer projects and associated contracts. Subrecipients sign a Standard Agreement with Caltrans that identifies FTA requirements for procurement, including reporting DBE participation on contracts involving Caltrans pass-through funding to Caltrans. Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report DBE participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

for non-Hispanic white men and majority-owned businesses in key business areas. In addition, the study team collected anecdotal evidence about potential barriers POC- and woman-owned businesses face throughout California from public hearings, in-depth interviews, focus groups, and business surveys (see Chapter 3, Appendix C, and Appendix D).

- BBC estimated the percentage of Caltrans' and subrecipients local agencies' prime contract and subcontract dollars POC- and woman-owned businesses are *ready, willing, and able* to perform. That analysis was based on Caltrans and subrecipient data and surveys the study team conducted with thousands of California businesses that work in industries related to the types of contracts Caltrans and subrecipient local agencies award. BBC analyzed availability separately for businesses owned by specific racial/ethnic groups and white women and for different types of contracts (see Chapter 5 and Appendix E).
- BBC analyzed prime contract and subcontract dollars Caltrans and subrecipient local agencies awarded to POC- and woman-owned businesses between October 1, 2017 and September 30 2020.<sup>4</sup> BBC analyzed participation separately for businesses owned by specific racial/ethnic groups and white women and for different types of contracts (see Chapter 6).
- BBC examined whether there were any disparities between the participation of POC- and woman-owned businesses in transit-related contracts Caltrans and subrecipient local agencies awarded during the study period and the availability of those businesses for that work. BBC analyzed disparity analysis results separately for businesses owned by specific racial/ethnic groups and white women and for different types of contracts. The study team also assessed whether any observed disparities were statistically significant (see Chapter 7 and Appendix F).
- BBC reviewed measures Caltrans uses to encourage the participation of small businesses as well as POC- and woman-owned businesses in its contracting as well as its implementation of the Federal DBE Program (see Chapter 8).
- Based on information from the availability analysis and other research, BBC provided Caltrans with information to help the agency set its next overall DBE goal for FTA-funded contracts (see Chapter 9).
- BBC provided guidance related to implementing the Federal DBE Program as well as additional program options and changes to current contracting practices Caltrans could consider (see Chapter 10).

## B. Availability Analysis Results

BBC used a *custom census* approach to analyze the availability of POC- and woman-owned businesses for Caltrans' and subrecipient local agencies' transit-related contracts and subcontracts. BBC's approach relied on information from surveys the study team conducted with potentially available businesses located in the relevant geographic market area—which BBC

---

<sup>4</sup> Note that prime contractors—not Caltrans and local agencies—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to Caltrans and subrecipient local agencies as *awarding* subcontracts.

identified as the entire state of California—that perform work within relevant subindustries. That approach allowed BBC to develop a representative and unbiased database of potentially available businesses to estimate the availability of POC- and woman-owned businesses in a statistically-valid manner.

**1. Overall.** Figure ES-1 presents dollar-weighted estimates of the availability of POC- and woman-owned businesses for all relevant Caltrans and subrecipient local agency contracts considered together. Overall, the availability of POC- and woman-owned businesses for that work is 21.7 percent. The business groups that exhibit the greatest availability for Caltrans and subrecipient local agency work are Black American-owned businesses (12.8%), Subcontinent Asian American-owned businesses (6.6%), and Hispanic American-owned businesses (2.0%). Woman-owned, Asian Pacific American-owned, and Native American-owned businesses exhibit less than 1 percent availability for all relevant contracts considered together.

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

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

Source:  
BBC Research & Consulting availability analysis.

Business Group	Availability %
Non-Hispanic white woman-owned	0.1 %
Asian Pacific American-owned	0.1 %
Black American-owned	12.8 %
Hispanic American-owned	2.0 %
Native American-owned	0.0 %
Subcontinent American-owned	6.6 %
<b>Total POC- and Woman-owned</b>	<b>21.7 %</b>

**2. Contract role.** Many POC- and woman-owned businesses are small businesses and thus often work as subcontractors. It is therefore useful to examine availability estimates separately for prime contracts and subcontracts. As shown in Figure ES-2, the availability of POC- and woman-owned businesses considered together is substantially higher for subcontracts (42.8%) than for prime contracts (21.3%).

**Figure ES-2.**  
**Availability estimates by contract role**

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

Source:  
BBC Research & Consulting availability analysis.

Business Group	Contract Role	
	Prime Contracts	Subcontracts
Non-Hispanic white woman-owned	0.1 %	2.0 %
Asian Pacific American-owned	0.1 %	3.1 %
Black American-owned	12.7 %	17.2 %
Hispanic American-owned	1.7 %	20.2 %
Native American-owned	0.0 %	0.0 %
Subcontinent American-owned	6.7 %	0.3 %
<b>Total POC- and Woman-owned</b>	<b>21.3 %</b>	<b>42.8 %</b>

**3. Industry.** BBC also examined availability analysis results separately for transit services, professional services, construction, and goods and services contracts. As shown in Figure ES-3, the availability of POC- and woman-owned businesses considered together is highest for professional services contracts (46.7%) and lowest for transit services contracts (21.5%).

**Figure ES-3.**  
**Availability estimates by industry**

Business Group	Industry			
	Transit Services	Professional Services	Construction	Goods and Services
Non-Hispanic white woman-owned	0.0 %	16.9 %	6.7 %	4.0 %
Asian Pacific American-owned	0.0 %	12.1 %	5.2 %	9.3 %
Black American-owned	12.9 %	8.4 %	7.8 %	2.6 %
Hispanic American-owned	2.0 %	3.1 %	21.7 %	11.8 %
Native American-owned	0.0 %	0.0 %	0.0 %	0.0 %
Subcontinent American-owned	6.6 %	6.1 %	5.2 %	1.3 %
<b>Total POC- and Woman-owned</b>	<b>21.5 %</b>	<b>46.7 %</b>	<b>46.6 %</b>	<b>28.9 %</b>

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not sum exactly to totals. For more detail, see Figures F-2, F-3, F-4, and F-5 in Appendix F.

Source: BBC Research & Consulting availability analysis.

### C. Utilization Analysis Results

BBC measured the participation of POC- and woman-owned businesses in Caltrans’ and subrecipient local agencies’ transit-related contracts in terms of *utilization*—the percentage of dollars that those businesses received on relevant prime contracts and subcontracts during the study period. BBC measured the participation of POC- and woman-owned businesses in Caltrans’ and subrecipient local agencies’ transit-related contracts regardless of whether they were certified as DBEs.

**1. Overall.** Figure ES-4 presents the participation of POC- and woman-owned businesses in all relevant prime contracts and subcontracts Caltrans and relevant subrecipient local agencies awarded during the study period, considered together. Caltrans and subrecipient local agencies awarded 0.4 percent of their relevant contract dollars to POC- and woman-owned businesses. Most of the dollars Caltrans and subrecipient local agencies awarded to POC- and woman-owned businesses were awarded to Asian Pacific American-owned businesses. All other business groups received less than 0.1 percent of total relevant contract dollars that Caltrans and subrecipient local agencies awarded during the study period.

**Figure ES-4.**  
**Overall utilization analysis results by racial/ethnic and gender group**

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

Source:  
 BBC Research & Consulting utilization analysis.

Business Group	Utilization
Non-Hispanic white woman-owned	0.0 %
Asian Pacific American-owned	0.4 %
Black American-owned	0.0 %
Hispanic American-owned	0.0 %
Native American-owned	0.0 %
Subcontinent American-owned	0.0 %
<b>Total POC- and Woman-owned</b>	<b>0.4 %</b>

**2. Contract role.** Many POC- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine utilization results separately for prime contracts and subcontracts. As shown in Figure ES-5, the participation of POC- and woman-

owned businesses was greater in the subcontracts (4.2%) than the prime contracts (0.4%) Caltrans and subrecipient local agencies awarded.

**Figure ES-5.**  
**Utilization analysis results**  
**by contract role**

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business Group	Contract Role	
	Prime Contracts	Subcontracts
Non-Hispanic white woman-owned	0.0 %	0.0 %
Asian Pacific American-owned	0.4 %	0.4 %
Black American-owned	0.0 %	1.4 %
Hispanic American-owned	0.0 %	1.5 %
Native American-owned	0.0 %	0.0 %
Subcontinent American-owned	0.0 %	0.9 %
<b>Total POC- and Woman-owned</b>	<b>0.4 %</b>	<b>4.2 %</b>

**3. Industry.** BBC also examined utilization analysis results separately for the transit services, professional services, construction, and goods and services contracts Caltrans and subrecipient local agencies awarded. As shown in Figure ES-6, the participation of POC- and woman-owned businesses considered together was greatest for professional services contracts (12.1%) and least for construction contracts (0.0%).

**Figure ES-6.**  
**Utilization results by industry**

Business Group	Industry			
	Transit Services	Professional Services	Construction	Goods and Services
Non-Hispanic white woman-owned	0.0 %	0.0 %	0.0 %	0.1 %
Asian Pacific American-owned	0.4 %	0.0 %	0.0 %	1.1 %
Black American-owned	0.0 %	5.2 %	0.0 %	0.0 %
Hispanic American-owned	0.0 %	3.5 %	0.0 %	1.5 %
Native American-owned	0.0 %	0.0 %	0.0 %	0.0 %
Subcontinent Asian American-owned	0.0 %	3.3 %	0.0 %	0.0 %
<b>Total POC- and Woman-owned</b>	<b>0.4 %</b>	<b>12.1 %</b>	<b>0.0 %</b>	<b>2.7 %</b>

Note: Numbers rounded to nearest tenth of 1 percent so may not sum exactly to totals. For more detail, Figures F-2, F-3, F-4, and F-5 in Appendix F.

Source: BBC Research & Consulting utilization analysis.

## D. Disparity Analysis Results

BBC compared the participation of POC- and woman-owned businesses in Caltrans and subrecipient local agency contracts to the availability of those businesses for that work. BBC calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent participation by percent availability and multiplying by 100. A disparity index of 100 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity ratio of less than 100 indicates a *disparity* between participation and availability. That is, the group is considered to have been *underutilized* relative to its availability. Finally, a disparity ratio of less than 80

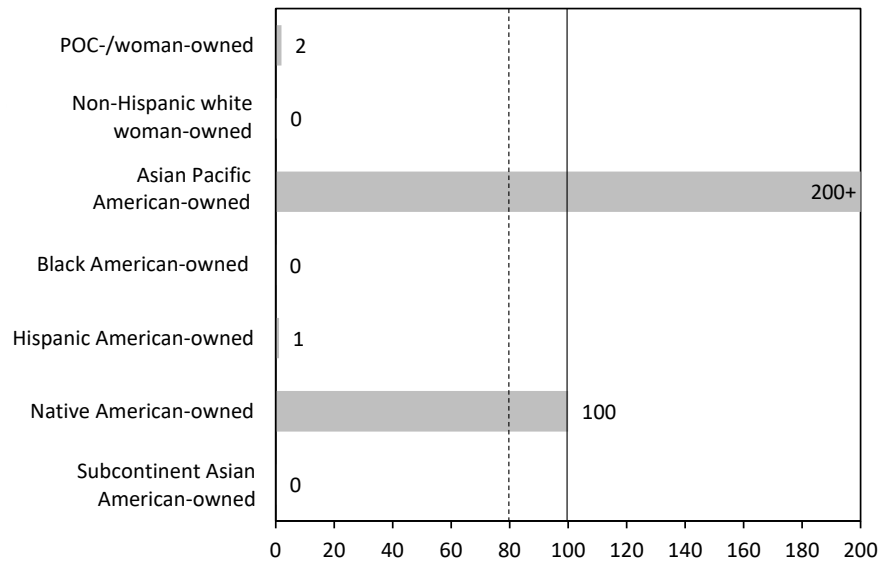
indicates a *substantial disparity* between participation and availability. That is, the group is considered to have been *substantially underutilized* relative to its availability.

**1. Overall.** Figure ES-7 presents disparity indices for all relevant prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. As shown in Figure ES-7, POC- and woman-owned businesses exhibited a disparity index of 2 for all relevant contracts Caltrans and subrecipient local agencies awarded during the study period, indicating that the participation of POC- and woman-owned businesses in transit-related contracts those agencies awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. With the exception of Asian Pacific American-owned businesses (disparity index of 200+) and Native American-owned businesses (disparity index of 100), all business groups exhibited substantial disparities on all relevant contracts considered together.

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

Note:  
Numbers rounded to nearest whole number.  
For more detail, see Figure F-1 in Appendix F.

Source:  
BBC Research & Consulting disparity analysis.



With the exception of a small number of contracts (5 prime contracts and subcontracts in total), Caltrans and subrecipient local agencies did not use any race- or gender-conscious measures (i.e., DBE goals) in awarding contracts during the study period. BBC examined disparity analysis results for contracts Caltrans and subrecipient local agencies awarded without the use of DBE goals (no-goals contracts). Disparity analysis results for no-goals contracts were very similar to those for all contracts considered together as presented in Figure ES-7. With the exception of Native American- and Asian Pacific American-owned businesses, all business groups also exhibited substantial disparities for no-goals contracts.<sup>5</sup>

**2. Contract role.** Subcontracts tend to be smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to POC- and woman-owned businesses, many of which are small businesses. Thus, it is useful to examine disparity analysis

<sup>5</sup> Native American-owned businesses did not receive any contracts or procurements let during the study period but did not show any availability for that work. Thus, Native American-owned businesses show parity on Caltrans contracts and procurements during the study period because their availability and utilization were equal.



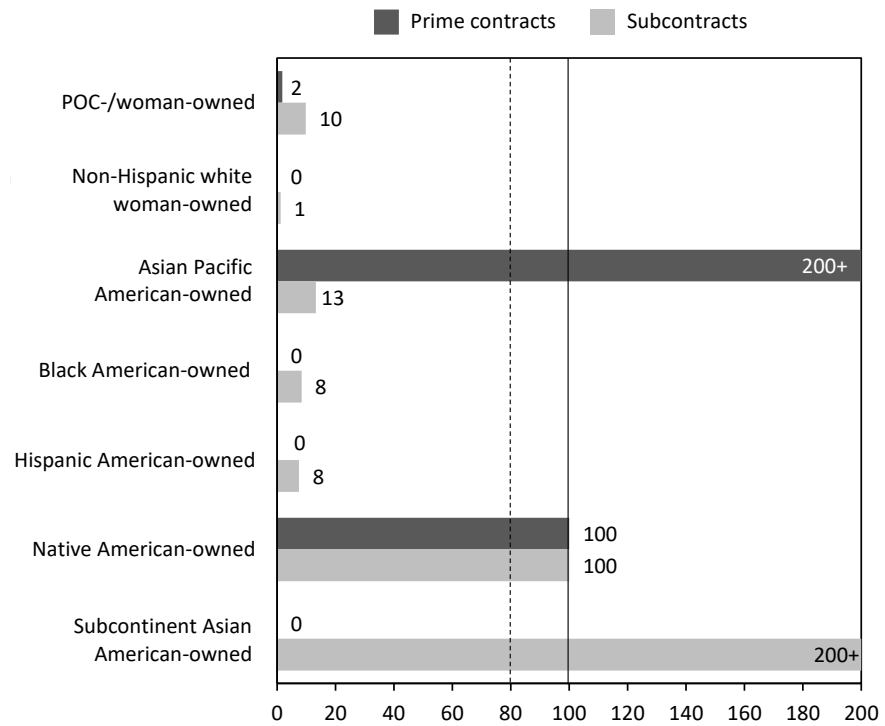
results separately for prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. As shown in Figure ES-8, POC- and woman-owned businesses considered together exhibited substantial disparity indices on both prime contracts (disparity index of 2) and subcontracts (disparity index of 10). Results for individual groups indicated that:

- Woman-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 0) and Subcontinent Asian American-owned businesses (disparity index of 0) exhibited substantial disparities on prime contracts.
- Woman-owned businesses (disparity index of 1), Asian Pacific American-owned businesses (disparity index of 13), Black American-owned businesses (disparity index of 8), and Hispanic American-owned businesses (disparity index of 8) exhibited substantial disparities on subcontracts.

**Figure ES-8.**  
**Disparity analysis**  
**results for prime**  
**contracts and**  
**subcontracts**

Note:  
Numbers rounded to nearest  
whole number.  
For more detail, see Figures F-6  
and F-7 in Appendix F.

Source:  
BBC Research & Consulting  
disparity analysis.



**3. Industry.** BBC also examined disparity analysis results separately for transit services, professional services, construction, and goods and services contracts Caltrans and subrecipient local agencies awarded during the study period. Figure ES-9 presents disparity indices for all relevant groups by contracting area. POC- and woman-owned businesses considered together exhibited substantial disparities on transit services contracts (disparity index of 2), professional services contracts (disparity index of 26), construction contracts (disparity index of 0), and goods and services contracts (disparity index of 9). Disparity analyses results for individual business groups differed by contracting area and group:

- Three groups exhibited substantial disparities on transit services contracts: Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses

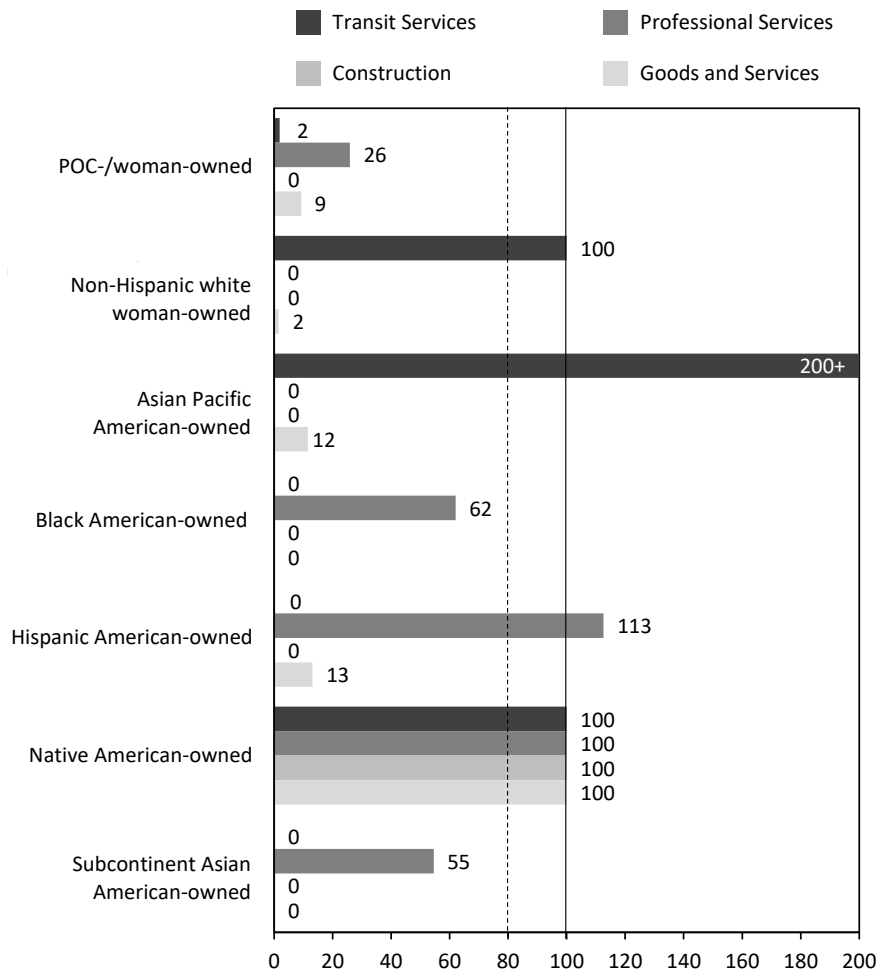
(disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 0).

- Four groups exhibited substantial disparities on professional services contracts: woman-owned businesses (disparity index of 0), Asian Pacific American-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 62), and Subcontinent Asian American-owned businesses (disparity index of 55).
- All individual groups exhibited substantial disparities on construction contracts except Native American-owned businesses (disparity index of 100).
- All individual groups exhibited substantial disparities on goods and services contracts except Native American-owned businesses (disparity index of 100).

**Figure ES-9.**  
**Disparity analysis**  
**results by industry**

Note:  
Numbers rounded to nearest whole number.  
For more detail, see Figures F-2, F-3, F-4, and F-5 in Appendix F.

Source:  
BBC Research & Consulting disparity analysis.



## E. Overall DBE Goal

As part of its implementation of the Federal DBE Program, Caltrans is required to set an overall goal for DBE participation in its FTA-funded contracts. Agencies that are direct recipients of USDOT funding and implement the Federal DBE Program must develop overall DBE goals every three years. However, the overall DBE goal is an *annual* goal, in that agencies must monitor DBE participation in their USDOT-funded contracts every year. 49 Code of Federal Regulations (CFR)

Part 26.45 outlines a two-step process for agencies to set their overall DBE goals: 1) establishing a *base figure*, and 2) considering a *step-2 adjustment*.

**1. Establishing a base figure.** For the purposes of helping Caltrans establish a base figure for its overall DBE goal, BBC considered information about the availability of *potential DBEs*—POC- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26.65—for FTA-funded prime contracts and subcontracts that Caltrans and subrecipient local agencies awarded during the study period. Figure ES-10 presents the availability of potential DBEs for the FTA-funded prime contracts and subcontracts that Caltrans and subrecipient local agencies awarded during the study period. The availability estimates presented in Figure ES-10 reflect a weight of 0.989 for transit services contracts, 0.004 for professional services contracts, 0.00 for construction contracts, and 0.006 for goods and services contracts based on the volume of dollars of FTA-funded contracts that Caltrans and relevant subrecipient local agencies awarded during the study period. If Caltrans expects that the relative distributions of FTA-funded transit services, professional services, construction, and goods and services contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components.

As show in Figure ES-10, potential DBEs might be expected to receive 21.6 percent of Caltrans’ and subrecipients’ FTA-funded prime contract and subcontract dollars based on their availability for that work. Caltrans might consider 21.6 percent as the base figure for its overall DBE goal if the agency anticipates that the types and sizes of FTA-funded contracts that it will award in the future will be similar to the FTA-funded contracts that it awarded during the study period.

**Figure ES-10.**  
**Availability components of the base figure**  
**(based on availability of potential DBEs for FTA-funded contracts)**

Potential DBEs	Availability Percentage				Weighted average
	Transit Services	Professional Services	Construction	Goods and Services	
Asian Pacific American	0.0 %	12.1 %	5.2 %	7.6 %	0.1 %
Black American	12.9	8.4	7.8	2.6	12.8
Hispanic American	2.0	2.5	21.7	11.8	2.1
Native American	0.0	0.0	0.0	0.0	0.0
Subcontinent Asian American	6.6	6.1	5.2	0.9	6.6
Non-Hispanic white woman	0.0	16.9	6.7	4.0	0.1
<b>Total potential DBEs</b>	<b>21.5 %</b>	<b>46.0 %</b>	<b>46.6 %</b>	<b>26.9 %</b>	<b>21.6 %</b>
<b>Industry weight</b>	<b>98.9 %</b>	<b>0.4 %</b>	<b>0.0 %</b>	<b>0.6 %</b>	

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals. See Figures F-10, F-11, F-12, F-13, and F-14 in Appendix F for corresponding disparity results tables.

Source: BBC Research & Consulting availability analysis.

**2. Considering a step-2 adjustment.** The Federal DBE Program requires agencies to consider potential step-2 adjustments to their base figures as part of determining their overall

DBE goals and outlines several factors that agencies must consider when assessing whether to make any adjustments:

- Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.<sup>6</sup>

BBC completed an analysis of each of the above step-2 factors. Much of the information that BBC examined was not easily quantifiable but is still relevant to Caltrans as it determines whether to make a step-2 adjustment. Taken together, the quantitative and qualitative evidence that the study team collected as part of the disparity study may support a step-2 adjustment to the base figure as Caltrans considers setting its overall DBE goal. Based on information from the disparity study and other relevant data, there are reasons why Caltrans might consider an adjustment to its base figure:

- BBC examined the participation of certified DBEs in FTA-funded contracts that Caltrans and subrecipient local agencies awarded during the study period. During that time, certified DBEs received 0.4 percent of dollars on Caltrans' FTA-funded contracts. That information supports a downward adjustment to Caltrans' base figure. If Caltrans uses an approach similar to what USDOT outlines in "Tips for Goals Setting" to adjust its base figure based on past DBE participation, it would take the average of its 21.6 percent base figure and the 0.4 percent past DBE participation, yielding an overall DBE goal of 11.0 percent
- BBC's analyses indicate that there are barriers that certain POC groups and women face related to human capital, financial capital, business ownership, and business success in the California contracting industry. Such barriers may decrease the availability of POC- and woman-owned businesses to obtain and perform the FTA-funded contracts that Caltrans and subrecipient local agencies award, which supports an upward adjustment to Caltrans' base figure.
- Caltrans might also adjust its base figure upward in light of evidence of barriers that affect POCs, women, and POC- and woman-owned businesses in obtaining financing, bonding, and insurance and evidence that POC- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men.
- BBC also examined information about the contracts agencies with which Caltrans has an established memorandum of understanding (MOU agencies) awarded during the study period. The study team examined the availability of potential DBEs for *all* Caltrans' FTA-funded contracts, including those that MOU agencies awarded. The availability of potential DBEs for all FTA-funded contracts considered together is 1.5 percent. That information could support a downward adjustment to Caltrans' base figure, but Caltrans should

---

<sup>6</sup> 49 CFR Section 26.45.

consider whether MOU agency contracts are similar in size and scope to those that Caltrans and subrecipient local agencies that are not MOU agencies award.

USDOT regulations clearly state that Caltrans is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment—either upward or downward—to its base figure. However, Caltrans is not required to make an adjustment as long as it can explain what factors it considered and can explain its decision as part of its goal-setting process.

## **F. Program Implementation**

Chapter 10 provides additional information relevant to Caltrans' implementation of the Federal DBE Program, including program measures that the agency could consider using to encourage the participation of POC- and woman-owned businesses in its contracting. Caltrans should review that information as well as other relevant information as it makes decisions concerning its future implementation of the Federal DBE Program. BBC presents key areas for potential refinement for Caltrans' consideration:

- Caltrans should consider continuing its efforts to network with POC- and woman-owned businesses but might also consider engaging the contracting community to better understand how it can facilitate events that directly address businesses' needs. Caltrans should also consider making use of online procurement fairs, webinars, conference calls, and other technology to provide outreach and technical assistance.
- To further encourage the participation of small businesses—including many POC- and woman-owned businesses—Caltrans should consider making efforts to unbundle relatively large contracts into several smaller contracts. Doing so would likely result in that work being more accessible to small businesses, which in turn might increase opportunities for POC- and woman-owned businesses. The vast majority of Caltrans' FTA-funded contracts are managed by subrecipient local agencies, so an important step in unbundling contracts would be to work with those agencies to identify opportunities to do so.
- Caltrans should consider exploring ways to increase prime contracting and subcontracting opportunities for small businesses, including many POC- and woman-owned businesses. Caltrans might consider implementing a small-business set-aside program to encourage the participation of small businesses as prime contractors. Caltrans could consider implementing a program that requires prime contractors to include minimum levels of subcontracting as part of their bids and proposals to increase subcontracting opportunities for small businesses.
- Caltrans should consider ensuring it collects comprehensive contract and subcontract data on all contracts and projects, including those contracts that subrecipient local agencies award and manage. Caltrans should consider collecting information about amounts committed to all prime contractors and subcontractors along with contact and business information about associated vendors. In addition, Caltrans should consider requiring prime contractors to submit subcontractor payment data as part of the invoicing process and as a condition of receiving payment.

- Caltrans implements a monitoring program to ensure that subrecipient local agencies are appropriately implementing the Federal DBE Program. Caltrans District Transit Representatives conduct compliance reviews of subrecipient local agencies to ensure they are properly implementing management and oversight practices. Caltrans should continue those efforts and determine whether additional training is required to ensure that subrecipient local agencies understand how to implement all aspects of the Federal DBE program.

As part of the disparity study, the study team also examined information concerning conditions in the local marketplace for POCs, women, and POC- and woman-owned businesses, including results for different racial/ethnic and gender groups. Caltrans should review the full disparity study report, as well as other information it may have, in determining what measures it should use as part of its implementation of the Federal DBE Program to better encourage the participation of POC- and woman-owned businesses in its FTA-funded contracting.

# CHAPTER 1.

---

Introduction

# CHAPTER 1.

## Introduction

As a United States Department of Transportation (USDOT) fund recipient, the California Department of Transportation (Caltrans) implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts. In connection with the USDOT funds it receives, Caltrans is responsible for managing Federal Transit Administration (FTA) grants that it awards to more than 80 transit agencies throughout California. Caltrans retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its implementation of the Federal DBE Program in encouraging the participation of person of color- (POC-) and woman-owned businesses in the contracts that result from those grants as well as from the FTA-funded contracts the agency awards itself.

A disparity study examines whether there are any disparities between:

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

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

- Local marketplace conditions for POC- and woman-owned businesses;
- Contracting practices and business programs the agency currently has in place; and
- Various aspects of implementing the Federal DBE Program effectively and in a legally defensible manner.

There are several reasons information from the 2022 Caltrans FTA Disparity Study is potentially useful to the agency:

- The study provides information about how well POC- and woman-owned businesses fare in Caltrans' transit-related contracting relative to their availability for that work.
- The study assesses how effective Caltrans' implementation of the Federal DBE Program is in improving outcomes for POC- and woman-owned businesses in the agency's transit-related contracting.
- The study identifies barriers POCs, women, and POC- and woman-owned businesses face in the local marketplace that might affect their ability to compete for Caltrans' transit-related contracts.
- The study provides insights into how to refine contracting processes and program measures to better encourage the participation of POC- and woman-owned businesses in Caltrans' transit-related contracts and help address marketplace barriers.



- An independent review of the participation of POC- and woman-owned businesses is valuable to Caltrans and external groups that monitor the agency’s contracting practices.
- Government organizations that have successfully defended their implementations of the Federal DBE Program and other POC- and woman-owned business programs in court have typically relied on information from disparity studies.

BBC introduces the 2022 Caltrans FTA Disparity Study in three parts:

- A. Background;
- B. Study Scope; and
- C. Study Team Members.

## A. Background

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

**1. Setting an overall goal for DBE participation.** As part of the Federal DBE Program, an agency is required to set an overall aspirational goal for DBE participation in its USDOT-funded contracts every three years.<sup>1</sup> If DBE participation for a particular year is less than the overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable the agency to meet the goal in the next year. The Federal DBE Program describes the steps an agency must follow in establishing its overall DBE goal. To begin the process, an agency must develop a *base figure* based on demonstrable evidence of the availability of DBEs to participate in its USDOT-funded contracts. Then, the agency must consider conditions in the local marketplace for POC- and woman-owned businesses and other factors and determine whether an upward or downward adjustment to its base figure is necessary to ensure its overall DBE goal is as precise as possible (referred to as a *step-2 adjustment*). An agency is not required to make a step-2 adjustment to its base figure, but it is required to consider various relevant factors and explain its decision to USDOT.

**2. Projecting the portion of the overall DBE goal to be met through race- and gender-neutral means.** USDOT also requires an agency to project the portion of its overall DBE goal it will meet through *race- and gender-neutral* measures and the portion it will meet through any *race- and gender-conscious* measures. Race- and gender-neutral measures are designed to encourage the participation of all businesses—or all small businesses—in an agency’s contracting, regardless of the race/ethnicity or gender of business owners (for examples of race- and gender-neutral measures, see 49 Code of Federal Regulations (CFR) Section 26.51(b)). If an agency cannot meet its goal solely through the use of race- and gender-neutral measures, then it must consider also using *race- and gender-conscious* measures. Race- and gender-conscious measures are specifically designed to encourage the participation of POC-

---

<sup>1</sup> 49 Code of Federal Regulations (CFR) Part 26 Section 45

and woman-owned businesses in an agency's contracting (e.g., using DBE goals to award individual contracts).

The only race- and gender-conscious measure Caltrans uses is applying DBE contract goals in awarding individual USDOT-funded contracts. Prime contractors bidding on those contracts must meet the goals by: 1) being DBEs themselves; 2) making subcontracting commitments to certified DBEs; or 3) submitting *good faith efforts* (GFE) documentation. Caltrans reviews GFE documentation and approves it if prime contractors demonstrate genuine efforts towards compliance with DBE goals, even if they were unsuccessful in partnering with DBE subcontractors. If prime contractors do not meet the goals through subcontracting commitments with DBEs or through approved GFE, then Caltrans rejects prime contractors' bids.

Caltrans does not use any race- or gender-conscious measures when awarding state-funded contracts because of Proposition 209. Proposition 209, which California voters passed in 1996, amended the California constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. However, Proposition 209 does not prohibit the use of those measures if an agency is required to implement them “to establish or maintain eligibility for any federal program,” which is why Caltrans continues to use race- and gender-conscious measures in awarding USDOT-funded contracts.

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

## **B. Study Scope**

Information from the disparity study will help Caltrans continue to encourage the participation of POC- and woman-owned businesses in its FTA-funded contracts and implement the Federal DBE Program effectively and in a legally defensible manner.

**1. Definitions of POC- and woman-owned businesses.** To interpret the analyses presented in the disparity study, it is useful to understand how the study team treats POC- and woman-owned businesses, businesses certified as DBEs, and businesses owned by women of color in its analyses.

**a. POC- and woman-owned businesses.** BBC focused its analyses on the POC- and woman-owned business groups presumed to be disadvantaged in the Federal DBE Program:

- Asian Pacific American-owned businesses;

- Black American-owned businesses;
- Hispanic American-owned businesses;
- Native American-owned businesses;
- Subcontinent Asian American-owned businesses; and
- Woman-owned businesses.

BBC considered businesses as POC- or woman-owned regardless of whether they were, or could be, certified as DBEs. Analyzing the participation and availability of POC- and woman-owned businesses regardless of DBE certification allowed the study team to assess whether there are disparities affecting all POC- and woman-owned businesses and not just certified businesses.

**b. Businesses owned by women of color.** BBC’s definition of POC-owned businesses included businesses owned by both men and women of color. For example, BBC grouped results for businesses owned by Black American men with results for businesses owned by Black American women.

**c. Woman-owned businesses.** Because BBC classified businesses owned by women of color according to their corresponding racial/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to results for *non-Hispanic white woman-owned businesses*. As with POC-owned businesses, BBC considered businesses to be woman-owned based on the known genders of business owners, regardless of whether the businesses were certified as DBEs.

**d. Majority-owned businesses.** BBC considered businesses to be majority-owned if they are businesses owned by non-Hispanic white men. In certain disparity study analyses, the study team coded each business as POC-, woman-, or majority-owned.

**e. DBEs.** DBEs are POC- and woman-owned businesses specifically certified as such by Caltrans. A determination of DBE eligibility includes assessing a business’ gross revenues and business owners’ personal net worths. Some POC- and woman-owned businesses do not qualify as DBEs because their gross revenues or net worths are too high. Businesses seeking DBE certification in California are required to submit an application to Caltrans. The application is available online and requires businesses to submit various information, including business name, contact information, tax information, work specializations, and race/ethnicity and gender of the owners. Caltrans reviews each application, which involves on-site or virtual meetings and additional documentation to confirm business information.<sup>2</sup>

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

---

<sup>2</sup> Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the certification requirements in 49 CFR Part 26.

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

**2. Analyses in the disparity study.** BBC examined whether there are any disparities between the participation and availability of POC- and woman-owned businesses on relevant Caltrans contracts. The study focused on the FTA-funded transit services, professional services, construction, and goods and services contracts Caltrans and subrecipient local agencies awarded between October 1, 2017 and September 30, 2020 (i.e., the study period).<sup>3</sup> Information is organized in the disparity study report in the following manner:

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

**b. Marketplace conditions.** BBC conducted quantitative analyses of the success of POCs, women, and POC- and woman-owned businesses in the California transportation contracting industry. BBC compared business outcomes for POCs, women, and POC- and woman-owned businesses to outcomes for non-Hispanic white men and majority-owned businesses in key business areas. In addition, the study team collected anecdotal evidence about potential barriers POC- and woman-owned businesses face throughout California from public hearings, in-depth interviews, focus groups, and business surveys. Information about marketplace conditions is presented in **Chapter 3, Appendix C, and Appendix D**.

**c. Data collection and analysis.** BBC examined data from multiple sources to complete the utilization and availability analyses, including from Caltrans and subrecipient local agencies. The scope of the study team's data collection and analysis for the study is presented in **Chapter 4**.

**d. Availability analysis.** As part of the availability analysis, BBC estimated the percentage of Caltrans' and subrecipients local agencies' prime contract and subcontract dollars POC- and woman-owned businesses are *ready, willing, and able* to perform. That analysis was based on Caltrans and subrecipient data and surveys the study team conducted with thousands of California businesses that work in industries related to the types of contracts Caltrans and subrecipient local agencies award. BBC analyzed availability separately for businesses owned by

---

<sup>3</sup> Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report their disadvantaged business enterprise (DBE) participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

specific racial/ethnic groups and white women and for different types of contracts. Results from the availability analysis are presented in **Chapter 5** and **Appendix E**.

**e. Utilization analysis.** BBC analyzed prime contract and subcontract dollars Caltrans and subrecipient local agencies awarded to POC- and woman-owned businesses between October 1, 2017 and September 30 2020.<sup>4</sup> BBC analyzed participation separately for businesses owned by specific racial/ethnic groups and white women and for different types of contracts. Results from the utilization analysis are presented in **Chapter 6**.

**f. Disparity analysis.** BBC examined whether there were any disparities between the participation of POC- and woman-owned businesses in transit-related contracts Caltrans and subrecipient local agencies awarded during the study period and the availability of those businesses for that work. BBC analyzed disparity analysis results separately for businesses owned by specific racial/ethnic groups and white women and for different types of contracts. The study team also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 7** and **Appendix F**.

**g. Program measures.** BBC reviewed measures Caltrans uses to encourage the participation of small businesses as well as POC- and woman-owned businesses in its contracting as well as its implementation of the Federal DBE Program. That information is presented in **Chapter 8**.

**h. Overall DBE goal.** Based on information from the availability analysis and other research, BBC provided Caltrans with information to help the agency set its next overall DBE goal for FTA-funded contracts, including establishing a base figure and considering a step-2 adjustment. Information about Caltrans' overall DBE goal is presented in **Chapter 9**.

**i. Program implementation.** BBC provided guidance related to implementing the Federal DBE Program as well as additional program options and changes to current contracting practices Caltrans could consider. The study team's review and guidance for program implementation is presented in **Chapter 10**.

## **C. Study Team Members**

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

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

**2. Rosales Business Partners, LLC.** Rosales Business Partners is a DBE-certified Hispanic American woman-owned economic and workforce consulting firm based in San Francisco, California. Rosales Business Partners conducted in-depth interviews with California businesses

---

<sup>4</sup> Note that prime contractors—not Caltrans and local agencies—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to Caltrans and subrecipient local agencies as *awarding* subcontracts.

and assisted the project team with policy review, community engagement, and data collection tasks.

**3. Luster National.** Luster National is a DBE-certified Black American-owned construction and policy development firm based in Oakland, California. Luster National conducted in-depth interviews with California businesses and assisted the project team with community engagement and data collection tasks.

**4. GCAP Services (GCAP).** GCAP is a DBE-certified Hispanic American-owned program implementation firm based in Costa Mesa and Sacramento, California. GCAP conducted focus groups and in-depth interviews with California businesses and assisted the project team with community engagement and data collection tasks.

**5. Davis Research.** Davis Research is a survey fieldwork firm based in Calabasas, California. The firm conducted telephone and online surveys with thousands of California businesses as part of the availability and utilization analyses.

# **CHAPTER 2.**

---

## **Legal Analysis**

# CHAPTER 2.

## Legal Analysis

As a recipient of United States Department of Transportation (USDOT) funds, the California Department of Transportation (Caltrans) implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to encourage the participation of person of color- (POC-) and woman-owned businesses in an agency's USDOT-funded contracting. Caltrans uses a combination of *race- and gender-neutral* and *race- and gender-conscious* measures as part of its implementation of the program. Race- and gender-neutral measures are designed to encourage the participation of all businesses in an agency's contracting, regardless of the race/ethnicity or gender of business owners. Examples of such measures include networking and outreach efforts, technical assistance programs, and mentor-protégé programs that are not limited to POC- and woman-owned businesses. In contrast, race- and gender-conscious measures are specifically designed to encourage the participation of POC- and woman-owned businesses in an agency's contracting. The only race- and gender-conscious measure Caltrans uses as part of the Federal DBE Program is using DBE contract goals to award individual USDOT-funded contracts. Prime contractors bidding on those contracts must meet the goals by: 1) being DBEs themselves; 2) making subcontracting commitments to DBEs; or 3) submitting *good faith efforts* documentation demonstrating they made genuine efforts to meet the goals but failed to do so.

Because Caltrans uses both race- and gender-neutral and race- and gender-conscious measures as part of its implementation of the Federal DBE Program, it is instructive to review information related to the legal standards governing their use. BBC Research & Consulting (BBC) summarizes legal information in four parts:

- A. Legal Standards for Different Types of Measures;
- B. Seminal Court Decisions;
- C. Relevant State Law and Regulations; and
- D. Addressing Requirements.

Appendix B presents additional details about the above topics.

### **A. Legal Standards for Different Types of Measures**

There are different legal standards for determining the constitutionality of POC- and woman-owned business programs, depending on whether they rely only on race- and gender-neutral measures or if they also include race- and gender-conscious measures.

**1. Programs that rely only on race- and gender-neutral measures.** Government agencies that implement POC- and woman-owned business programs that rely only on race- and gender-neutral measures must show a *rational basis* for their programs. Showing a rational basis requires agencies to demonstrate their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of programs



that could impinge on the rights of others. When courts review programs based on a rational basis, only the most egregious violations lead to programs being deemed unconstitutional.

**2. Programs that include race- and gender-conscious measures.** Person of color- and woman-owned business programs that include both race- and gender-neutral and race- and gender-conscious measures—such as Caltrans’ implementation of the Federal DBE Program—must meet the *strict scrutiny* standard of constitutional review.<sup>1</sup> In contrast to a rational basis, the strict scrutiny standard presents the highest threshold for evaluating the legality of government programs that could impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, government agencies must show a *compelling governmental interest* in using race- and gender-conscious measures and ensure the use of such measures is *narrowly tailored*.

**a. Compelling governmental interest.** Government agencies using race- and gender-conscious measures have the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Agencies cannot rely on national statistics of discrimination to draw conclusions about market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.<sup>2</sup> It is not necessary for government agencies themselves to have discriminated against POC- or woman-owned businesses for them to take remedial action. They could take remedial action if evidence demonstrates they are *passive participants* in race- or gender-based discrimination that exists in their relevant geographic market areas (RGMA).

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

- The necessity of such measures and the efficacy of alternative race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waiver and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.<sup>3</sup>

---

<sup>1</sup> Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

<sup>2</sup> See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

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

## B. Seminal Court Decisions

Two United States Supreme Court cases established the strict scrutiny standard for evaluating the constitutionality of POC- and woman-owned business programs that include race- and gender-conscious measures:

- *City of Richmond v. J.A. Croson Company (Croson)*;<sup>4</sup> and
- *Adarand Constructors, Inc. v. Peña (Adarand)*.<sup>5</sup>

Many subsequent decisions in district courts and federal courts have expanded requirements for the use of race- and gender-conscious measures as part of POC- and woman-owned business programs, including several cases in the Ninth Circuit, the jurisdiction in which Caltrans operates. BBC briefly summarizes the United States Supreme Court's decisions in *Croson* and *Adarand* as well as the Ninth Circuit Court of Appeals' decisions in two other seminal cases related to POC- and woman-owned business programs: *Western States Paving Co. v. Washington State Department of Transportation (Western States)* and *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al. (AGC, San Diego)*.<sup>6, 7</sup>

**1. *Croson* and *Adarand*.** The United States Supreme Court's landmark decisions in *Croson* and *Adarand* are the most important court decisions to date in connection with POC- and woman-owned business programs, race- and gender-conscious measures, and disparity study methodology. In *Croson*, the Supreme Court struck down the City of Richmond's race-based subcontracting program as unconstitutional and, in doing so, established various requirements government agencies must meet when considering the use of race-conscious measures as part of their contracting:

- Agencies' use of race-conscious measures must meet the strict scrutiny standard of constitutional review—that is, in remedying any identified discrimination, they must establish a *compelling governmental interest* to do so and must ensure the use of such measures is *narrowly tailored*.
- In assessing availability, agencies must account for various characteristics of the prime contracts and subcontracts they award and the degree to which local businesses are *ready, willing, and able* to perform that work.
- If agencies show *statistical disparities* between the percentage of dollars they awarded to POC-owned businesses and the percentage of dollars those businesses might be available to perform, then *inferences of discrimination* could exist, justifying the use of narrowly-tailored race-conscious measures.

---

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

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

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

<sup>7</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. 2013).

The Supreme Court's decision in *Adarand* expanded its decision in *Crosby* to include federal government programs—such as the Federal DBE Program—that include race-conscious measures, requiring that those programs must also meet the strict scrutiny standard.

**2. *Western States*.** *Western States* represented the first time the Ninth Circuit Court of Appeals considered the constitutionality of a state department of transportation's implementation of the Federal DBE Program. In *Western States*, the Court struck down the Washington State Department of Transportation's (WSDOT's) implementation of the Federal DBE Program, because it did not satisfy the narrow tailoring requirement of the strict scrutiny standard. Specifically, the Court held that:

- WSDOT did not present compelling evidence of race- or gender-based discrimination in the Washington transportation contracting industry, and agencies must have evidence of such discrimination for their use of race- and gender-conscious measures to be considered narrowly tailored and serving a remedial purpose.
- Even when evidence of discrimination exists within agencies' RGMA, the use of race- and gender-conscious measures is narrowly tailored only when it is limited to those business groups that have been shown to actually suffer from discrimination in their marketplaces.
- Agencies can rely on statistical disparities between the participation and availability of POC- and woman-owned businesses on contracts they awarded to show discrimination against particular business groups in the marketplace if those contracts were awarded using only race- and gender-neutral measures.
- In assessing availability, agencies must account for various characteristics—such as capacity, firm size, and contract size—of the prime contracts and subcontracts they award as well as of the businesses located in their RGMA.
- WSDOT only provided minimal statistical evidence and no anecdotal evidence regarding race- and gender-based discrimination in its RGMA, and sufficient amounts of both are necessary to show the use of race- and gender-conscious measures is narrowly tailored.

**3. *AGC, San Diego*.** *AGC, San Diego* was the only other time the Ninth Circuit Court of Appeals considered the constitutionality of a state department of transportation's implementation of the Federal DBE Program after *Western States*. However, in contrast to its decision in *Western States*, the Court upheld Caltrans' implementation of the Federal DBE Program as constitutional, ruling that it met both the compelling governmental interest and narrow tailoring requirements of the strict scrutiny standard. Caltrans' implementation of the Federal DBE Program and its defense of its program was based in large part on a 2007 disparity study BBC conducted.

## C. Relevant State Law and Regulations

Although Caltrans uses race- and gender-conscious measures to award individual USDOT-funded contracts, it does not use any race- or gender-conscious measures to award state-funded contracts because of Proposition 209, which California voters passed in 1996 and became effective in 1997. Proposition 209 amended Section 31, Article 1 of the California Constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies

in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. Proposition 209 does not prohibit the use of those measures if an agency is required to implement them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state,” which is why Caltrans can legally use race- and gender-conscious measures as part of the Federal DBE Program.

No government agencies in California have successfully used race- or gender-conscious measures as part of awarding state- or locally-funded contracts since Proposition 209 passed. The City of San Jose implemented a POC- and woman-owned business program that included race- and gender-conscious measures, but the program was challenged in court, and the California Supreme Court found it violated Section 31, Article 1 of the California Constitution.<sup>8</sup>

## D. Addressing Requirements

Many government agencies have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring their use of race- and gender-conscious measures is narrowly tailored. Various aspects of the 2022 Caltrans Federal Transit Administration Disparity Study specifically address requirements the United States Supreme Court and other federal courts have established around POC- and woman-owned business programs and race- and gender-conscious measures:

- The study includes extensive econometric analyses and analyses of anecdotal evidence to assess whether any discrimination exists for POCs, women, and POC- and woman-owned businesses in the RGMA and whether Caltrans is actively or passively participating in that discrimination.
- The study accounts for various characteristics of the prime contracts and subcontracts Caltrans and subrecipient local agencies award as well as specific characteristics of businesses working in the RGMA, resulting in estimates of the degree to which POC- and woman-owned businesses are *ready, willing, and able* to perform that work.
- The study includes assessments of whether POC- and woman-owned businesses exhibit substantial statistical disparities between participation and availability for Caltrans’ and subrecipient local agencies’ contracts, indicating whether any inferences of discrimination exist for individual groups.
- The study includes specific recommendations to help ensure Caltrans’ implementation of the Federal DBE Program is narrowly tailored in remedying any identified discrimination, including recommendations related to:
  - Identifying which racial/ethnic and gender groups exhibit substantial barriers;
  - Maximizing the use of race- and gender-neutral measures to address any barriers;
  - Ensuring race- and gender-conscious measures are flexible, rationally related to marketplace conditions, and not overly burdensome on third parties; and
  - Setting an overall DBE goal consistent with federal regulations and case law.

---

<sup>8</sup> *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

# **CHAPTER 3.**

---

## **Marketplace Conditions**

## CHAPTER 3.

# Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded persons of color (POCs) and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination produced substantial disparities for POCs and women, the effects of which are still apparent today. Those barriers limited opportunities for POCs in terms of both education and workplace experience.<sup>1, 2, 3, 4</sup> Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.<sup>5</sup> Historically, POC groups and women in California have faced similar barriers. For example, Black Americans and Hispanic Americans are incarcerated at higher rates than non-Hispanic white Americans in California.<sup>6</sup> Black children in California are much more likely to live and grow up in poverty than other children after accounting for other demographic factors.<sup>7</sup> In addition, Black Americans and Hispanic Americans have substantially higher poverty rates than non-Hispanic white Americans in California.<sup>8</sup>

In the middle of the 20<sup>th</sup> century, many reforms opened up new opportunities for POCs and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women’s Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.<sup>9</sup> Those reforms increased diversity in workplaces and reduced educational and employment disparities for POCs and women.<sup>10, 11, 12, 13</sup> However, despite those improvements, POCs and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.<sup>14, 15, 16, 17</sup>

Federal Courts and the United States Congress have considered barriers POCs, women, and POC- and woman-owned businesses face in a local marketplace as evidence of the existence of race- and gender-based discrimination in that marketplace.<sup>18, 19, 20</sup> The United States Supreme Court and other Federal Courts have held that analyses of conditions in a local marketplace for POCs, women, and POC- and woman-owned businesses are instructive in determining whether agencies’ implementations of POC- and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for POC- and woman-owned businesses to successfully compete for government contracts. Passive participation in discrimination means agencies unintentionally perpetuate race- or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race- or gender-based discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.<sup>21, 22, 23</sup>

BBC Research & Consulting (BBC) conducted quantitative and qualitative analyses to assess whether POCs, women, and POC- and woman-owned businesses face any barriers in California

transit-related industries. The study team also examined the potential effects any such barriers have on the formation and success of businesses and on their participation in, and availability for, transit-related contracts the California Department of Transportation (Caltrans) and subrecipient local agencies award. The study team examined marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs and women face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether POCs and women face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership** to assess whether POCs and women own businesses at rates comparable to that of non-Hispanic white men; and
- **Business success** to assess whether POC- and woman-owned businesses have outcomes similar to those of other businesses.

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

## A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Factors such as education, business experience, and managerial experience have been shown to be related to business success.<sup>24, 25, 26, 27</sup> Any barriers in those areas might make it more difficult for POCs and women to work in relevant industries and prevent some of them from starting and operating businesses successfully.

**1. Education.** Barriers associated with educational attainment may preclude the entry or advancement of certain individuals in certain industries because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.<sup>28, 29</sup> Nationally, POCs lag behind non-Hispanic whites in terms of both educational attainment and the quality of education they receive.<sup>30, 31</sup> Persons of color are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.<sup>32</sup> In addition, Black American students are more than three times as likely as non-Hispanic whites to be expelled or suspended from high school.<sup>33</sup> For those and other reasons, POCs are far less likely than non-Hispanic whites to attend college, enroll at highly- or moderately-selective four-year institutions, or earn college degrees.<sup>34</sup>

Disparities in educational outcomes seem to exist in California as well. For example, Black Americans and Hispanic Americans are less prepared for college than non-Hispanic white Americans in California, and Black Americans and Hispanic Americans are underrepresented relative to the population in the University of California system.<sup>35</sup> BBC's analyses of the



California labor force also indicate that certain groups are far less likely than others to earn college degrees. Figure 3-1 presents the percentage of California workers who have earned four-year college degrees by race/ethnicity and gender. As shown in Figure 3-1, Black American, Hispanic American, Native American, and other race POC workers are substantially less likely than non-Hispanic white workers to have four-year college degrees.

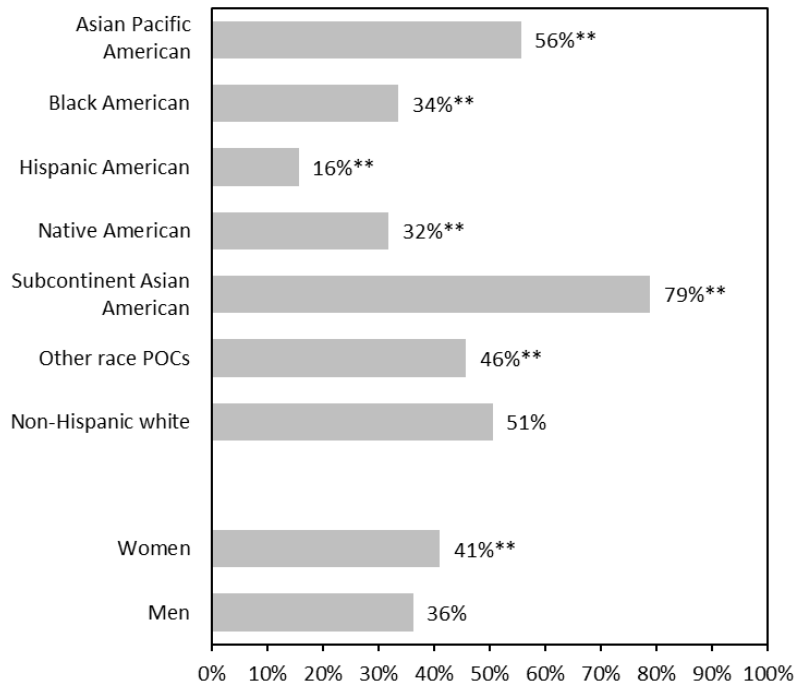
**Figure 3-1.**  
**Percent of California workers 25 and older with at least a four-year college degree**

Notes:

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

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



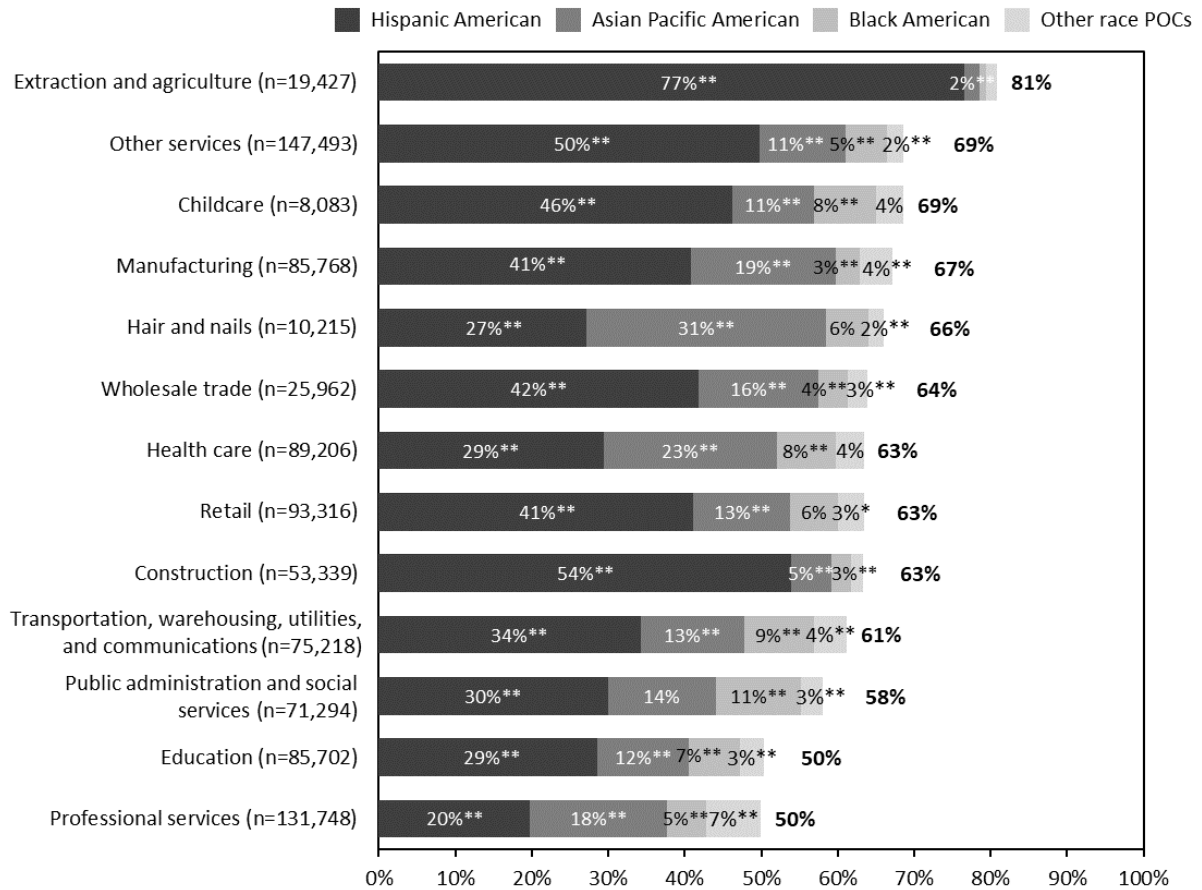
**2. Employment and management experience.** An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit POCs and women from acquiring that experience could prevent them from starting and operating related businesses in the future.

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

BBC's analyses of the labor force in California are largely consistent with nationwide findings. Figures 3-2 presents the representation of POC workers in various California industries. As shown in Figure 3-2, the industries with the highest representations of POC workers are extraction and agriculture, other services, and childcare. The California industries with the lowest representations of POC workers are public administration and social services, education, and professional services.



**Figure 3-2.**  
**Percent representation of POCs in various California industries**



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

The representation of POCs among all California workers is 14% for Asian Pacific Americans, 6% for Black Americans, 38% for Hispanic Americans, 4% for Other race POCs and 61% for all POCs considered together.

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

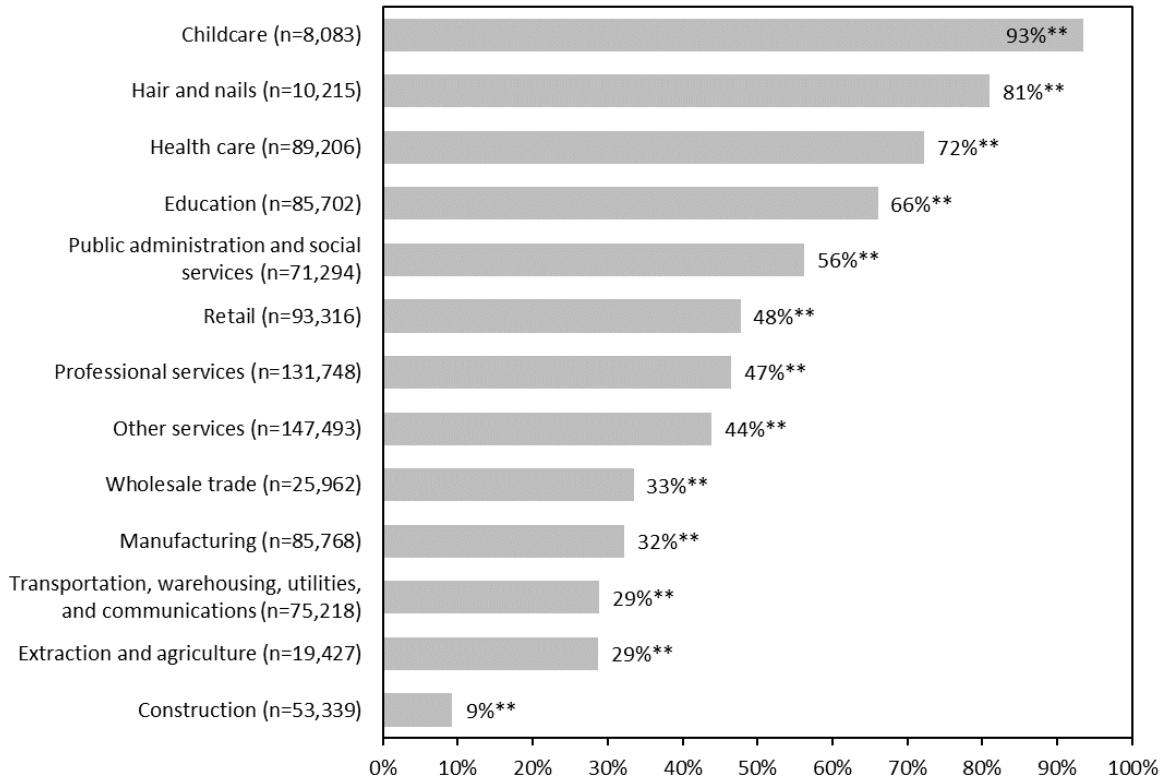
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation,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

All labels lower than 2% were removed due to poor visibility.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

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

**Figure 3-3.**  
**Percent representation of women in various California industries**



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

The representation of women among all California workers is 46%.

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**b. Management experience.** Managerial experience is essential to business success, but discrimination remains a persistent obstacle to greater diversity in management positions.<sup>48, 49, 50</sup> Nationally, POCs and women are far less likely than non-Hispanic white men to work in management positions.<sup>51, 52</sup> Similar outcomes appear to exist for POCs and women in California as well. BBC examined the concentration of individuals of those groups in management positions in the California construction, professional services, transit services, and goods and services industries. As shown in Figure 3-4:

- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, Hispanic Americans, and other race POCs work as managers in the construction industry.
- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans and Hispanic Americans work as managers in the professional services industry. In addition,

compared to men, a smaller percentage of women work as managers in the professional services industry.

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

**3. Intergenerational business experience.** Having family members who own and work in businesses is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks, obtain knowledge of best practices and business etiquette, and receive hands-on experience in helping run businesses. However, nationally, POCs have substantially fewer family members who own businesses and both POCs and women have fewer opportunities to be involved with those businesses.<sup>53, 54</sup> That lack of experience makes it difficult for POCs and women to subsequently start their own businesses and operate them successfully.

**Figure 3-4.**  
**Percent of non-owner workers who worked as a manager in each study-related industry, California and the United States, 2015-2019**

Group	Construction	Professional Services	Transit Services	Goods and Other Services
<b>Race/ethnicity</b>				
Asian Pacific American	9.5 % **	2.1 % **	3.1 %	1.6 % *
Black American	5.5 % **	4.9 %	0.9 % *	0.9 % **
Hispanic American	2.6 % **	1.7 % **	1.3 %	0.3 % **
Native American	12.9 %	7.4 %	5.2 %	0.0 %
Subcontinent Asian American	16.6 %	2.7 %	2.3 %	0.7 % **
Other race POCs	3.0 % **	0.0 % †	0.0 % †	0.0 % †
Non-Hispanic white	13.6 %	3.8 %	2.3 %	2.5 %
<b>Gender</b>				
Women	8.2 % **	1.8 % **	1.3 %	0.5 % **
Men	6.7 %	3.6 %	1.9 %	1.3 %
<b>All individuals</b>	<b>6.8 %</b>	<b>3.1 %</b>	<b>1.7 %</b>	<b>1.2 %</b>

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

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

## B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.<sup>55, 56, 57</sup> Individuals can acquire financial capital through many sources, including employment wages, personal wealth, homeownership, and financing. If

barriers exist in financial capital markets, POCs and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

**1. Wages and income.** Wage and income gaps between POCs and non-Hispanic whites and between women and men exist throughout the country, even when researchers have statistically controlled for various personal factors ostensibly unrelated to race and gender.<sup>58, 59, 60</sup> For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.<sup>61, 62</sup> Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.<sup>63</sup>

BBC observed wage gaps in California consistent with those that researchers have observed nationally. Figure 3-5 presents mean annual wages for California workers by race/ethnicity and gender. As shown in Figure 3-5:

- Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and other race POCs earn substantially less than non-Hispanic whites; and
- Women earn substantially less than men.

**Figure 3-5.**  
**Mean annual wages**  
**in California**

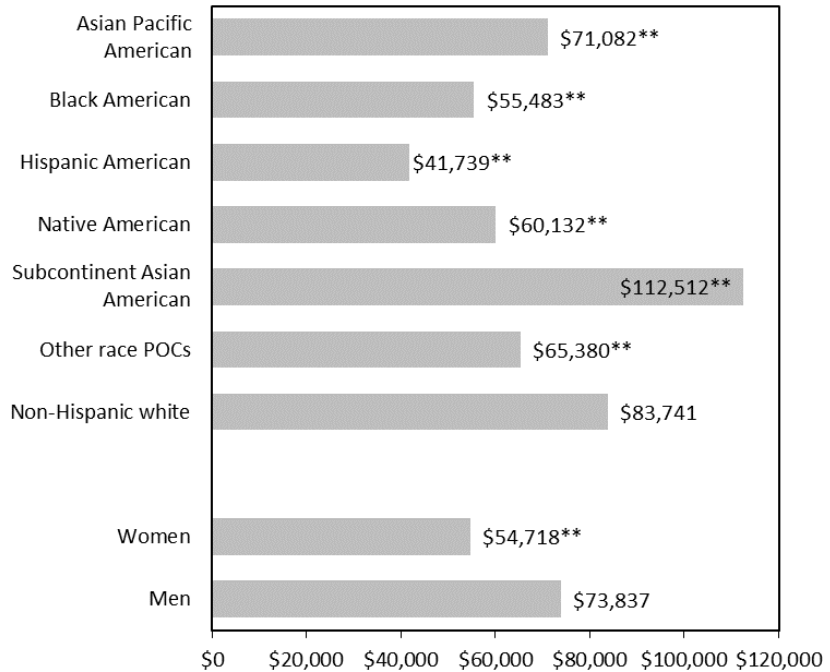
Note:

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

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

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to assess whether wage disparities exist even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for various personal factors, being Asian Pacific American, Black American, Hispanic American, Native American, or other race POC was associated with substantially lower earnings than being non-Hispanic white. In addition, being a woman was associated with substantially lower earnings than being a man (for details, see Figure C-9 in Appendix C).

**2. Personal wealth.** Another important source of business capital is often personal wealth. As with wages and income, there are substantial disparities between POCs and non-Hispanic whites and between women and men in terms of personal wealth.<sup>64, 65</sup> For example, in 2019, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 14 percent and 17 percent that of non-Hispanic whites, respectively.<sup>66</sup> In addition, approximately one-out-of-five Black Americans and one-out-of-six Hispanic Americans in the United States are living in poverty, compared to one-out-of-eleven non-Hispanic whites.<sup>67</sup> Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.<sup>68</sup>

**3. Homeownership.** Homeownership and home equity have also been shown to be key sources of business capital.<sup>69, 70</sup> However, POCs appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.<sup>71</sup> Discrimination is at least partly to blame for those disparities. Research indicates that POCs continue to be given less information on prospective homes and have their purchase offers rejected because of their race.<sup>72, 73</sup> Persons of color who own homes tend to own homes worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.<sup>74, 75</sup> Differences in home values and equity between POCs and non-Hispanic whites can be attributed—at least, in part—to depressed property values that tend to exist in racially-segregated neighborhoods.<sup>76, 77</sup>

Persons of color appear to face homeownership barriers in California similar to those observed nationally. As shown in Figure 3-6, all relevant racial/ethnic groups in California exhibit homeownership rates substantially lower than that of non-Hispanic whites.

**Figure 3-6.**  
**Home ownership rates in California**

Note:

The sample universe is all households.

\*\* Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

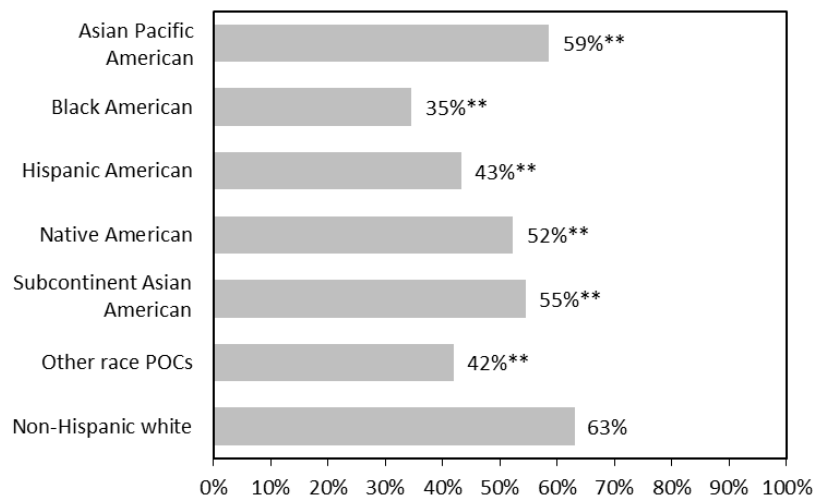


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in California. Those data indicate that California homeowners who identify as Black Americans, Hispanic Americans, Native Americans, and other race POCs own homes that, on average, are worth less than those of non-Hispanic whites.

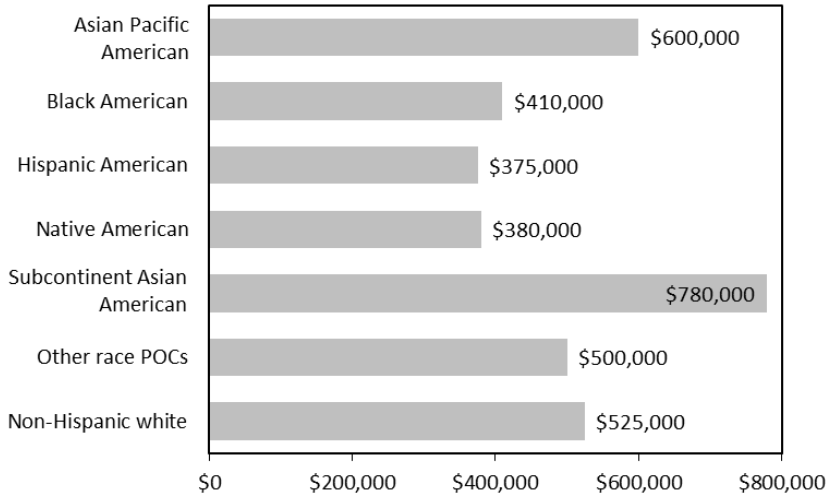
**Figure 3-7.**  
**Median home values in California**

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.



**4. Access to financing.** Persons of color and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.<sup>78, 79, 80, 81, 82, 83</sup> BBC assessed difficulties POCs and women face in home credit and business credit markets in California.

**a. Home credit.** Persons of color and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of POCs and women during the pre-application phase and disproportionate targeting of POC and women borrowers for subprime home loans.<sup>84, 85, 86, 87, 88</sup> Race- and gender-based barriers in home credit markets have led to decreases in homeownership among POCs and women and have eroded their levels of personal wealth.<sup>89, 90, 91, 92</sup> To examine how POCs fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity in California. As shown in Figure 3-8, high-income Black American and Native American households in California appear to have been denied home loans at higher rates than non-Hispanic white households. In addition, the study team's analyses indicate that Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or other Pacific Islanders in California are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

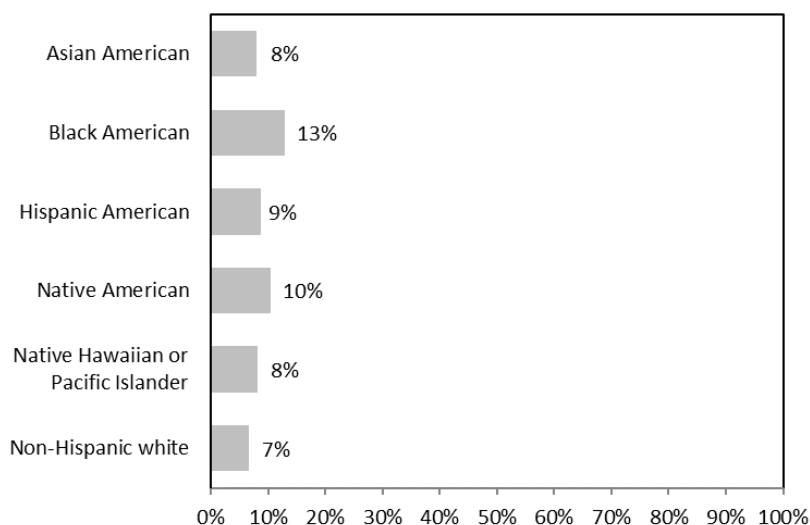
**Figure 3-8.**  
**Denial rates of**  
**conventional purchase**  
**loans for high-income**  
**households in California**

Note:

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

Source:

FFIEC HMDA data 2019. The raw data was obtained from Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.



**b. Business credit.** Person of color- and woman-owned businesses also face substantial difficulties accessing business credit. For example, during loan pre-application meetings, POC-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.<sup>93</sup> Researchers have shown that Black American-owned businesses and Hispanic American-owned businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.<sup>94, 95, 96</sup> In addition, women are less likely to apply for credit than men and receive loans of less value when they do.<sup>97, 98</sup> Without equal access to business capital, POC- and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and must rely more on personal finances.<sup>99, 100, 101, 102</sup>

### C. Business Ownership

Nationally, there has been substantial growth in the number of POC- and woman-owned businesses in recent years. For example, from 2012 to 2018, the number of woman-owned businesses increased by 10 percent, Black American-owned businesses increased by 14 percent, and Hispanic American-owned businesses increased by 15 percent.<sup>103, 104</sup> Despite the progress POCs and women have made with regard to business ownership, barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.<sup>105, 106, 107, 108</sup> In addition, although rates of business ownership have increased among POCs and women, they have been unable to penetrate all industries evenly. They disproportionately own businesses in industries that require less human and financial capital to be successful and already include large concentrations of individuals from disadvantaged groups.<sup>109, 110, 111</sup>

The study team examined rates of business ownership in the California construction, professional services, transit services, and goods and services industries by race/ethnicity and gender. As shown in Figure 3-9:



- Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race POCs own construction businesses at lower rates than non-Hispanic whites. In addition, women own construction businesses at a lower rate than men.
- Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans own professional services businesses at a lower rate than non-Hispanic whites. In addition, women own professional services businesses at a lower rate than men.
- Black Americans and Hispanic Americans own transit services businesses at lower rates than non-Hispanic whites.
- Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans own goods and services businesses at a lower rate than non-Hispanic whites. In addition, women own goods and services businesses at a lower rate than men.

**Figure 3-9.**  
**Business ownership rates in study-related industries in California**

Group	Construction	Professional Services	Transit Services	Goods and Other Services
<b>Race/ethnicity</b>				
Asian Pacific American	28.9 %	9.5 % **	3.5 %	20.7 % **
Black American	16.1 % **	7.6 % **	0.1 % **	16.0 % **
Hispanic American	18.2 % **	9.4 % **	0.9 % **	15.8 % **
Native American	22.0 % **	11.1 % **	2.5 %	18.5 % **
Subcontinent Asian American	22.3 % **	6.3 % **	0.0 %	24.8 % **
Other race POCs	16.4 % **	9.6 % †	0.0 % †	9.1 % †
Non-Hispanic white	29.8 %	18.6 %	4.3 %	22.9 %
<b>Gender</b>				
Women	14.3 % **	11.5 % **	1.2 %	13.2 % **
Men	23.9 %	15.6 %	2.2 %	19.4 %
<b>All individuals</b>	<b>23.0 %</b>	<b>14.5 %</b>	<b>1.9 %</b>	<b>18.7 %</b>

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

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

BBC also conducted regression analyses to determine whether differences in business ownership rates based on race/ethnicity and gender exist even after statistically controlling for various personal factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. Figure 3-10 presents the racial/ethnic and gender factors that were significantly and independently related to business ownership for each relevant industry. As shown in Figure 3-10, even after accounting for various personal factors:

- Being Black American, Hispanic American, or Native American is associated with a lower likelihood of owning a construction business compared to being non-Hispanic white. In



addition, being a woman is associated with a lower likelihood of owning a construction business compared to being a man.

- Being Asian Pacific American, Black American, Hispanic American, or Subcontinent Asian American is associated with a lower likelihood of owning a professional services business compared to being non-Hispanic white. In addition, being a woman is associated with a lower likelihood of owning a professional services business compared to being a man.
- Being Black American or Hispanic American is associated with a lower likelihood of owning a transit services business compared to being non-Hispanic white.
- Being Hispanic American or another race POC is associated with a lower likelihood of owning a goods and services business compared to being non-Hispanic white. In addition, being a woman is associated with a lower likelihood of owning a goods and services business compared to being a man.

**Figure 3-10.**  
**Statistically significant relationships between race/ethnicity and gender and business ownership in relevant California industries, 2015-2019**

Source:  
 BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa>.

Industry and Group	Coefficient
<b>Construction</b>	
Black American	-0.4021
Hispanic American	-0.2671
Native American	-0.1713
Women	-0.4658
<b>Professional Services</b>	
Asian Pacific American	-0.2815
Black American	-0.3875
Hispanic American	-0.0985
Subcontinent Asian American	-0.5522
Women	-0.1508
<b>Transit services</b>	
Black American	-1.6233
Hispanic American	-0.8717
<b>Goods and services</b>	
Hispanic American	-0.1764
Other race POCs	-0.8759
Women	-0.3085

## D. Business Success

There is a great deal of research indicating that, nationally, POC- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of business closures than non-Hispanic whites and men. In addition, POC- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men, respectively, using a number of different indicators such as profits and business size (but also see Robb and Watson 2012).<sup>112, 113, 114</sup> BBC examined data on business closures, business receipts, and business owner earnings to further explore business success in California.

**1. Business closure.** The study team examined rates of closure among California businesses by the race/ethnicity and gender of the owners. As shown in Figure 3-11, Black American- and

Hispanic American-owned businesses in California appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men.

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

**Note:**

Data include only non-publicly held businesses.

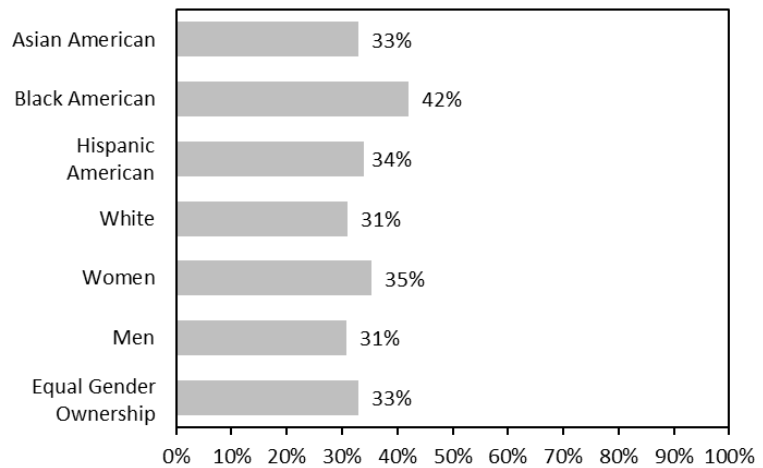
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

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

**Source:**

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

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



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

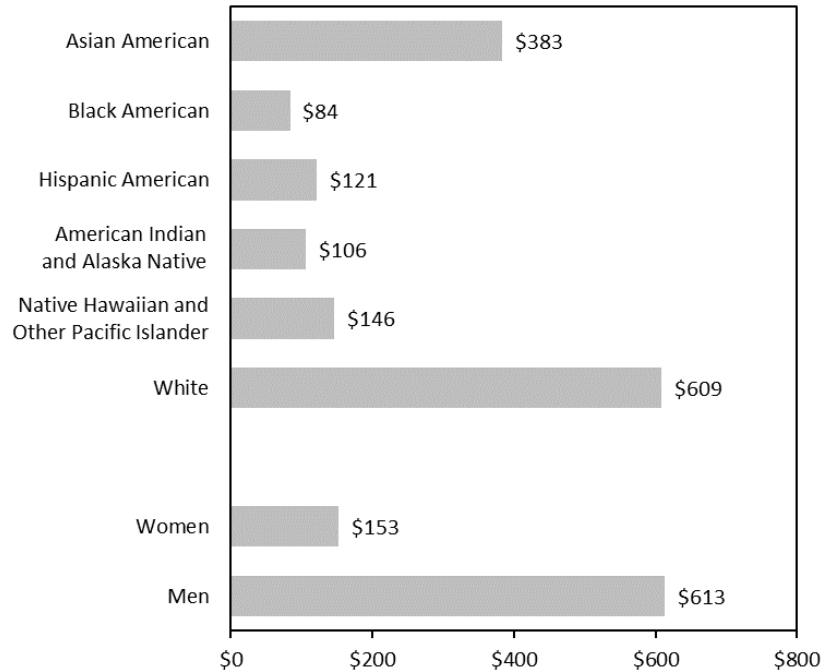
**Figure 3-12.**  
**Mean annual business receipts (in thousands) in California**

Note:

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

Source:

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



**3. Business owner earnings.** BBC also analyzed business owner earnings to assess whether POCs and women in California earn as much from the businesses they own as non-Hispanic whites and men do. As shown in Figure 3-13:

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

**Figure 3-13.**  
**Mean annual business owner earnings in California**

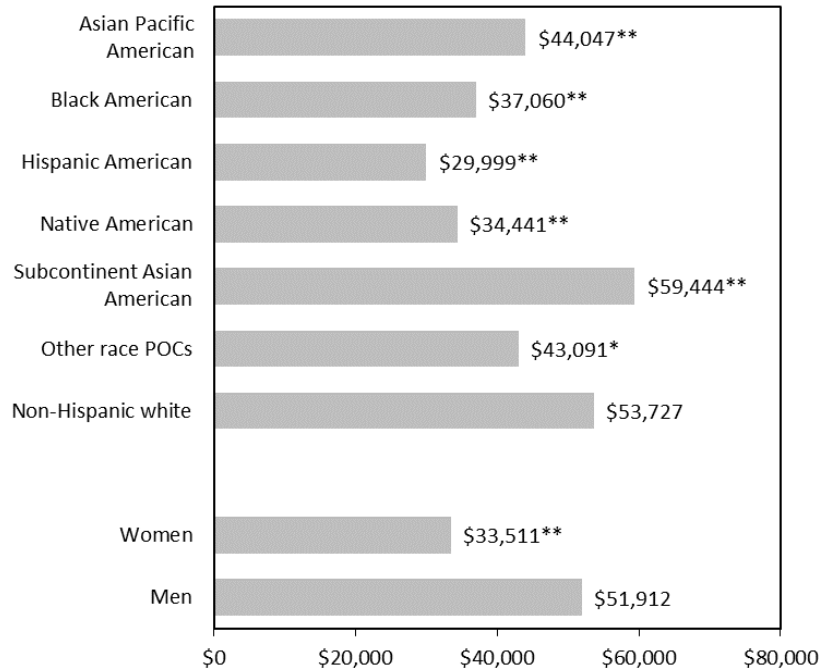
Note:

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

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

Source:

BBC Research & Consulting from 2015 - 2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to determine whether differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being non-Hispanic white, being Asian Pacific American, Black American, or Native American was associated with substantially lower business owner earnings. Similarly, compared to being a man, being a woman was associated with substantially lower business owner earnings (for details, see Figure C-25 in Appendix C).

## E. Summary

BBC's analyses of marketplace conditions indicate that POCs, women, and POC- and woman-owned businesses face certain barriers in California. Existing research and primary research BBC conducted indicate that race- and gender-based disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence those disparities exist even after accounting for various factors such as age, income, education, and familial status. There is also evidence that many disparities are due—at least, in part—to discrimination.

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

- 
- <sup>1</sup> Haney-López, Ian. 2006. *White by Law: The Legal Construction of Race*. New York: NYU Press.
- <sup>2</sup> Woodward, Comer Vann. 1955. *The Strange Career of Jim Crow*. Oxford: Oxford University Press.
- <sup>3</sup> Prucha, Francis Paul. 1986. *The Great Father: The United States Government and the American Indians*. Lincoln: University of Nebraska Press.
- <sup>4</sup> Lee, Erika. 2003. *At America's Gates: Chinese Immigration During the Exclusion Era, 1882-1943*. Chapel Hill, NC: University of North Carolina Press.
- <sup>5</sup> Goldin, Claudia. 2006. "The Quiet Revolution That Transformed Women's Employment, Education, and Family." *The American Economic Review* 96(2):1-21.
- <sup>6</sup> Harris, Heather, Justin Gross, Joseph Hayes and Alexandria Gumbs. 2019. "Just the facts: California's prison population." San Francisco, CA: Public Policy Institute of California.
- <sup>7</sup> Bohn, Sarah, Caroline Danielson, M. Bandy, and J. Hayes. 2017. "Geography of child poverty in California." San Francisco, CA: Public Policy Institute of California.
- <sup>8</sup> Wimer, Christopher, Marybeth Mattingly, Sara Kimberlin, Jonathan Fisher, Caroline Danielson, and Sarah Bohn. 2018. "2.1 million Californians in deep poverty." Palo Alto, CA: Stanford Center on Poverty and Inequality. Retrieved May 19, 2021.
- <sup>9</sup> Dobbin, Frank. 2009. *Inventing Equal Opportunity*. Princeton: Princeton University Press.
- <sup>10</sup> Holzer, Harry and David Neumark. 2000. "Assessing Affirmative Action." *Journal of Economic Literature* 38(3):483-568
- <sup>11</sup> Kalev, Alexandra, Frank Dobbin, and Erin Kelly. 2006. "Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies." *American Sociological Review* 71(4):589-617.
- <sup>12</sup> Kao, Grace and Jennifer S. Thompson. 2003. "Racial and Ethnic Stratification in Educational Achievement and Attainment." *Annual Review of Sociology* 29(1):417-42.
- <sup>13</sup> DiPrete, Thomas A. and Claudia Buchmann. 2013. *The Rise of Women: The Growing Gender Gap in Education and What It Means for American Schools*. New York: Russell Sage Foundation.
- <sup>14</sup> Travis, Jeremy, Bruce Western, and Steve Redburn. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. National Research Council. Washington D.C.: Division of Behavioral and Social Sciences and Education. Retrieved January 6, 2015 ([http://www.nap.edu/booksearch.php?booksearch=1&record\\_id=18613&term=Black&chapter=33-69](http://www.nap.edu/booksearch.php?booksearch=1&record_id=18613&term=Black&chapter=33-69)).
- <sup>15</sup> Charles, Camille Zubrinsky. 2003. "The Dynamics of Racial Residential Segregation." *Annual Review of Sociology* 29:167-207.
- <sup>16</sup> Bianchi, Suzanne M., Liana C. Sayer, Melissa A. Millie, and John P. Robinson. 2012. "Housework: Who Did, Does or Will Do It, and How Much Does It Matter?" *Social Forces* 91(1):55-63.
- <sup>17</sup> Alexander, Michelle. 2010. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.
- <sup>18</sup> *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"); *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, appeal pending.
- <sup>19</sup> *Adarand VII*, 228 F.3d at 1168-70; *Western States Paving*, 407 F.3d at 992; see *DynaLantic*, 885 F.Supp.2d 237; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, appeal pending; *Geyer Signal*, 2014 WL 130909297 at \*14.
- <sup>20</sup> *Adarand VII* at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal*, 2014 WL 1309092 at \*14.
- <sup>21</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
- <sup>22</sup> *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).
- <sup>23</sup> *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041.
- <sup>24</sup> Fairlie, Robert W. and Alicia M. Robb. 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.
- <sup>25</sup> Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.
- <sup>26</sup> Fairlie, Robert W. and Alicia M. Robb. 2009. "Gender Differences in Business Performance: Evidence From the Characteristics of Business Owners Survey." *Small Business Economics* 33(4):375-95.
- <sup>27</sup> Hout, Michael and Harvey Rosen. 2000. "Self-Employment, Family Background, and Race." *Journal of Human Resources* 35(4):670-92.
- <sup>28</sup> Emmons, William R. and Bryan J. Noeth. 2015. *Why Didn't Higher Education Protect Hispanic and Black Wealth?* St. Louis, MO: Center for Household Financial Stability. Retrieved August 20, 2015 ([https://www.stlouisfed.org/~media/Publications/In%20the%20Balance/Images/Issue\\_12/ITB\\_August\\_2015.pdf](https://www.stlouisfed.org/~media/Publications/In%20the%20Balance/Images/Issue_12/ITB_August_2015.pdf)).
- <sup>29</sup> Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (<http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>).
- <sup>30</sup> National Center for Education Statistics. 2010. *Status and Trends in the Education of Racial and Ethnic Minorities*. National Center for Education Statistics. Retrieved January 20, 2015 (<http://nces.ed.gov/pubs2010/2010015/tables.asp>).
- <sup>31</sup> Kao, Grace and Jennifer S. Thompson. 2003. "Racial and Ethnic Stratification in Educational Achievement and Attainment." *Annual Review of Sociology* 29(1):417-42.

- 
- <sup>32</sup> U.S. Department of Education Office for Civil Rights. 2014a. *College and Career Readiness*. Washington D.C.: U.S. Department of Education. Retrieved January 3, 2015 (<http://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf>).
- <sup>33</sup> U.S. Department of Education Office for Civil Rights. 2014b. *School Discipline, Restraint, and Seclusion Highlights*. Washington D.C.: U.S. Department of Education. Retrieved January 3, 2015 (<http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>).
- <sup>34</sup> Bozkick, Robert and Erich Lauff. 2007. Education Longitudinal Study of 2002 (ELS:2002): *A First Look at the Initial Postsecondary Experiences of the High School Sophomore Class of 2002*. National Center for Education Statistics. Retrieved January 20, 2015 (<http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2008308>).
- <sup>35</sup> Jackson, J., and O. Rodriguez. 2017. "Just the facts: College readiness in California." San Francisco, CA: Public Policy Institute of California.
- <sup>36</sup> Correll, Shelley J., Stephen Benard, and In Paik. 2007. "Getting a Job: Is There a Motherhood Penalty?" *American Journal of Sociology* 112(5):1297–1339.
- <sup>37</sup> Pager, Devah, Bruce Western, and Bart Bonikowski. 2009. "Discrimination in a Low-Wage Labor Market A Field Experiment." *American Sociological Review* 74(5):777–99.
- <sup>38</sup> Bertrand, Marianne and Sendhil Mullainathan. 2004. "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination." *American Economic Review* 94(4):991–1013.
- <sup>39</sup> Scheider, Jessica and Elise Gould. 2016. "'Women's Work' and the Gender Pay Gap: How Discrimination, Societal Norms, and Other Forces affect Women's Occupational Choices." Washington D.C.: Economic Policy Institute. Retrieved July 25, 2016 (<http://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/>).
- <sup>40</sup> Beck, E. M., Patrick M. Horan, and Charles M. Tolbert II. 1980. "Industrial Segmentation and Labor Market Discrimination." *Social Problems* 28(2):113–30.
- <sup>41</sup> Catanzarite, Lisa. 2003. "Race-Gender Composition and Occupational Pay Degradation." *Social Problems* 50(1):14–37.
- <sup>42</sup> Cohen, Philip N. and Matt L. Huffman. 2003. "Occupational Segregation and the Devaluation of Women's Work across U.S. Labor Markets." *Social Forces* 81(3):881–908.
- <sup>43</sup> Huffman, Matt L. and Philip N. Cohen. 2004. "Racial Wage Inequality: Job Segregation and Devaluation across U.S. Labor Markets." *American Journal of Sociology* 109(4):902–36.
- <sup>44</sup> Travis, Jeremy, Bruce Western, and Steve Redburn. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. National Research Council. Washington D.C.: Division of Behavioral and Social Sciences and Education. Retrieved January 6, 2015 ([http://www.nap.edu/booksearch.php?booksearch=1&record\\_id=18613&term=Black&chapter=33-69](http://www.nap.edu/booksearch.php?booksearch=1&record_id=18613&term=Black&chapter=33-69)).
- <sup>45</sup> Sakala, Leah. 2014. *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*. Northampton, MA: Prison Policy Initiative. Retrieved July 26, 2015 (<http://www.prisonpolicy.org/reports/rates.html>).
- <sup>46</sup> Pager, Devah. 2003. "The Mark of a Criminal Record." *American Journal of Sociology* 108(5):937–75.
- <sup>47</sup> Western, Bruce and Becky Pettit. 2010. "Incarceration & Social Inequality." *Daedalus* 139(3):8–19.
- <sup>48</sup> Wilson, George and Debra Branch McBrier. 2005. "Race and Loss of Privilege: African American/White Differences in the Determinants of Job Layoffs From Upper-Tier Occupations." *Sociological Forum* 20(2):301–21.
- <sup>49</sup> Roscigno, Vincent J., Lisette M. Garcia, and Donna Bobbitt-Zeher. "Social Closure and Processes of Race/Sex Employment Discrimination." *The Annals of the American Academy of Political and Social Science* 609 (1): 16–48.
- <sup>50</sup> Roscigno, Vincent J. Lisa M. Williams, and Reginald A. Byron. 2012. "Workplace Racial Discrimination and Middle Class Vulnerability." *American Behavioral Scientist* 56(5):696–710.
- <sup>51</sup> Smith, Ryan A. 2002. "Race, Gender, and Authority in the Workplace: Theory and Research." *Annual Review of Sociology* 28:509–42.
- <sup>52</sup> Wilson, George. 1997. "Pathways to Power: Racial Differences in the Determinants of Job Authority." *Social Problems* 44(1):38–54.
- <sup>53</sup> Hout, Michael and Harvey Rosen. 2000. "Self-Employment, Family Background, and Race." *Journal of Human Resources* 35(4):670–92.
- <sup>54</sup> Fairlie, Robert W. and Alicia M. Robb. 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.
- <sup>55</sup> Robb, Alicia and Robert Fairlie. 2007. "Access to Financial Capital among U.S. Businesses: The Case of African American Firms." *The Annals of the American Academy of Political and Social Science* 613(1):47–72.
- <sup>56</sup> Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." *Review of Income & Wealth* 58(2):279–306.
- <sup>57</sup> Bahn, Kate, Regina Willensky, and Annie McGrew. 2016. *A Progressive Agenda for Inclusive and Diverse Entrepreneurship*. Washington D.C.: Center for American Progress. Retrieved December 1, 2016 (<https://www.americanprogress.org/issues/economy/reports/2016/10/13/146019/a-progressive-agenda-for-inclusive-and-diverse-entrepreneurship/>).



- 
- <sup>58</sup> Cha, Youngjoo and Kim A. Weeden. 2014. "Overwork and the Slow Convergence in the Gender Gap in Wages." *American Sociological Review* 79(3):457–84.
- <sup>59</sup> McCall, Leslie. 2001. "Sources of Racial Wage Inequality in Metropolitan Labor Markets: Racial, Ethnic, and Gender Differences." *American Sociological Review* 66(4):520–41.
- <sup>60</sup> Tomaskovic-Devey, Donald. 1993b. "The Gender and Race Composition of Jobs and the Male/Female, White/Black Pay Gaps." *Social Forces* 72(1):45–76.
- <sup>61</sup> Economic Policy Institute. 2012a. *African Americans*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (<http://stateofworkingamerica.org/files/book/factsheets/african-americans.pdf>).
- <sup>62</sup> Economic Policy Institute. 2012b. *Latinos*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (<http://www.stateofworkingamerica.org/fact-sheets/latinos/>).
- <sup>63</sup> Graf, Nikki, Anna Brown and Eileen Patten. 2018. *The Narrowing but Persistent, Gender Gap in Pay*. Washington, D.C.: Pew Research Center. Accessed August 29, 2018 (<http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/>).
- <sup>64</sup> Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (<http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>).
- <sup>65</sup> Sullivan, Laura, Tatjana Meschede, Lars Dietrich, Thomas Shapiro, Amy Traub, Catherine Ruetschlin, and Tamara Draut. 2015. *The Racial Wealth Gap: Why Policy Matters*. New York: Demos. Retrieved August 28, 2015 ([http://www.demos.org/sites/default/files/publications/RacialWealthGap\\_1.pdf](http://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf)).
- <sup>66</sup> Bhutta, Neil, Andrew C. Chang, Lisa J. Dettling, and Joanne W. Hsu. 2020. *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*. FEDS Notes. Washington D.C.: Board of Governors of the Federal Reserve System. Retrieved May 25, 2021 (<https://doi.org/10.17016/2380-7172.2797>).
- <sup>67</sup> Kaiser Health Foundation. 2019. "Poverty by Race/Ethnicity." Retrieved May 19, 2021 (<https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/>).
- <sup>68</sup> Chang, Mariko Lin. 2010. *Shortchanged: Why Women Have Less Wealth and What Can Be Done About It*. Oxford: Oxford University Press.
- <sup>69</sup> Berger, Allen N. and Gregory F. Udell. 1998. "The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle." *Journal of Banking & Finance* 22(6–8):613–73.
- <sup>70</sup> Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." *Review of Income & Wealth* 58(2):279–306.
- <sup>71</sup> U. S. Census Bureau. 2013a. "American Community Survey 2013 1 Year Estimates." Retrieved January 20, 2015 (<http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>).
- <sup>72</sup> Turner, Margery Austen, Rob Santos, and Diane K. Levy, Doug Wissoker, Claudia Aranda, and Rob Pitingolo. 2013. *Housing Discrimination Against Racial and Ethnic Minorities 2012*. Washington, D.C.: U.S. Department of Housing and Urban Development. Retrieved January 2, 2015 ([http://www.huduser.org/portal/publications/fairhsg/hsg\\_discrimination\\_2012.html](http://www.huduser.org/portal/publications/fairhsg/hsg_discrimination_2012.html)).
- <sup>73</sup> Roscigno, Vincent J., Diana L. Karafin, and Griff Tester. 2009. "The Complexities and Processes of Racial Housing Discrimination." *Social Problems* 56(1): 49–69.
- <sup>74</sup> Kochhar, Rakesh and Richard Fry. 2014. "Wealth Inequality Has Widened along Racial, Ethnic Lines since End of Great Recession." *Pew Research Center*. Retrieved December 29, 2014 (<http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>).
- <sup>75</sup> Burd-Sharps, Sarah and Rebecca Rasch. 2015. *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*. Brooklyn, NY: Social Science Research Council. Retrieved June 23, 2015. (<http://www.ssrc.org/publications/view/129CDF74-1F11-E511-940A-005056AB4B80/>).
- <sup>76</sup> Charles, Camille Zubrinsky. 2003. "The Dynamics of Racial Residential Segregation." *Annual Review of Sociology* 29:167–207.
- <sup>77</sup> Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (<http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>).
- <sup>78</sup> Blanchard, Lloyd, Bo Zhao, and John Yinger. 2008. "Do Lenders Discriminate Against Minority and Woman Entrepreneurs?" *Journal of Urban Economics* 63(2):467–97.
- <sup>79</sup> Cavalluzzo, Ken S., Linda C. Cavalluzzo, and John D. Wolken. 2002. "Competition, Small Business Financing, and Discrimination: Evidence from a New Survey." *The Journal of Business* 75(4):641–79.
- <sup>80</sup> Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth, and Discrimination." *The Journal of Business* 78(6):2153–78.
- <sup>81</sup> Gruenstein Bocian, Debbie, Wei Li, Carolina Reid, and Robert G. Quercia. 2011. *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*. Washington D.C.: Center for Responsible Lending. Retrieved January 21, 2015
- <sup>82</sup> Mijid, Naranchimeg and Alexandra Bernasek. 2013. "Gender and the Credit Rationing of Small Businesses." *The Social Science Journal* 50(1):55–65.
- <sup>83</sup> Ross, Stephen L. and John Yinger. 2002. *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*. Cambridge, MA: MIT Press.

- 
- <sup>84</sup> Ross, Stephen L., Margery Austin Turner, Erin Godfrey, and Robin R. Smith. 2008. "Mortgage Lending in Chicago and Los Angeles: A Paired Testing Study of the Pre-Application Process." *Journal of Urban Economics* 63(3):902–19.
- <sup>85</sup> Dymski, Gary, Jesus Hernandez, and Lisa Mohanty. 2013. "Race, Gender, Power, and the US Subprime Mortgage and Foreclosure Crisis: A Meso Analysis." *Feminist Economics* 19(3):124–51.
- <sup>86</sup> Fishbein, Allen J. and Patrick Woodall. 2006. *Women are Prime Targets Subprime: Women Are Disproportionately Represented in High-Cost Mortgage Market*. Washington D.C.: Consumer Federation of America. Retrieved January 5, 2015 ([http://policylinkcontent.s3.amazonaws.com/WomenPrimeTargetsSubprimeLending\\_CFA\\_0.pdf](http://policylinkcontent.s3.amazonaws.com/WomenPrimeTargetsSubprimeLending_CFA_0.pdf)).
- <sup>87</sup> Williams, Richard, Reynold Nesiba, and Eileen Diaz McConnell. 2005. "The Changing Face of Inequality in Home Mortgage Lending." *Social Problems* 52(2):181–208.
- <sup>88</sup> Wyly, Elvin and C. S. Ponder. 2011. "Gender, Age, and Race in Subprime America." *Housing Policy Debate* 21(4):529–64.
- <sup>89</sup> Baker, Amy Castro. 2011. *Tearing Down the Wealth of Women*. New York: Women's Media Center. Retrieved January 5, 2015 (<http://www.womensmediacenter.com/feature/entry/tearing-down-the-wealth-of-women>).
- <sup>90</sup> Baker, Amy Castro. 2014. "Eroding the Wealth of Women: Gender and the Subprime Foreclosure Crisis." *Social Service Review* 88(1):59–91.
- <sup>91</sup> Rugh, Jacob S. and Douglas S. Massey. 2010. "Racial Segregation and the American Foreclosure Crisis." *American Sociological Review* 75(5):629–51.
- <sup>92</sup> Burd-Sharps, Sarah and Rebecca Rasch. 2015. *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*. Brooklyn, NY: Social Science Research Council. Retrieved June 23, 2015. (<http://www.ssrc.org/publications/view/129CDF74-1F11-E511-940A-005056AB4B80/>).
- <sup>93</sup> Bone, Sterling A., Glenn L. Christensen, and Jerome D. Williams. 2014. "Rejected, Shackled, and Alone: The Impact of Systematic Restricted Choice on Minority Consumers' Construction of Self." *Journal of Consumer Research* 41(2): 451–474.
- <sup>94</sup> Blanchard, Lloyd, Bo Zhao, and John Yinger. 2008. "Do Lenders Discriminate Against Minority and Woman Entrepreneurs?" *Journal of Urban Economics* 63(2):467–97.
- <sup>95</sup> Blanchflower, David G., Phillip B. Levine, and David J. Zimmerman. 2003. "Discrimination in the Small Business Credit Market." *The Review of Economics and Statistics* 85(4):930–43.
- <sup>96</sup> Bates, Timothy and Alicia Robb. 2016. "Impacts of Owner Race and Geographic Context on Access to Small Business Financing." *Economic Development Quarterly* 30(2): 159–170.
- <sup>97</sup> Mijid, Naranchimeg and Alexandra Bernasek. 2013. "Gender and the Credit Rationing of Small Businesses." *The Social Science Journal* 50(1):55–65.
- <sup>98</sup> Treichel, Monica Zimmerman and Jonathan A. Scott. 2006. "Women-Owned Businesses and Access to Bank Credit: Evidence from Three Surveys Since 1987." *Venture Capital* 8(1):51–67.
- <sup>99</sup> Coleman, Susan and Alicia Robb. 2009. "A Comparison of New Firm Financing by Gender: Evidence from the Kauffman Firm Survey Data." *Small Business Economics* 33(4):397–411.
- <sup>100</sup> Robb, Alicia and Robert Fairlie. 2007. "Access to Financial Capital among U.S. Businesses: The Case of African American Firms." *The Annals of the American Academy of Political and Social Science* 613(1):47–72.
- <sup>101</sup> Robb, Alicia, Susan Coleman, and Dane Stangler. 2014. Sources of Economic Hope: Women's Entrepreneurship. Kansas City, KS: Ewing Marion Kauffman Foundation. Retrieved November 3, 2016 (<http://www.kauffman.org/what-we-do/research/2014/11/sources-of-economic-hope-womens-entrepreneurship>).
- <sup>102</sup> Robb, Alicia. 2013. *Access to Capital among Young Firms, Minority-owned Firms, Woman-owned Firms, and High-tech Firms*. Washington D.C.: Small Business Administration Office of Advocacy. Retrieved January 5, 2015 ([https://www.sba.gov/sites/default/files/files/rs403tot\(2\).pdf](https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf)).
- <sup>103</sup> United States Census Bureau. 2012. "Survey of Business Owners." Retrieved August 16, 2019. (<https://data.census.gov/cedsci/table?tid=SBOCS2012.SB1200CSA01&hidePreview=true>).
- <sup>104</sup> United States Census Bureau. 2019. "Annual Business Survey." Retrieved May 25, 2021 (<https://data.census.gov/cedsci/table?tid=ABSCS2018.AB1800CSA01&hidePreview=true>).
- <sup>105</sup> Fairlie, Robert W. and Alicia M. Robb. 2009b. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." *Small Business Economics* 33(4):375–95.
- <sup>106</sup> Fairlie, Robert W. 2006. "Entrepreneurship among Disadvantaged Groups: Women, Minorities, and the Less Educated." Pp. 437–75 in *The Life Cycle of Entrepreneurial Ventures*, edited by Simon Parker. Springer Science & Business Media.
- <sup>107</sup> Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.
- <sup>108</sup> Bahn, Kate, Regina Willensky, and Annie McGrew. 2016. *A Progressive Agenda for Inclusive and Diverse Entrepreneurship*. Washington D.C.: Center for American Progress. Retrieved December 1, 2016 (<https://www.americanprogress.org/issues/economy/reports/2016/10/13/146019/a-progressive-agenda-for-inclusive-and-diverse-entrepreneurship/>).
- <sup>109</sup> Budig, Michelle J. 2006b. "Intersections on the Road to Self-Employment: Gender, Family and Occupational Class." *Social Forces* 84(4):223–39.
- <sup>110</sup> Lofstrom, Magnus and Timothy Bates. 2013. "African Americans' Pursuit of Self-Employment." *Small Business Economics* 40(1):73–86.



---

<sup>111</sup> Bahn, Kate, Regina Willensky, and Annie McGrew. 2016. *A Progressive Agenda for Inclusive and Diverse Entrepreneurship*. Washington D.C.: Center for American Progress. Retrieved December 1, 2016 (<https://www.americanprogress.org/issues/economy/reports/2016/10/13/146019/a-progressive-agenda-for-inclusive-and-diverse-entrepreneurship/>).

<sup>112</sup> Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.

<sup>113</sup> Coleman, Susan and Alicia Robb. 2009. "A Comparison of New Firm Financing by Gender: Evidence from the Kauffman Firm Survey Data." *Small Business Economics* 33(4):397–411.

<sup>114</sup> Robb, Alicia M. and John Watson. 2012. "Gender Differences in Firm Performance: Evidence from New Ventures in the United States." *Journal of Business Venturing* 27(5):544–58.

# **CHAPTER 4.**

---

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

# CHAPTER 4.

## Collection and Analysis of Contract Data

Chapter 4 provides an overview of the contracts BBC Research & Consulting (BBC) analyzed as part of the disparity study and the process we used to collect relevant contract and vendor data for the disparity study. Chapter 4 is organized into five parts:

- A. Overview of Transit-related Contracts;
- B. Contract Data;
- C. Vendor Data;
- D. Relevant Types of Work; and
- E. Agency Review Process.

### A. Overview of Transit-related Contracts

The California Department of Transportation's (Caltrans') Division of Rail and Mass Transportation (DRMT) is responsible for administering federal grant programs that provide funding for third-party operating assistance, capital improvement projects, and transportation planning. Most of Caltrans' transit-related and Federal Transit Administration- (FTA-) funded contracts are awarded through subrecipient local agencies that either perform the work in-house or contract with third-party vendors to perform the work. In addition, DRMT awards a small number of contracts directly to contractors, consultants, and suppliers.

**1. DRMT.** DRMT manages the delivery of funds to subrecipient local agencies for the following FTA programs:

- Section 5310 – Elderly and Disabled Program;
- Section 5311 – Rural Transit Assistance Program;
- Section 5311 (f) – Intercity Bus Program;
- Section 5339 – Bus and Bus Related Equipment Program; and
- Congestion Mitigation and Air Quality (CMAQ).

The 5310 and 5339 programs are discretionary funding programs. Caltrans awards funds for those programs to grant applicants throughout California. Both 5311 programs are non-discretionary funding programs. Caltrans allocates 5311 funding to non-urbanized areas throughout California according to Census population data. CMAQ funds are directed to activities that help communities maintain or attain National Ambient Air Quality Standards. Through the 5310, 5311, 5339, and CMAQ programs, DRMT oversees funding to more than 80 subrecipient local agencies—including cities, counties, and regional agencies—for the purpose of improving mass transportation infrastructure and providing transportation services.

**2. Subrecipient local agencies.** Subrecipients of Caltrans' FTA funds must comply with federal procurement standards set forth in 2 Code of Federal Regulations (CFR) Part 1201.<sup>1</sup> Subrecipients sign a Standard Agreement with Caltrans that identifies FTA requirements for procurement and certifies their compliance with those requirements. Those requirements extend to subrecipients' agreements with third-party vendors, if applicable. Caltrans reviews and approves those agreements to ensure compliance. Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report their disadvantaged business enterprise (DBE) participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

## **B. Contract Data**

BBC examined FTA-funded contracts Caltrans and relevant subrecipient local agencies awarded between October 1, 2017 and September 30, 2020 (i.e., the study period). We worked closely with Caltrans staff to collect data on the transit services, professional services, construction, and goods and services prime contracts and subcontracts each agency awarded during the study period.

**1. Prime contract data.** BBC met with Caltrans staff to determine what types of data the agency maintained on transit-related contracts it and relevant subrecipient local agencies awarded during the study period. Caltrans provided BBC with electronic data on the prime contracts it directly awarded as well as those awarded by relevant subrecipient local agencies. Information about prime contracts came from two Caltrans data sources: BlackCat and a Procurement Log maintained by DRMT.

**2. Subcontract data.** Caltrans acts as a pass-through agency that provides funding to subrecipient local agencies to administer projects and associated contracts. Caltrans provided information on all relevant prime contracts, but it does not maintain comprehensive information about associated subcontracts. To collect subcontract data, BBC contacted subrecipient local agencies directly and asked them to provide information about all subcontracts associated with the relevant prime contracts they awarded during the study period. We attempted to collect subcontract data associated with 31 prime contracts relevant subrecipient local agencies awarded during the study period. We worked with Caltrans to obtain contact information for all relevant subrecipient local agencies and then emailed data request forms to each one. After the first round of emails, BBC sent reminder emails to subrecipient local agencies that did not respond in the first round and worked with Caltrans to continue to contact them. In total, we collected subcontract data associated with more than \$22.5 million of contracts relevant subrecipient local agencies awarded during the study period.

**3. Prime contract and subcontract amounts.** For each contract element—that is, prime contract or subcontract—included in our analyses, BBC examined the dollars Caltrans or the

---

<sup>1</sup> <https://www.ecfr.gov/cgi-bin/text-idx?SID=7bb1b970d53b4236e5132c967213c58f&mc=true&node=pt2.1.1201&rgn=div5>

respective subrecipient local agency awarded to each prime contractor and the dollars prime contractors committed to any subcontractors. If a contract did not include any subcontracts, we attributed the contract’s entire award amount to the prime contractor. If a contract included subcontracts, we calculated subcontract amounts as the amounts committed to each subcontractor. We then calculated the prime contract amount as the total award amount less the sum of dollars committed to all subcontractors.

**4. Contracts included in study analyses.** Figure 4-1 presents the number of contract elements and associated dollars BBC included in the analyses. In total, we included 137 contract elements, which accounted for approximately \$74.5 million worth of dollars in the study analyses.

**Figure 4-1.**  
**Contract elements included in the study**

Source:  
BBC from Caltrans and subrecipient local agency contract and data.

Contract Type	Number of Contract Elements	Dollars (in thousands)
Transit services	16	\$73,742
Professional services	21	\$320
Construction	14	\$9
Good and services	86	\$467
<b>Total</b>	<b>137</b>	<b>\$74,538</b>

### C. Vendor Data

BBC compiled the following information on businesses that participated in relevant contracts Caltrans and subrecipient local agencies awarded during the study period:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was person of color- (POC-) or woman-owned);
- Ethnicity of ownership (if POC-owned);
- Certification status (i.e., whether each business was certified as a DBE by Caltrans);
- Primary lines of work; and
- Business size.

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

- Caltrans and subrecipient local agency contract and vendor data;
- California Unified Certification Program DBE database;
- California Department of General Services Directory of Certified Businesses;
- California Public Utilities Certification Program database;

- United States Small Business Administration certification and ownership lists, including 8(a), HUBZone, and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Business surveys we conducted as part of the utilization and availability analyses; and
- Business websites.

## D. Relevant Types of Work

For each contract element, BBC determined the *subindustry* that best characterized the vendors' primary lines of work (e.g., third-party transit operations). We identified subindustries based on agency data, business surveys we conducted, certification lists, D&B business listings, and other sources. Figure 4-2 presents the dollars the study included for each relevant subindustry.

BBC combined related types of work that accounted for relatively small percentages of total contracting dollars into five "other" subindustries: "other professional services," "other construction materials," "other construction services," "other goods," and "other services." For example, the contracting dollars Caltrans and subrecipient local agencies awarded to contractors for "waterproofing" represented less than 1 percent of total dollars we included in the study. So, we combined "waterproofing" with other types of construction services that also accounted for small percentages of total dollars and that were dissimilar to other subindustries into the "other construction services" subindustry.

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

- Were part of subindustries not typically included in an FTA-related disparity study and that accounted for relatively small proportions of Caltrans and subrecipient local agency work (\$28,000).<sup>2</sup>
- Reflected *national markets*—that is, subindustries dominated by large national or international businesses—or were part of subindustries for which Caltrans and subrecipient local agencies awarded the majority of contracting dollars to businesses located outside of the relevant geographic market area (\$1 million);<sup>3</sup>
- Were part of subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate leases or banking services; \$27,000); or
- Caltrans and subrecipient local agencies awarded to universities, government agencies, utility providers, or other nonprofit organizations (\$11 million).

---

<sup>2</sup> Examples of such work include specialty sport shops and thermometers.

<sup>3</sup> Examples of such work include computer manufacturing and proprietary software.

## E. Agency Review Process

Caltrans reviewed BBC's contract and vendor data several times during the study process. We met with Caltrans to review the data collection process, information we gathered, and data tables. We incorporated Caltrans' feedback into the final contract and vendor data we used as part of the disparity study.

**Figure 4-2.**  
**Contract dollars by**  
**subindustry**

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

Source:  
BBC from Caltrans and subrecipient  
local agency contract data.

Industry	Total (in Thousands)
<b>Transit Services</b>	
Third-party transit operations	\$62,021
Paratransit services	\$11,720
<b>Total transit services</b>	<b>\$73,742</b>
<b>Professional Services</b>	
IT and data services	\$36
Transportation planning and environmental services	\$21
Advertising, marketing and public relations	\$20
Business services and consulting	\$11
Testing and inspection	\$1
Other professional services	\$231
<b>Total professional services</b>	<b>\$320</b>
<b>Construction</b>	
Electrical equipment and supplies	0
Trucking, hauling, and storage	0
Other construction materials	\$6
Other construction services	\$3
<b>Total construction</b>	<b>\$9</b>
<b>Goods and Services</b>	
Petroleum and petroleum products	\$256
Vehicle parts and supplies	\$76
Computers and peripherals	\$33
Communications equipment	\$19
Uniforms and apparel	\$16
Vehicle repair services	\$13
Security systems	\$9
Office equipment and supplies	\$8
Automobiles	\$8
Cleaning and janitorial supplies	\$5
Cleaning and janitorial services	\$3
Furniture	\$2
Other goods	\$11
Other services	\$9
<b>Total goods and services</b>	<b>\$467</b>
<b>GRAND TOTAL</b>	<b>\$74,538</b>

# CHAPTER 5.

---

## Availability Analysis



# CHAPTER 5.

## Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of person of color- (POC-) and woman-owned businesses that are ready, willing, and able to perform on transit-related prime contracts and subcontracts the California Department of Transportation (Caltrans) and relevant subrecipient local agencies awarded between October 1, 2017 and September 30, 2020 (i.e., the study period).<sup>1,2</sup> Chapter 5 describes the availability analysis in six parts:

- A. Purpose of the Availability Analysis;
- B. Available Businesses;
- C. Availability Database;
- D. Availability Calculations;
- E. Availability Results; and
- F. Base Figure for Overall DBE Goal.

Appendix E provides supporting information related to the availability analysis.

### A. Purpose of the Availability Analysis

BBC examined the availability of POC- and woman-owned businesses for Caltrans and subrecipient local agency prime contracts and subcontracts to:

- Estimate the degree to which those business are ready, willing, and able to perform Caltrans and subrecipient local agency work (i.e., *availability*); and
- Use as benchmarks against which to compare the actual participation of those businesses in Caltrans and subrecipient local agency work (i.e., *disparities*).

The availability analysis provides information related to Caltrans' implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. Estimating availability is useful to Caltrans in setting its overall DBE goal for the participation of POC- and woman-owned businesses in the work it and subrecipient local agencies award as well as in setting *contract-specific goals*, if the agency decides the use of such measures is appropriate. Assessing disparities between participation and availability allowed BBC to determine whether certain business groups were *underutilized* during the study period relative to their availability for Caltrans and subrecipient

---

<sup>1</sup> "Woman-owned businesses" refers to white woman owned businesses. Information and results for businesses owned by women of color are included along with those of their corresponding racial/ethnic groups.

<sup>2</sup> Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report their disadvantaged business enterprise (DBE) participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

local agency work, which is crucial to determining whether the use of contract-specific goals or other race- and gender-conscious measures is appropriate and, if so, ensuring their use meets the strict scrutiny standard of constitutional review (for details, see Chapters 2 and 10).

## B. Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of Federal Transit Administration- (FTA-) funded transit services, professional services, construction, and goods and services prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. BBC began the availability analysis by identifying the specific subindustries in which Caltrans and subrecipient local agencies spend the majority of their relevant contracting dollars (for details, see Chapter 4) as well as the geographic area in which the majority of the businesses with which Caltrans and relevant subrecipient local agencies spend those contracting dollars are located (i.e., the *relevant geographic market area, or RGMA*, which BBC identified as the entire state of California).<sup>3</sup>

BBC then conducted extensive surveys with thousands of businesses in the marketplace to develop a representative and unbiased database of potentially available businesses located in the RGMA that perform work within relevant subindustries. The objective of the surveys was not to collect information from every relevant business operating in the local marketplace, but rather to collect information from an unbiased subset of the California business population that appropriately represents the entire local business population, which allowed us to estimate the availability of POC- and woman-owned businesses in an accurate and statistically valid manner.

**1. Overview of availability surveys.** The study team conducted telephone surveys with business owners and managers to identify California businesses that are potentially available for Caltrans' and subrecipient local agencies' transit-related prime contracts and subcontracts. BBC began the process by compiling a *phone book* of all types of businesses—regardless of ownership characteristics—that perform work in relevant industries and are located within the RGMA. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. We compiled information about all business establishments D&B lists under 8-digit work specialization codes that were most related to the transit-related contracts that Caltrans and subrecipient local agencies awarded during the study period. BBC obtained listings on 9,446 California businesses that do work related to those work specializations. However, we did not have working phone numbers for 1,967 of those businesses, but the study team attempted availability surveys with the remaining 7,479 businesses.

**2. Survey information.** The study team conducted availability surveys with businesses listed in our phone book to collect various information about each business, including:

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;

---

<sup>3</sup> BBC defined the RGMA for the disparity study as the entire state of California. We made that determination based on the fact that Caltrans and subrecipient local agencies award the vast majority of their contract dollars to businesses located within California (approximately 99.9% of relevant contract dollars).

- Primary lines of work;
- Interest in performing work for government agencies;
- Interest in performing work as a prime contractor or subcontractor;
- Largest contract the business is able to perform;
- The geographic areas the business serves; and
- Race/ethnicity and gender of ownership.

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

- Being a private business;
- Having performed work relevant to Caltrans' and subrecipient local agencies' transit-related contracting; and
- Being interested in working for Caltrans or other government agencies.

BBC also considered the following information to determine if businesses were potentially available for specific prime contracts and subcontracts Caltrans and subrecipient local agencies award:

- The roles in which they work (i.e., as a prime contractor, subcontractor, or both);
- The largest contracts they are able to perform; and
- Being able to perform work or serve customers in the geographical area in which the work took place.

### **C. Businesses in the Availability Database**

After conducting availability surveys, the study team developed a database of information about businesses potentially available for Caltrans' and subrecipient local agencies' transit-related contracts. Figure 5-1 presents the percent of businesses in the *availability database* that were POC- or woman-owned. The database included information on 354 businesses potentially available for specific transit services, professional services, construction, and goods and services contracts Caltrans and subrecipient local agencies award. As shown in Figure 5-1, of those businesses, 47.7 percent were POC- or woman-owned, which reflects a simple count of businesses with no analysis of their availability for specific contracts Caltrans and subrecipient local agencies award. It represents only a first step toward analyzing the availability of POC- and woman-owned businesses for that work.

**Figure 5-1.**  
**Percent of businesses in the availability database that were POC- or woman-owned**

Note:

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

Source:

BBC Research & Consulting availability analysis.

Business Group	Availability %
Non-Hispanic white woman-owned	9.0 %
Asian Pacific American-owned	7.6 %
Black American-owned	7.6 %
Hispanic American-owned	18.9 %
Native American-owned	0.6 %
Subcontinent American-owned	4.0 %
<b>Total POC- and Woman-owned</b>	<b>47.7 %</b>

## D. Availability Calculations

BBC used a *custom census* approach—which accounts for specific business characteristics such as work type, business capacity, contractor role, and interest in public agency work—to estimate the availability of POC- and woman-owned businesses for Caltrans and relevant subrecipient local agency work. That method of examining availability has been accepted in federal court as the preferred methodology for conducting availability analyses.<sup>4, 5, 6</sup> We analyzed information from the availability database to develop dollar-weighted estimates of the degree to which POC- and woman-owned businesses are ready, willing, and able to perform Caltrans and subrecipient local agency work. Those estimates represent the percentage of contracting dollars one would expect Caltrans and subrecipient local agencies to award to POC- and woman-owned businesses based on their availability for specific types and sizes of that work.

BBC used a contract-by-contract matching approach to estimate availability. Only a portion of the businesses in the availability database was considered potentially available for any given prime contract or subcontract. BBC first identified the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*), including type of work, contract size, location of work, and contract role and then took the following steps to estimate availability for each contract element:

1. BBC identified businesses in the availability database that reported they:
  - Are interested in providing transit services, professional services, construction services, or goods and services in that particular role for that type of work for government agencies;
  - Can perform work or serve customers in the geographical area where the work took place; and
  - Have the ability to perform work of that size or larger.

<sup>4</sup> *Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill., 2015), *affirmed*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016).

<sup>5</sup> *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010).

<sup>6</sup> *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), *aff'd* 473 F.3d 715 (7<sup>th</sup> Cir. 2007).

2. The study team then counted the number of POC-owned businesses, woman-owned businesses, and businesses owned by white men in the availability database that met the criteria specified in Step 1.
3. The study team translated the counts of businesses in step 2 into percentages.

BBC repeated those steps for each contract element included in the disparity study, and then multiplied the percentages of businesses for each contract element by the dollars associated with it, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of POC- and woman-owned businesses overall and separately for each relevant racial/ethnic and gender group. We also estimated availability separately for various subsets of contracts Caltrans and subrecipient local agencies awarded during the study period. Figure 5-2 provides an example of how BBC calculated availability for a specific subcontract associated with a transit operations prime contract a subrecipient local agency awarded during the study period.

BBC's availability calculations are based on prime contracts and subcontracts Caltrans and relevant subrecipient local agencies awarded between October 1, 2017 and September 30, 2020. A key assumption of the availability analysis is that the work Caltrans and relevant subrecipient local agencies awarded during the study period is representative of the contracts they will award in the future. If the types and sizes of contracts Caltrans and relevant subrecipient local agencies award in the future differ substantially from the ones they awarded during the study period, then Caltrans should adjust availability estimates accordingly.

## E. Availability Results

BBC estimated the availability of POC- and woman-owned businesses for the transit-related prime contracts and subcontracts Caltrans and relevant subrecipient local agencies awarded during the study period.

**1. Overall results.** Figure 5-3 presents dollar-weighted estimates of the availability of POC- and woman-owned businesses for all relevant Caltrans and subrecipient local agency contracts considered together. Overall, the availability of POC- and woman-owned businesses for that work is 21.7 percent, indicating that one might expect Caltrans and subrecipient local agencies to award 21.7 percent of their relevant contract dollars to POC- and woman-owned businesses based on their availability for that work. The business groups that exhibit the greatest

### Figure 5-2. Example of calculating availability

On a contract a subrecipient local agency awarded during the study period, the prime contractor awarded a subcontract worth \$11,934 for communication equipment. To determine the overall availability of POC- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

- a. Indicated they provided communication equipment;
- b. Reported being able to perform work of equal size or larger;
- c. Can perform work or serve customers in the location where the work took place; and
- d. Reported interest in working as a subcontractor on government contracts.

BBC found 18 businesses in the availability database that met those criteria. Of those businesses, 9 were POC- or woman-owned businesses. Thus, the availability of POC- and woman-owned businesses for the subcontract was 50.0 percent (i.e.,  $9/18 \times 100 = 50$ ).

availability for Caltrans and subrecipient local agency work are Black American-owned businesses (12.8%), Subcontinent Asian American-owned businesses (6.6%), and Hispanic American-owned businesses (2.0%). Woman-owned, Asian Pacific American-owned, and Native American-owned businesses exhibit less than 1 percent availability for all relevant contracts considered together.

**Figure 5-3.**  
**Overall availability estimates for Caltrans and subrecipient local agency work**

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

Source:  
BBC Research & Consulting availability analysis.

Business Group	Availability %
Non-Hispanic white woman-owned	0.1 %
Asian Pacific American-owned	0.1 %
Black American-owned	12.8 %
Hispanic American-owned	2.0 %
Native American-owned	0.0 %
Subcontinent American-owned	6.6 %
<b>Total POC- and Woman-owned</b>	<b>21.7 %</b>

**2. Contract role.** Many POC- and woman-owned businesses are small businesses and thus often work as subcontractors. It is therefore useful to examine availability estimates separately for prime contracts and subcontracts. Figure 5-4 presents those results. As shown in Figure 5-4, the availability of POC- and woman-owned businesses considered together is substantially higher for subcontracts (42.8%) than for prime contracts (21.3%).

**Figure 5-4.**  
**Availability estimates by contract role**

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

Source:  
BBC Research & Consulting availability analysis.

Business Group	Contract Role	
	Prime Contracts	Subcontracts
Non-Hispanic white woman-owned	0.1 %	2.0 %
Asian Pacific American-owned	0.1 %	3.1 %
Black American-owned	12.7 %	17.2 %
Hispanic American-owned	1.7 %	20.2 %
Native American-owned	0.0 %	0.0 %
Subcontinent American-owned	6.7 %	0.3 %
<b>Total POC- and Woman-owned</b>	<b>21.3 %</b>	<b>42.8 %</b>

**3. Industry.** BBC also examined availability analysis results separately for transit services, professional services, construction, and goods and services contracts. As shown in Figure 5-5, the availability of POC- and woman-owned businesses considered together is highest for professional services contracts (46.7%) and lowest for transit services contracts (21.5%).

**Figure 5-5.**  
**Availability estimates by industry**

Business Group	Industry			
	Transit Services	Professional Services	Construction	Goods and Services
Non-Hispanic white woman-owned	0.0 %	16.9 %	6.7 %	4.0 %
Asian Pacific American-owned	0.0 %	12.1 %	5.2 %	9.3 %
Black American-owned	12.9 %	8.4 %	7.8 %	2.6 %
Hispanic American-owned	2.0 %	3.1 %	21.7 %	11.8 %
Native American-owned	0.0 %	0.0 %	0.0 %	0.0 %
Subcontinent American-owned	6.6 %	6.1 %	5.2 %	1.3 %
<b>Total POC- and Woman-owned</b>	<b>21.5 %</b>	<b>46.7 %</b>	<b>46.6 %</b>	<b>28.9 %</b>

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not sum exactly to totals. For more detail, see Figures F-2, F-3, F-4, and F-5 in Appendix F.

Source: BBC Research & Consulting availability analysis.

## F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in Caltrans' FTA-funded contracts. BBC calculated the base figure using the same availability database and approach described above except calculations only included *potential DBEs*—that is, POC- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 Code of Federal Regulations Part 26. BBC's availability analysis indicates that the availability of potential DBEs for Caltrans' FTA-funded contracts is 21.6 percent. Caltrans might consider 21.6 percent as the base figure for its overall goal for DBE participation, assuming that the types and sizes of the FTA-funded contracts it and relevant subrecipient local agencies award in the time period that the goal will cover are similar to the types of FTA-funded contracts Caltrans and subrecipient local agencies awarded during the study period. For details about Caltrans' overall DBE goal, see Chapter 9.

# **CHAPTER 6.**

---

## **Utilization Analysis**



# CHAPTER 6.

## Utilization Analysis

Chapter 6 presents information about the participation of person of color- (POC-) and woman-owned businesses in transit-related contracts the California Department of Transportation (Caltrans) and relevant subrecipient local agencies awarded between October 1, 2017 and September 30, 2020 (i.e., the study period).<sup>1</sup> BBC Research & Consulting (BBC) measured the participation of POC- and woman-owned businesses in Caltrans' and subrecipient local agencies' transit-related contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars the organizations awarded to those businesses during the study period.<sup>2</sup> BBC measured the participation of POC- and woman-owned businesses in Caltrans' and subrecipient local agencies' transit-related contracts regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).

### A. Overall Results

BBC first examined the participation of POC- and woman-owned businesses in all relevant transit services, professional services, construction, and goods and services contracts and subcontracts Caltrans and relevant subrecipient local agencies awarded during the study period, considered together. As shown in Figure 6-1, Caltrans and subrecipient local agencies awarded 0.4 percent of their relevant contract dollars to POC- and woman-owned businesses. Most of the dollars Caltrans and subrecipient local agencies awarded to POC- and woman-owned businesses were awarded to Asian Pacific American-owned businesses. All other business groups received less than 0.1 percent of total relevant contract dollars that Caltrans and subrecipient local agencies awarded during the study period.

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

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

Source:  
BBC Research & Consulting utilization analysis.

Business Group	Utilization
Non-Hispanic white woman-owned	0.0 %
Asian Pacific American-owned	0.4 %
Black American-owned	0.0 %
Hispanic American-owned	0.0 %
Native American-owned	0.0 %
Subcontinent American-owned	0.0 %
<b>Total POC- and Woman-owned</b>	<b>0.4 %</b>

<sup>1</sup> Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report their disadvantaged business enterprise (DBE) participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

<sup>2</sup> "Woman-owned businesses" refers to white woman owned businesses. Information and results for businesses owned by women of color are included along with those of their corresponding racial/ethnic groups.

## B. Contract Role

Many POC- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine utilization results separately for prime contracts and subcontracts. Figure 6-2 presents those results. As shown in Figure 6-2, the participation of POC- and woman-owned businesses was greater in the subcontracts (4.2%) than the prime contracts (0.4%) Caltrans and subrecipient local agencies awarded.

**Figure 6-2.**  
**Utilization analysis results**  
**by contract role**

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business Group	Contract Role	
	Prime Contracts	Subcontracts
Non-Hispanic white woman-owned	0.0 %	0.0 %
Asian Pacific American-owned	0.4 %	0.4 %
Black American-owned	0.0 %	1.4 %
Hispanic American-owned	0.0 %	1.5 %
Native American-owned	0.0 %	0.0 %
Subcontinent American-owned	0.0 %	0.9 %
<b>Total POC- and Woman-owned</b>	<b>0.4 %</b>	<b>4.2 %</b>

## C. Industry

BBC also examined utilization analysis results separately for the transit services, professional services, construction, and goods and services contracts Caltrans and subrecipient local agencies awarded. As shown in Figure 6-3, the participation of POC- and woman-owned businesses considered together was greatest for professional services contracts (12.1%) and least for construction contracts (0.0%).

**Figure 6-3.**  
**Utilization results by industry**

Business Group	Industry			
	Transit Services	Professional Services	Construction	Goods and Services
Non-Hispanic white woman-owned	0.0 %	0.0 %	0.0 %	0.1 %
Asian Pacific American-owned	0.4 %	0.0 %	0.0 %	1.1 %
Black American-owned	0.0 %	5.2 %	0.0 %	0.0 %
Hispanic American-owned	0.0 %	3.5 %	0.0 %	1.5 %
Native American-owned	0.0 %	0.0 %	0.0 %	0.0 %
Subcontinent Asian American-owned	0.0 %	3.3 %	0.0 %	0.0 %
<b>Total POC- and Woman-owned</b>	<b>0.4 %</b>	<b>12.1 %</b>	<b>0.0 %</b>	<b>2.7 %</b>

Note: Numbers rounded to nearest tenth of 1 percent so may not sum exactly to totals. For more detail, Figures F-2, F-3, F-4, and F-5 in Appendix F.

Source: BBC Research & Consulting utilization analysis.

## D. Concentration of Dollars

BBC analyzed whether the dollars that relevant business groups received on transit-related contracts during the study period were spread across a relatively large number of businesses or

were concentrated with a relatively small number of businesses. The study team assessed that question by calculating:

- The number of different POC- and woman-owned businesses that received contracting dollars during the study period; and
- The number of different POC- and woman-owned businesses that accounted for 75 percent of the total contracting dollars that POC- and woman-owned businesses received during the study period.

Overall, 8 different POC- and woman-owned businesses participated in Caltrans' and subrecipient local agencies' transit-related contracts during the study period. One business accounted for 85 percent of the total contracting dollars awarded to POC- and woman-owned businesses during the study period.

# CHAPTER 7.

---

## Disparity Analysis

# CHAPTER 7.

## Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the percent of contract dollars the California Department of Transportation (Caltrans) and relevant subrecipient local agencies award to person of color- (POC-) and woman-owned businesses (i.e., *utilization* or *participation*) with the percent of contract dollars one might expect Caltrans and relevant subrecipient local agencies to award to those businesses based on their *availability* for that work.<sup>1,2</sup> The analysis focused on transit services, professional services, construction, and goods and services contracts Caltrans and relevant subrecipient local agencies awarded between October 1, 2017 and September 30, 2020 (i.e., the study period). Chapter 7 presents the disparity analysis in three parts:

- A. Overview;
- B. Disparity Analysis Results; and
- C. Statistical Significance.

### A. Overview

BBC expressed both utilization and availability as percentages of total dollars associated with a particular set of contracts or procurements and then calculated a *disparity index* to help compare actual participation and estimated availability for relevant business groups and different sets of contracts. We used the following formula to do so:

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

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

---

<sup>1</sup> Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report their disadvantaged business enterprise (DBE) participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

<sup>2</sup> “Woman-owned businesses” refers to white woman owned businesses. Information and results for businesses owned by women of color are included along with those of their corresponding racial/ethnic groups.

aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.<sup>3</sup>

## B. Disparity Analysis Results

BBC measured disparities between the participation and availability of POC- and woman-owned businesses for various sets of transit-related contracts Caltrans and relevant subrecipient local agencies awarded during the study period. The study team measured disparities for POC- and woman-owned businesses considered together and separately for each relevant racial/ethnic and gender group.

**1. Overall.** Figure 7-1 presents disparity indices for all relevant prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. There is a line at the disparity index level of 100, which indicates parity, and a line at the disparity index level of 80, which indicates a substantial disparity. As shown in Figure 7-1, POC- and woman-owned businesses exhibited a disparity index of 2 for all relevant contracts Caltrans and subrecipient local agencies awarded during the study period, indicating that the participation of POC- and woman-owned businesses in transit-related contracts those agencies awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. Disparity indices varied greatly across individual groups. Results by individual group indicated that:

- Four groups exhibited substantial disparities: woman-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 1), and Subcontinent Asian American-owned businesses (disparity index of 0).
- Asian Pacific American-owned businesses (disparity index of 200+) and Native American-owned businesses (disparity index of 100) did not exhibit disparities.

With the exception of a small number of contracts (5 prime contracts and subcontracts in total), Caltrans and subrecipient local agencies did not use any race- or gender-conscious measures (i.e., disadvantaged business enterprise, or DBE, goals) in awarding contracts during the study period. BBC examined disparity analysis results for contracts Caltrans and subrecipient local agencies awarded without the use of DBE goals (no-goals contracts). Disparity analysis results for no-goals contracts were very similar to those for all contracts considered together as presented in Figure 7-1. POC- and woman-owned businesses considered together exhibited a disparity index of 3 for no-goals contracts Caltrans and subrecipient local agencies awarded during the study period. Four individual groups exhibited substantial disparities for no-goals contracts: woman-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 4), and Subcontinent Asian American-owned businesses (disparity index of 0). Asian Pacific American-

---

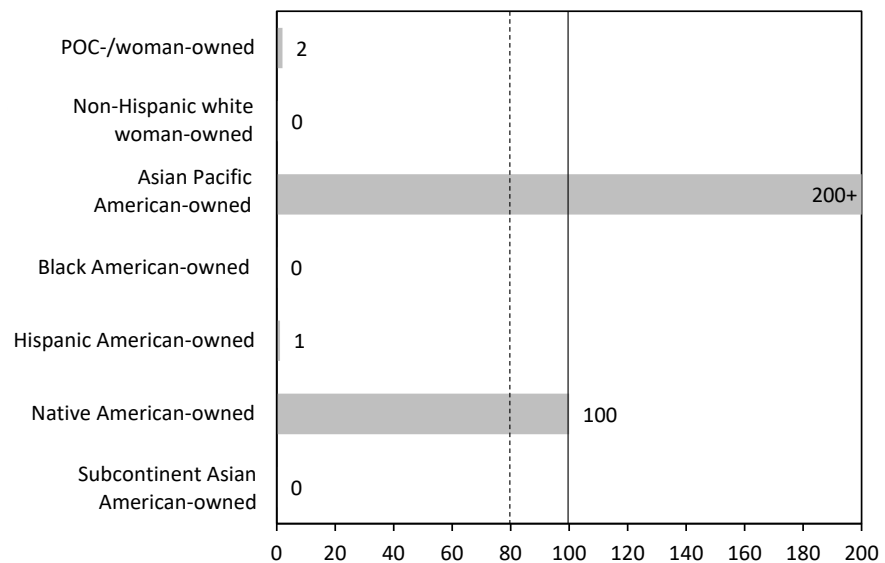
<sup>3</sup> For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).

owned businesses (disparity index of 200+) and Native American-owned businesses (disparity index of 100) did not exhibit disparities for no-goals contracts.

**Figure 7-1.**  
**Overall disparity analysis results**

Note:  
Numbers rounded to nearest whole number.  
For more detail, see Figure F-1 in Appendix F.

Source:  
BBC Research & Consulting disparity analysis.



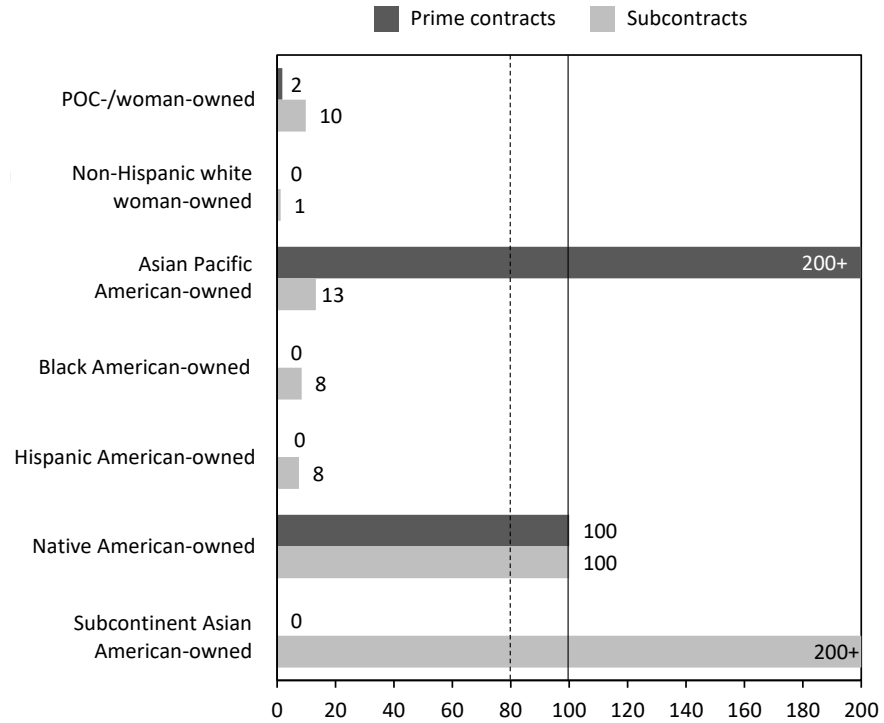
**2. Contract role.** Subcontracts tend to be smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to POC- and woman-owned businesses, many of which are small businesses. Thus, it is useful to examine disparity analysis results separately for prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. Figure 7-2 presents disparity indices for all relevant groups separately for prime contracts and subcontracts. As shown in Figure 7-2, POC- and woman-owned businesses considered together exhibited substantial disparity indices on both prime contracts (disparity index of 2) and subcontracts (disparity index of 10). Results for individual groups indicated that:

- Four groups exhibited substantial disparities on prime contracts: woman-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 0) and Subcontinent Asian American-owned businesses (disparity index of 0).
- Woman-owned businesses (disparity index of 1), Asian Pacific American-owned businesses (disparity index of 13), Black American-owned businesses (disparity index of 8), and Hispanic American-owned businesses (disparity index of 8) exhibited substantial disparities on subcontracts.

**Figure 7-2.**  
**Disparity analysis**  
**results for prime**  
**contracts and**  
**subcontracts**

Note:  
 Numbers rounded to nearest  
 whole number.  
 For more detail, see Figures F-6  
 and F-7 in Appendix F.

Source:  
 BBC Research & Consulting  
 disparity analysis.



**3. Industry.** BBC also examined disparity analysis results separately for transit services, professional services, construction, and goods and services contracts Caltrans and subrecipient local agencies awarded during the study period. Figure 7-3 presents disparity indices for all relevant groups by contracting area. POC- and woman-owned businesses considered together exhibited substantial disparities on transit services contracts (disparity index of 2), professional services contracts (disparity index of 26), construction contracts (disparity index of 0), and goods and services contracts (disparity index of 9). Disparity analyses results for individual business groups differed by contracting area and group:

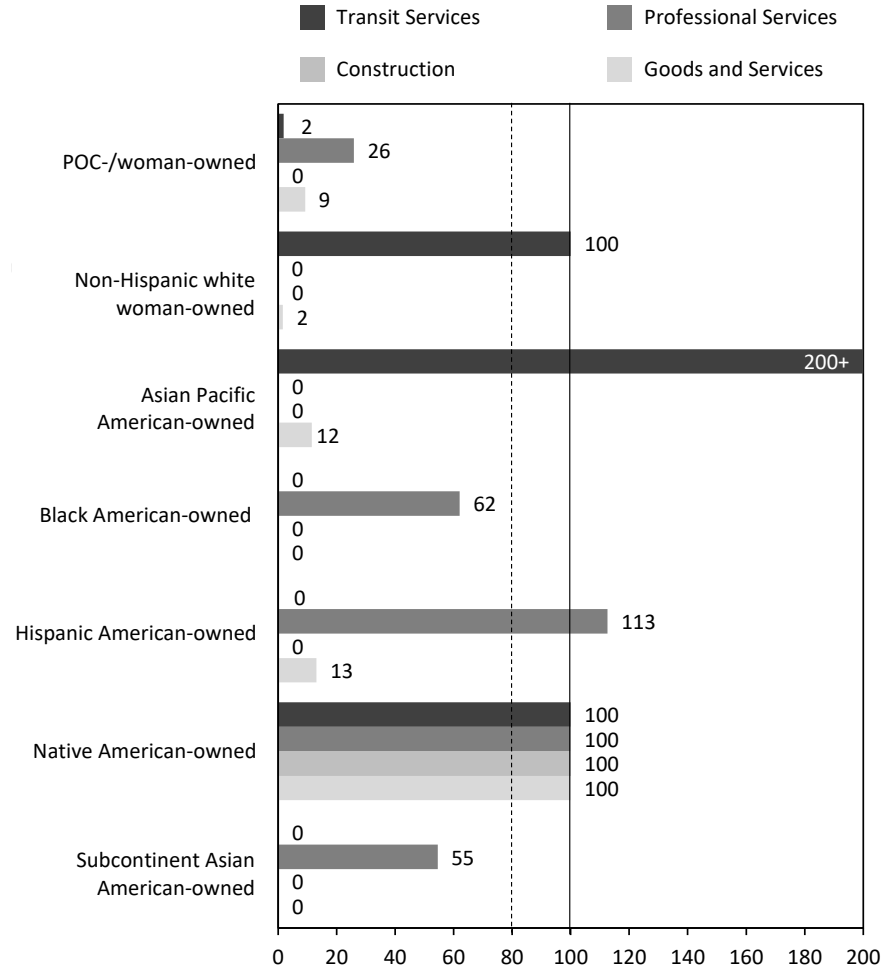
- Three groups exhibited substantial disparities on transit services contracts: Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 0).
- Four groups exhibited substantial disparities on professional services contracts: woman-owned businesses (disparity index of 0), Asian Pacific American-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 62), and Subcontinent Asian American-owned businesses (disparity index of 55).
- All individual groups exhibited substantial disparities on construction contracts except Native American-owned businesses (disparity index of 100).
- All individual groups exhibited substantial disparities on goods and services contracts except Native American-owned businesses (disparity index of 100).



**Figure 7-3.**  
**Disparity analysis**  
**results by industry**

Note:  
 Numbers rounded to nearest whole number.  
 For more detail, see Figures F-2, F-3, F-4, and F-5 in Appendix F.

Source:  
 BBC Research & Consulting disparity analysis.



### C. Statistical Significance

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

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

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

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

**2. Results.** BBC ran Monte Carlo simulations on all Caltrans and relevant subrecipient local agency contracts considered together to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant. As shown in Figure 7-4, results from the Monte Carlo analysis indicated that the disparity POC- and woman-owned businesses considered together exhibited for Caltrans and subrecipient agency work was statistically significant at the 95 percent confidence level. The disparities woman-, Black American-, and Hispanic American-owned businesses exhibited were also statistically significant at the 95 percent confidence level.

**Figure 7-4.**  
**Monte Carlo simulation results for disparity analysis results**

Business Group	Disparity index	Number of simulations out of 1 million that was equal or below observed participation	Probability of observed participation occurring due to "chance"
POC- and woman-owned	2	1,032	0 %
Non-Hispanic white woman-owned	0	1,770	0 %
POC-owned	2	1,527	0 %
Asian Pacific American-owned	200+	N/A	N/A %
Black American-owned	0	11,218	1.1 %
Hispanic American-owned	1	22,343	2 %
Native American-owned	100	N/A	N/A %
Subcontinent Asian American-owned	0	204,143	20.4 %

Source: BBC Research & Consulting disparity analysis.

# **CHAPTER 8.**

---

## **Program Measures**

# CHAPTER 8.

## Program Measures

As part of implementing the Federal Disadvantaged Business Enterprise (DBE) Program, the California Department of Transportation (Caltrans) uses a combination of *race- and gender-neutral* and *race- and gender-conscious* measures to encourage the participation of person of color- (POC-) and woman-owned businesses in its transit-related contracting.<sup>1</sup> Race- and gender-neutral measures are designed to encourage the participation of all businesses—or, all small businesses—in an organization’s contracting. Participation in such measures is not limited to POC- and woman-owned businesses. In contrast, race- and gender-conscious measures are designed specifically to encourage the participation of POC- and woman-owned businesses in an organization’s contracting (e.g., using DBE goals to award individual contracts).

To meet the *narrow tailoring* requirement of the *strict scrutiny* standard of constitutional review, agencies that implement the Federal DBE Program must meet the maximum feasible portion of their overall DBE goals through the use of race- and gender-neutral measures.<sup>2</sup> If an agency cannot meet its overall DBE goal through the use of race- and gender-neutral measures alone, then it must consider also using race- and gender-conscious measures. When submitting documentation related to its overall DBE goal to the United States Department of Transportation, an agency must project the portion of its overall DBE goal it expects to meet through race- and gender-neutral measures and what portion it expects to meet through race- and gender-conscious measures.

BBC Research & Consulting (BBC) reviewed measures Caltrans currently uses to encourage the participation of POC- and woman-owned businesses in its contracting. BBC reviewed Caltrans’ program measures in three parts:

- A. DBE Certification;
- B. Race- and Gender-neutral Measures; and
- C. Race- and Gender-conscious Measures.

### A. DBE Certification

Caltrans’ Office of Civil Rights (OCR) implements the Federal DBE Program, including certifying DBEs. The application is entirely online and is free to submit with the exception of a notary fee in some cases. To be eligible, business owners must prove they are part of a “socially and economically disadvantaged” group as defined in 49 Code of Federal Regulations (CFR) Part 26. The business owner must have 51 percent interest in the business, including management and

---

<sup>1</sup> “Woman-owned businesses” refers to white woman owned businesses. Information and results for businesses owned by women of color are included along with those of their corresponding racial/ethnic groups.

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

control of day-to-day decisions, must be a United States citizen or legal resident, and must have a personal net worth of less than \$1.32 million. The business itself must be independent and have average revenue of less than \$28.48 million over three years. The certification process takes 90 days and includes an on-site or virtual visit.

Once businesses are certified, they are added to the California Unified Certification Program (CUCP) database, which is searchable and one of the primary resources prime contractors can use to find DBE subcontractors. Certain measures Caltrans uses as part of the Federal DBE Program—including networking opportunities like OCR’s DBE Summit—are only available to certified businesses.

## **B. Race- and Gender-neutral Measures**

Caltrans uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many POC- and woman-owned businesses—in its contracting. Caltrans uses the following types of race- and gender-neutral measures as part of implementing the Federal DBE Program:

- Business outreach and communication;
- Technical assistance; and
- Prompt payment.

**1. Business outreach and communication.** Caltrans conducts several outreach and communication efforts across California to encourage the participation and growth of small businesses and POC- and woman-owned businesses. In each of Caltrans’ 12 districts, district small business liaisons (DSBLs) act as points of contact on behalf of the agency for small businesses, including DBEs and many other POC- and woman-owned businesses. DSBLs help prime contractors identify potential subcontractors and lead more focused outreach, such as local procurement fairs, workshops, and small business events, within their respective districts. DSBLs are also primarily responsible for facilitating various outreach efforts, including:

- Meetings and relationship building;
- Website communications;
- Advertising; and
- Other outreach events and workshops.

**a. Meetings and relationship building.** In an effort to engage stakeholders, Caltrans meets regularly with a wide range of interest groups, including trade associations and small business and DBE representatives. Most notably, Caltrans hosts Small Business Council (SBC) meetings six times a year with members of small business trade associations representing at least 35 members that are organized under the laws of California and have small business interests in Caltrans contracts and projects (including construction; commodities; and architecture and engineering, or A&E). The locations for SBC meetings alternate between Caltrans headquarters in Sacramento and various district offices throughout California. Caltrans uses the meetings to provide information about future contract opportunities and engage small businesses and POC-

and woman-owned businesses in the Caltrans contracting processes. In addition, SBC holds committee meetings covering more detailed topics related to construction, engineering, and commodities contracting. SBC committees are responsible for discussing those issues and presenting recommendations to the main membership body.

OCR manages invitations to Caltrans SBC meetings, and the meetings are not exclusive to members—non-members who are interested in the meetings can also attend. In addition to statewide SBC meetings, other Caltrans districts organize their own SBC meetings to focus on local issues.

**b. Website communications.** Caltrans revises and updates the OCR and Division of Rail and Mass Transportation’s (DRMT’s) websites regularly. The websites currently provide access to various resources, including links to relevant information such as:

- Information about transit grants and contracts;
- DBE certification database;
- DBE certification workshop presentations, guidelines, frequently asked questions, instructions, and application;
- Supportive services programs and resources;
- Technical assistance resources; and
- Contact information for each DSBL.

Caltrans also maintains a centralized calendar of events to highlight outreach opportunities throughout the state. DSBLs are responsible for entering event information into the calendar.

**c. Advertising.** In addition to attending meetings, events, and accessing the OCR website, there are several other ways for small businesses, including many POC- and woman-owned businesses, to find out about Caltrans contract opportunities.

**i. Project advertisements.** Caltrans and subrecipients advertise relevant upcoming projects in various manners that comply with federal requirements for competitively bid projects, such as advertising in newspapers, trade journals, and online publications.

**ii. Cal eProcure.** Cal eProcure is an online portal contractors can use to access bid opportunities with the State of California. Contract opportunities are posted online and distributed to contractors that are registered through Cal eProcure.

**iii. California Multiple Awards Schedule (CMAS).** DRMT uses CMAS to find qualified businesses to bid on projects it directly manages. Whenever possible, Caltrans sends out a Request for Offer to at least three contractors on the CMAS business list that perform the type of work needed for the project. CMAS is overseen by the California Department of General Services (DGS), and businesses must apply through DGS to become CMAS contractors.

**d. Other outreach events and workshops.** Caltrans participates in a number of outreach events and workshops, some of which are organized by headquarters and others by district offices. The most notable workshops and outreach events Caltrans hosts include the following.

**i. Certification workshops.** Caltrans provides certification workshops for potential DBEs across the state. The workshops cover topics such as certification requirements and guidelines for completing the certification application.

**ii. Pre-proposal conferences.** Caltrans hosts pre-proposal conferences for contracts on an as-needed basis, either in person or via teleconference. Pre-proposal conferences are held early in the advertisement period, and attendance is optional. During a pre-proposal conference, the respective contract manager discusses the project's scope of work, and a Department of Procurement and Contracting representative provides tips on how to submit a responsive bid.

**2. Technical assistance.** Caltrans offers various forms of technical assistance. DSBLs and Caltrans staff offer one-on-one technical assistance to small businesses, including many POC- and woman-owned businesses. Businesses can request assistance related to navigating contracting documents, the DBE certification process, and other topics. In addition, OCR is developing partnerships with outside resource centers based on new relationships executive management is cultivating.

**3. Prompt payment.** Caltrans implements prompt payment policies in accordance with California Public Contract Code Section 10262.5, also known as the California Prompt Payment Act. Per the act, Caltrans must be pay invoices within 30 days of approval, and prime contractors must pay subcontractors within seven days of receiving payment from Caltrans. In addition, Caltrans and subrecipient local agencies monitor payments for relevant projects to ensure small businesses and POC- and woman-owned businesses are participating in contracts in a manner consistent with commitments prime contractors made to them at the time of contract award.

## **C. Race- and Gender-conscious Measures**

The only race- and gender-conscious measure Caltrans uses is using DBE contract goals to award individual Federal Transit Administration- (FTA-) funded contracts. Prime contractors bidding on a relevant contract must meet the contract goal by: 1) being DBEs themselves; 2) making subcontracting commitments to DBEs; or 3) submitting *good faith efforts (GFE)* documentation demonstrating they made genuine efforts to meet the goal but failed to do so. Caltrans reviews GFE documentation and approves it if prime contractors demonstrate genuine efforts towards compliance with the DBE goal. Examples of GFEs include:

- Identifying elements of the contract available for DBE subcontractors;
- Soliciting bids directly from DBEs, including following up and negotiating when possible;
- Providing DBEs with information about the project, contract requirements, and other elements of the work; and
- Assisting DBEs with obtaining bonding, insurance, other financing requirements, or supplies and materials.

Bidders may also provide information about other efforts they made in attempting to find DBE subcontractors. If a bidder does not meet the goal or submit appropriate GFE documentation, then Caltrans rejects their bid.

Caltrans does not use any race- or gender-conscious measures when awarding state-funded contracts because of Proposition 209. Proposition 209, which California voters passed in 1996, amended the California constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. However, Proposition 209 does not prohibit the use of those measures if an agency is required to implement them “to establish or maintain eligibility for any federal program,” which is why Caltrans continues to use race- and gender-conscious measures in awarding its FTA-funded contracts.



# **CHAPTER 9.**

---

**Overall DBE Goal**

# CHAPTER 9.

## Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the California Department of Transportation (Caltrans) is required to set an overall goal for DBE participation in its Federal Transit Administration- (FTA-) funded contracts. Agencies are required to develop overall DBE goals every three years, but overall DBE goals are *annual* goals in that agencies must monitor DBE participation in their FTA-funded contracts every year. If an agency's DBE participation for a particular year is less than its overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures that enable it to meet the goal in the next year.

Caltrans must prepare and submit a Goal and Methodology document to FTA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. Caltrans last developed an overall DBE goal for FTA-funded contracts for federal fiscal years (FFYs) 2020 through 2022, for which the agency established an overall DBE goal of 4.6 percent. Caltrans indicated to FTA that it planned to meet the goal through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

Caltrans is required to develop a new goal for FFYs 2023 through 2025. Chapter 9 provides information that Caltrans might consider as part of setting its new overall DBE goal and is organized in two parts based on the two-step goal-setting process that 49 Code of Federal Regulations (CFR) Part 26.45 sets forth:

- A. Establishing a Base Figure; and
- B. Considering a Step-2 Adjustment.

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

Establishing a base figure is the first step in calculating an overall goal for DBE participation in Caltrans' FTA-funded contracts, including those relevant subrecipient local agencies award and manage. As presented in Chapter 5, *potential DBEs*—that is, person of color- (POC-) and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 21.6 percent of Caltrans' FTA-funded prime contract and subcontract dollars based on their availability for that work. Caltrans might consider 21.6 percent as the base figure for its overall DBE goal if it anticipates that the types and sizes of FTA-funded contracts that it and relevant subrecipient local agencies award in the future will be

similar to the FTA-funded contracts they awarded during the study period (i.e., October 1, 2017 through September 30, 2020).<sup>1</sup>

Figure 9-1 presents the transit services, professional services, construction, and goods and services components of the base figure for Caltrans' overall DBE goal, which are based on the availability of potential DBEs for FTA-funded prime contracts and subcontracts. The overall base figure reflects a weight of 0.989 for transit services contracts, 0.004 for professional services contracts, 0.00 for construction contracts, and 0.006 for goods and services contracts based on the volume of dollars of FTA-funded contracts that Caltrans and relevant subrecipient local agencies awarded during the study period. If Caltrans expects that the relative distributions of FTA-funded transit services, professional services, construction, and goods and services contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. Caltrans might also consider evaluating whether the types and sizes of the FTA-funded contracts that it and relevant subrecipient local agencies award will change substantially in the future. For additional details about the availability analysis, see Chapter 5.

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

Potential DBEs	Availability Percentage				Weighted average
	Transit Services	Professional Services	Construction	Goods and Services	
Asian Pacific American	0.0 %	12.1 %	5.2 %	7.6 %	0.1 %
Black American	12.9	8.4	7.8	2.6	12.8
Hispanic American	2.0	2.5	21.7	11.8	2.1
Native American	0.0	0.0	0.0	0.0	0.0
Subcontinent Asian American	6.6	6.1	5.2	0.9	6.6
Non-Hispanic white woman	0.0	16.9	6.7	4.0	0.1
<b>Total potential DBEs</b>	<b>21.5 %</b>	<b>46.0 %</b>	<b>46.6 %</b>	<b>26.9 %</b>	<b>21.6 %</b>
<b>Industry weight</b>	<b>98.9 %</b>	<b>0.4 %</b>	<b>0.0 %</b>	<b>0.6 %</b>	

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals. See Figures F-10, F-11, F-12, F-13, and F-14 in Appendix F for corresponding disparity results tables.

Source: BBC Research & Consulting availability analysis.

## B. Considering a Step-2 Adjustment

The Federal DBE Program requires Caltrans to consider a potential step-2 adjustment to its base figure as part of determining its overall DBE goal. Caltrans is not required to make a step-2 adjustment as long as it considers appropriate factors and explains its decision in its Goal and

<sup>1</sup> Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report their disadvantaged business enterprise (DBE) participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

Methodology document. The Federal DBE Program outlines several factors that an agency must consider when assessing whether to make a step-2 adjustment to its base figure:

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

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

**1. Current capacity of DBEs to perform work on USDOT-assisted contracting as measured by the volume of work DBEs have performed in recent years.** USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation in their USDOT-funded contracts in recent years. As part of the utilization analysis (for details, see Chapter 6), BBC examined the participation of certified DBEs in FTA-funded contracts that Caltrans and relevant subrecipient local agencies awarded in FFYs 2018, 2019, and 2020. During that time, certified DBEs received 0.4 percent of dollars on Caltrans’ FTA-funded contracts. That information supports a downward adjustment to Caltrans’ base figure. If Caltrans uses an approach similar to what USDOT outlines in “Tips for Goals Setting” to adjust its base figure based on past DBE participation, it would take the average of its 21.6 percent base figure and the 0.4 percent past DBE participation, yielding an overall DBE goal of 11.0 percent.

BBC also examined past DBE participation based on the *Uniform Reports of DBE Commitments/Awards and Payments (Uniform Reports)* the agency recently submitted to FTA. As shown in Figure 9-2, Caltrans’ Uniform Reports from FFYs 2018 through 2020 indicate median DBE participation of 6.4 percent. If Caltrans were to adjust its base figure based on information from the agency’s Uniform Reports, it would take the average of the 21.6 percent base figure and the 6.4 percent median past DBE participation, yielding a potential overall DBE goal of 14.0 percent. However, Caltrans reviewed the volume of contracts dollars included in its Uniform Reports from 2018 through 2020 and the volume of dollars examined in the 2022 Caltrans FTA Disparity Study and believes information from the disparity study is more comprehensive.

---

<sup>2</sup> 49 CFR Section 26.45.

**Figure 9-2.**  
**Past DBE participation based on**  
**Uniform Reports**

Source:  
 BBC from Caltrans Uniform Reports of DBE  
 Commitments/Awards and Payments.

Federal Fiscal Year	DBE Attainment
2018	1.0%
2019	6.4%
2020	15.4%
<b>Median past DBE participation</b>	<b>6.4%</b>

**2. Information related to employment, self-employment, education, training, and unions.** Chapter 3 summarizes information about conditions in the local contracting industry for POCs, women, and POC- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices C and D, respectively. BBC’s analyses indicate that there are barriers that certain POC groups and women face related to human capital, financial capital, business ownership, and business success in the California contracting industry. Such barriers may decrease the availability of POC- and woman-owned businesses to obtain and perform the FTA-funded contracts that Caltrans and subrecipient local agencies award, which supports an upward adjustment to Caltrans’ base figure.

**3. Any disparities in the ability of DBEs to get financing, bonding, and insurance.** BBC’s analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that POCs, women, and POC- and woman-owned businesses in California do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices C and D). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for POCs and women to successfully form and operate businesses in the California contracting marketplace. Any barriers that POC- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for Caltrans’ FTA-funded prime contracts and subcontracts. Thus, information from the disparity study about financing, bonding, and insurance also supports an upward adjustment to Caltrans’ base figure.

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

**Success of businesses.** There is quantitative evidence that certain groups of POC- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix C presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of POC- and woman-owned businesses, as presented in Appendix D. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects POC- and woman-

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

owned businesses in the local contracting industry. Thus, information about the success of businesses also supports an upward adjustment to Caltrans' base figure.

**Evidence from disparity studies conducted within the jurisdiction.** USDOT suggests that federal aid recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make adjustments to their base figures. Caltrans should review results from those disparity studies—for example, other disparity studies that BBC has conducted for Caltrans and the City of San Diego—when determining its overall DBE goal. However, Caltrans should note that the results of those studies are tailored specifically to the contracts and policies of each agency. Those contracts and policies may differ in many important respects from those of Caltrans.

**Information about memorandum of understanding (MOU) agency contracts.** BBC also examined information about the contracts agencies with which Caltrans has an established memorandum of understanding (MOU agencies) awarded during the study period. The study team examined the availability of potential DBEs for *all* Caltrans' FTA-funded contracts, including those that MOU agencies awarded. The availability of potential DBEs for all FTA-funded contracts considered together is 1.5 percent. That information could support a downward adjustment to Caltrans' base figure, but Caltrans should consider whether MOU agency contracts are similar in size and scope to those that Caltrans and subrecipient local agencies that are not MOU agencies award.

**Summary.** The quantitative and qualitative evidence the study team collected as part of the disparity study may support an adjustment to the base figure as Caltrans considers setting its overall DBE goal. Based on information from the disparity study, there are reasons why Caltrans might consider an adjustment to its base figure:

- Caltrans might adjust its base figure upward to account for barriers that POCs and women face in human capital and business ownership in the local contracting industry.
- Evidence of barriers that affect POCs, women, and POC- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of POC- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to Caltrans' base figure.
- Caltrans must consider the volume of work DBEs have performed in recent years when determining whether to make an adjustment to its base figure. If Caltrans were to adjust its base figure based on information about DBE participation from the utilization analysis that BBC conducted as part of the disparity study, it might consider taking the average of its base figure and the 0.4 percent DBE utilization found as part the disparity study. If Caltrans were to adjust its base figure based on information from the agency's Uniform Reports, it might consider taking the average of its base figure and the 6.4 percent median past DBE participation based on it Uniform Reports.

USDOT regulations clearly state that an agency such as Caltrans is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment—either upward or downward—to its base figure. However, *Tips for Goal-Setting* states that an

agency such as Caltrans is not required to make an adjustment as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

# **CHAPTER 10.**

---

## **Program Implementation**



# CHAPTER 10.

## Program Implementation

Chapter 10 reviews information relevant to the California Department of Transportation's (Caltrans') implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for Federal Transit Administration- (FTA-) funded contracts as well as considerations that Caltrans could consider making to refine its implementation of the program.

### A. Federal DBE Program

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

**1. Reporting to DOT – 49 CFR Part 26.11 (b).** Caltrans must periodically report DBE participation in its FTA-funded contracts to the United States Department of Transportation (USDOT). Caltrans requires subrecipient local agencies to submit *Uniform Report of DBE Awards or Commitments and Payments Form* that detail the participation of DBEs in FTA-funded projects. Caltrans compiles the information from those reports and submits it to USDOT twice each year. Caltrans plans to continue to collect and report that information in the future using the same approach.

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

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

Caltrans currently maintains a bidders list that includes all the above information for businesses bidding or proposing on the agency's federally funded prime contracts and subcontracts. Caltrans should continue to review whether subrecipient local agencies are consistently collecting the above information about prime contractors and subcontractors that bid on projects funded with passthrough funds from Caltrans.

**a. Information from availability surveys.** As part of the availability analysis, the study team collected information about local businesses that are potentially available for different types of Caltrans prime contracts and subcontracts, including those managed by subrecipient local agencies.

---

<sup>1</sup> Because only certain portions of the Federal DBE Program are discussed in Chapter 10, Caltrans should refer to the complete federal regulations when considering its implementation of the program.

Caltrans and subrecipient local agencies should consider using that information to augment their current bidders list.

**b. Maintaining comprehensive vendor data.** In order to effectively track the participation of person of color- (POC-) and woman-owned businesses in its contracts, Caltrans should consider continuing to improve the information that it collects on the ownership status of businesses that participate in its contracts, including both prime contracts and subcontracts. Not only should Caltrans consider collecting information about DBE status, but it should also consider obtaining information on the race/ethnicity and gender of business owners regardless of certification status. Caltrans should also consider collecting that information from subrecipient local agencies. As appropriate, Caltrans can use business information that the study team collected as part of the disparity study to augment its vendor data.

**3. Prompt payment mechanisms – 49 CFR Part 26.29.** Caltrans' prompt payment policies appear to comply with 49 CFR Part 26.29. California law requires Caltrans to pay all contractors within 45 days of receiving properly completed, undisputed invoices or automatically calculate and pay late fees. For construction contracts, the public contract code requires Caltrans to pay a prime contractor no more than 30 days after the agency's receipt of a properly completed invoice. Prime contractors are required to pay their subcontractors no later than seven days after receiving payment from Caltrans. Qualitative information that the study team collected through in-depth interviews indicated that some businesses are dissatisfied with how promptly they receive payments on public-sector contracts in general. Several businesses indicated that slow payments make it particularly difficult for small businesses to maintain adequate cash flow. Caltrans should consider maintaining the efforts it and subrecipient local agencies make to ensure prompt payment to both prime contractors and subcontractors.

**4. DBE directory – 49 CFR Part 26.31.** Caltrans maintains a current list of firms certified as DBEs through the California Unified Certification Program (CUCP). The CUCP DBE directory is available on Caltrans' website and lists all DBE-certified businesses by business name, industry code, and work type. Qualitative information that the study team collected through in-depth interviews indicated that some business owners felt that prime contractors typically work with subcontractors with which they have a previous relationship rather than using the DBE directory to seek out new subcontractors. Caltrans and subrecipient local agencies should continue to promote the DBE directory to prime contractors so they can continue to be aware of qualified DBE subcontractors.

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

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

BBC examined potential overconcentration on Caltrans and subrecipient local agency contracts and identified four subindustries in which certified DBEs accounted for more than 50 percent of the total subcontract dollars awarded in that subindustry during the study period:

- Advertising, marketing, and public relations (56%);
- Office equipment and supplies (60%);
- Business services and consulting (89%); and
- Other professional services (100%).<sup>2</sup>

That value is based only on subcontract dollars, so it does not include work that prime contractors self-performed in that area. If the study team had included self-performed work in that analysis, the percentage for which DBEs accounted would likely have decreased. Caltrans should consider reviewing similar information and continuing to monitor advertising, marketing, and public relations; business services and consulting; other professional services; and other work specializations for potential overconcentration in the future. Doing so might entail collecting data on subcontractor participation and prime contractor self-performance in each relevant work specialization. USDOT provides the following recommendations for agencies to address over concentration:

*If a recipient finds an area of overconcentration, it would have to devise means of addressing the problem that work in their local situations. Possible means of dealing with the problem could include assisting prime contractors to find DBEs in non-traditional fields or varying the use of contract goals to lessen any burden on particular types of non-DBE specialty contractors. While recipients would have to obtain DOT approval of determinations of overconcentration and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.<sup>3</sup>*

**6. Business development programs (BDPs)– 49 CFR Part 26.35 and mentor-protégé programs – 49 CFR Appendix D to Part 26.** BDPs are programs that are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the Federal DBE Program. As part of a BDP, or separately, agencies may establish a mentor-protégé program, in which a non-DBE or another DBE serves as a mentor and principal source of business development assistance to a protégé DBE. Caltrans offers the Calmentor Program for small professional services businesses. That program provides small businesses—including DBEs—with opportunities to participate in mentor-protégé relationships with larger, more successful businesses working in similar industries.

Caltrans should continue to engage not only small businesses and DBEs but potential mentor businesses to encourage their active participation in the agency’s mentor-protégé programs. Caltrans could also consider expanding its mentor-protégé programs to include businesses that provide transit operations and goods and services. Such an expansion could benefit DBEs working in industries specifically related to Caltrans’ and subrecipient local agencies’ transit-related

---

<sup>2</sup> “Other professional services” includes construction management, surveying services, architectural services, and landscaping services, amongst other types of work.

<sup>3</sup> 64 F.R. 5106 (February 2, 1999)

contracting opportunities. Caltrans should also continue to communicate with certified DBEs to ensure that its BDPs provide the most relevant specialized assistance that is tailored to the needs of developing businesses in the California marketplace.

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

To monitor the performance of DBEs, Caltrans has established extensive monitoring mechanisms. Caltrans’ District Transit Representatives conduct compliance reviews of subrecipient local agencies to ensure they are appropriately implementing oversight practices and reviewing reimbursement requests for DBE payments. Caltrans also reports information about DBE commitments and attainments in its *Uniform Report of DBE Awards or Commitments and Payments Form* to FTA. Caltrans should consider reviewing the requirements set forth in 49 CFR Part 26.37(b), 49 CFR Part 26.55, and in The Final Rule to ensure its monitoring and enforcement mechanisms are appropriately implemented and consistent with federal regulations and best practices.

**8. Fostering small business participation – 49 CFR Part 26.39.** As part of implementing the Federal DBE Program, Caltrans must include measures to facilitate small business competition, “taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.”<sup>4</sup> The Final Rule effective February 28, 2011 added a requirement for agencies to submit a plan for fostering small business participation in their contracting. USDOT identifies the following potential strategies for fostering small business participation:

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

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

---

<sup>4</sup> 49 CFR Part 26.39(a).

- Working with small businesses to help them better understand contracting and procurement opportunities with the agency;
- Encouraging prime contractors and individual departments to use small businesses on contracts;
- Encouraging small businesses—including many POC- and woman-owned businesses—to pursue relevant business certifications;
- Hosting and participating in forums, business development meetings, and other events that are intended to increase contracting opportunities for small businesses; and
- Creating the Small Business Council to promote the effective implementation of federal and state requirements and assist with issues relating to small business participation.

Chapter 8 of the report provides examples of various small business program measures Caltrans currently uses.

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

**10. Setting overall DBE goals – 49 CFR Part 26.45.** Agencies must develop and submit overall DBE goals every three years. Chapter 9 uses data and results from the disparity study to provide Caltrans with information that could be useful in developing its next overall DBE goal.

**11. Analysis of reasons for not meeting overall DBE goal – 49 CFR Part 26.47(c).** Based on information about awards and commitments to DBE-certified businesses, Caltrans has not consistently met its DBE goal for its FTA-funded contracts in the recent past. Agencies are required to take the following actions if their DBE participation for a particular fiscal year is less than their overall DBE goal for that year:

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

**a. Need for separate accounting for participation of potential DBEs.** In accordance with guidance in the Federal DBE Program, BBC’s analysis of the overall DBE goal in the disparity study includes DBEs that are currently certified and POC- and woman-owned businesses that could *potentially* be DBE-certified based on revenue standards (i.e., *potential DBEs*).<sup>5</sup> Agencies can explore whether one reason why they have not met their overall DBE goals is because they are not counting the participation of potential DBEs. USDOT might then expect an agency to explore ways to further encourage potential DBEs to become DBE-certified as one way of closing the gap between reported

---

<sup>5</sup> Note that POC- and woman-owned businesses that could be DBE-certified but that are not currently certified are counted as part of calculating the overall DBE goal. However, their participation is not counted as part of Caltrans’ DBE participation reports to USDOT.

DBE participation and its overall DBE goal. In order to have the information to explore that possibility, Caltrans should consider:

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

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

**12. Maximum feasible portion of goal met through neutral program measures – 49 CFR Part 26.51(a).** Caltrans must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. Caltrans must project the portion of its overall DBE goal that it anticipates achieving through the use such measures. The agency should consider information presented in the disparity study, information about past DBE attainment, and other information when making such projections.

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

- DBE contract goals may only be used on contracts that have subcontracting possibilities;
- Agencies are not required to set DBE contract goals on every USDOT-funded contract;
- During the period covered by the overall DBE goal, an agency must set DBE contract goals so that they will cumulatively result in meeting the portion of the overall DBE goal the agency projects being unable to meet through race- and gender-neutral measures;

---

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

- An agency's use of DBE contract goals must provide for participation by all DBE groups eligible to participate in race- and gender-conscious measures and must not be subdivided into group-specific goals; and
- An agency must maintain and report data on DBE participation separately for contracts that include and do not include DBE contract goals.

If Caltrans determines that it should continue to apply DBE contract goals to USDOT-funded contracts, then it should also evaluate which DBE groups should be considered eligible for those goals. If Caltrans decides to consider only certain DBE groups (e.g., groups that Caltrans determines to be *underutilized* DBEs) as eligible to participate in DBE contract goals, it must submit a waiver request to FTA.

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

- Several POC- and woman-owned businesses commented that race- and gender-conscious measures and certifications have had positive impacts on their businesses and help to “get in the door.” A number of POC- and woman-owned businesses underscored that such measures have allowed for greater opportunity for their businesses and help their businesses become known in the marketplace.
- Several interviewees indicated that public agencies, including Caltrans, could do more to actively monitor and enforce the Federal DBE Program. A number of business owners emphasized the need for increased oversight to ensure the appropriate use of good faith efforts and monitor business participation.

Caltrans should consider those and other comments presented in Appendix D if it determines that it is appropriate to use DBE contract goals on USDOT-funded contracts in the future.

#### **14. Flexible use of any race- and gender-conscious measures – 49 CFR Part 26.51(f).**

Agencies must exercise flexibility in any use of race- and gender-conscious measures such as DBE contract goals. For example, if Caltrans determines that DBE participation exceeds its overall DBE goal for a fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal in a fiscal year, then it must make appropriate modifications to its use of race- and gender-neutral and race- and gender-conscious measures to allow it to meet its overall DBE goal in the following year. If Caltrans observes increased DBE participation (relative to availability) on contracts to which race- and gender-conscious measures do not apply, the agency might consider changing its projection of how much of its overall DBE goal it can achieve through the use of race- and gender-neutral measures in the future.

**15. Good faith efforts procedures – 49 CFR Part 26.53.** USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Part 26. Caltrans' current implementation of the Federal DBE Program outlines the good faith efforts process that it uses for DBE contract goals. The DBE Program Implementation Modifications Final Rule issued on October 2, 2014 updated requirements for good faith efforts when agencies use DBE contract goals. Caltrans should review 49 CFR Part 26.53 and The Final Rule to ensure that its good faith efforts



procedures are consistent with federal regulations. Caltrans requires prime contractors to submit good faith efforts documentation and written confirmation in the event that bidders' efforts to include sufficient DBE participation are unsuccessful. In deciding whether to accept good faith efforts, Caltrans considers the quality, quantity, and extent of the different kinds of efforts bidders made. Caltrans determines whether efforts are those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet a contract goal. Caltrans does not accept perfunctory efforts as good faith efforts. Individual Caltrans divisions have the discretion to assess the sufficiency of bidders' good faith efforts.

**16. Counting DBE participation – 49 CFR Part 26.55.** 49 CFR Part 26.55 describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. Section 26.11 discusses the *Uniform Report of DBE Commitments/Awards and Payments*. Caltrans currently tracks participation for certified DBEs but not for uncertified POC- and woman-owned businesses. As discussed above, in addition to tracking the participation of certified DBEs, Caltrans should consider developing procedures to consistently track participation of all POC- and woman-owned businesses and potential DBEs in the contracts that it and subrecipient local agencies award. Those efforts will help the agency better track the effectiveness of its efforts to encourage DBE participation and businesses that could become DBE certified in the future. If applicable, Caltrans should also consider collecting important information regarding any shortfalls in annual DBE participation, including preparing participation reports for all POC- and woman-owned businesses (not only those that are DBE-certified). Caltrans should consider collecting and using the following information consistently for Caltrans and relevant subrecipient local agency contracts:

- Registration documents from businesses working as, or interested in working as, prime contractors or subcontractors, including information about the race/ethnicity and gender of their owners;
- Prime contractor and subcontractor participation;
- Reports of DBE participation in FTA-funded contracts as required by the Federal DBE Program;
- Payment data for prime contractors and subcontractors;
- Subcontractor participation data (for all tiers and suppliers) for all businesses regardless of race/ethnicity, gender, or certification status;
- Descriptions of the areas of contracts on which subcontractors worked; and
- Subcontractors' contact information and committed dollar amounts from prime contractors at the time of contract award.

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



**17. DBE certification – 49 CFR Part 26 Subpart D.** Caltrans is one of the certifying agency members of CUCP, which is responsible for all DBE certifications in California. The CUCP certification process is designed to comply with 49 CFR Part 26 Subpart D. As Caltrans continues to work with DBE-certified businesses, the agency should consider ensuring that CUCP continues to certify all groups that the Federal DBE Program presumes to be socially and economically disadvantaged in a manner that is consistent with federal regulations. Some business owners and managers participating in in-depth interviews commented on the DBE certification process. Some felt that certification is highly valuable but commented on the length, complexity, and cost of the certification process. Business owners reported that the process is difficult to understand, poorly advertised, requires lots of paperwork, and is very time consuming. Appendix D provides other business owners' perceptions of the DBE certification process. Caltrans appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. However, Caltrans might research other ways to make the certification process easier for potential DBEs.

**18. Monitoring changes to the Federal DBE Program.** Federal regulations related to the Federal DBE Program change periodically, such as with the DBE Inflationary Adjustment Final Rule issued on December 14, 2020, the DBE Program Implementation Modifications Final Rule issued on October 2, 2014, and the Final Rule issued on February 28, 2011. Caltrans should continue to monitor such developments and ensure that the agency's implementation of the Federal DBE Program is in compliance with federal regulations. Other transportation agencies' implementations of the Federal DBE Program are under review in federal district courts. Caltrans should monitor court decisions in those and other relevant cases (for details see Appendix B).

## **B. Additional Considerations**

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

**1. Networking and outreach.** Caltrans hosts and participates in many networking and outreach events that include information about marketing, DBE certification, doing business with the agency, and available bid opportunities. Qualitative information collected as part of in-depth interviews indicated that many businesses are aware of Caltrans' networking and outreach events but that many of them do not participate in them because of the time it takes to do so. Business owners noted the need for more networking opportunities with other business owners and Caltrans staff. Caltrans might consider how it can tailor events to specific industries or business groups to further maximize their value and provide opportunities to foster deeper connections among participants. In addition, Caltrans should consider ways it can leverage technology to network with and provide information to the business community. Caltrans should consider making use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance.

**2. Unbundling large contracts.** In general, POC- and woman-owned businesses typically exhibit higher availability for smaller contracts, and qualitative evidence indicated that the size of government contracts often serves as a barrier to their ability to access bid opportunities (for

details, see Appendix D). To further encourage the participation of small businesses—including many POC- and woman-owned businesses—Caltrans should consider making efforts to unbundle relatively large contracts into several smaller contracts. The vast majority of Caltrans’ FTA-funded contracts are managed by subrecipient local agencies, so an important step in unbundling contracts would be to work with those agencies to identify opportunities to do so. In particular, Caltrans should consider working with subrecipient local agencies to unbundle transit operations contracts that tend to be relatively large. Unbundling contracts would likely result in that work being more accessible to small businesses, which in turn might increase opportunities for POC- and woman-owned businesses and result in greater POC- and woman-owned business participation.

**3. Contract and subcontract data.** Caltrans maintains some data on contracts and subcontracts that are associated with the FTA-funded projects it awards, but subrecipient local agencies collect and report those data inconsistently. Caltrans should consider ensuring that it is collecting comprehensive contract and subcontract data on all contracts and projects, including those contracts that subrecipient local agencies award and manage. Caltrans should consider collecting information about amounts committed to all prime contractors and subcontractors along with contact and business information about vendors. In addition, Caltrans should consider requiring prime contractors to submit subcontractor payment data as part of the invoicing process and as a condition of receiving payment. Collecting subcontractor payment information will help ensure that Caltrans monitors the participation of POC- and woman-owned businesses for all projects appropriately.

**4. Subrecipient training and monitoring.** Caltrans implements a monitoring program to ensure that subrecipient local agencies are appropriately implementing the Federal DBE Program. Caltrans District Transit Representatives conduct compliance reviews of subrecipient local agencies to ensure that local agencies are properly implementing management and oversight practices. Caltrans should continue those efforts and determine whether additional training is required to ensure that subrecipient local agencies understand how to implement all aspects of the Federal DBE program. Caltrans might consider additional training related to:

- Reviewing standard agreements and memorandums of understanding between Caltrans and subrecipient local agencies;
- Collecting consistent and comprehensive contract and vendor data;
- Enforcing good faith efforts;
- Identifying opportunities to unbundle relatively large contracts;
- Monitoring business participation on relevant contracts and procurements; and
- Reporting required information to Caltrans to help the agency comply with the Federal DBE Program.

Caltrans should consider engaging subrecipient local agencies to identify additional areas in which training might be appropriate.

# **APPENDIX A.**

---

## **Definitions of Terms**

# APPENDIX A.

## Definitions of Terms

Appendix A defines terms useful to understanding the 2022 California Department of Transportation Federal Transit Administration Disparity Study report.

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

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

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

### Anecdotal Information

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

### Availability Analysis

An availability analysis assesses the percentage of dollars one might expect a specific group of businesses to receive on contracts or procurements a particular agency awards. The availability analysis in this study is based on the match between various characteristics of potentially available businesses and prime contracts and subcontracts the California Department of Transportation and subrecipient local agencies awarded during the study period.

## Base Figure

In accordance with United States Department of Transportation requirements, establishing a base figure is the first step agencies must take in calculating overall Disadvantaged Business Enterprise goals. Agencies must base calculations of their base figures on demonstrable evidence of the availability of potential Disadvantaged Business Enterprises to participate in their United States Department of Transportation-funded projects. That evidence often comes from an *availability analysis*.

## Business

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

## Business Listing

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

## California Department of Transportation (Caltrans)

Caltrans is responsible for the planning, construction, operation, and maintenance of the transportation system throughout California, including highways and bridges, airports, public transit, rail freight, and rail passenger systems. As a United States Department of Transportation fund recipient, Caltrans is required to implement the Federal Disadvantaged Business Enterprise Program. It also operates the Unified Certification Program and is responsible for Disadvantaged Business Enterprise certification throughout California.

## Compelling Governmental Interest

As part of the strict scrutiny standard of constitutional review, a government agency must demonstrate a compelling governmental interest in remedying past identified discrimination in order to implement race- or gender-conscious measures. That is, an agency that uses race- or gender-conscious measures as part of a contracting program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. The agency must assess such discrimination within its own relevant geographic market area.

## Consultant

A consultant is a business that performs professional services contracts.

## Contract

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

## Contract Element

A contract element is either a prime contract or subcontract.

## **Contractor**

A contractor is a business that performs construction contracts.

## **Control**

Control means exercising management and executive authority of a business.

## **Custom Census Availability Analysis**

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

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

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

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

A determination of economic disadvantage includes assessing businesses' gross revenues (maximum revenue limits ranging from \$7 million to \$28.48 million depending on work type) and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some person of color- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the economic requirements set forth in 49 CFR Part 26.

## **Disparity**

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

## Disparity Analysis

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

## Disparity Index

A disparity index is computed by dividing the actual participation of a specific group of businesses in Caltrans contracting by the estimated availability of the group for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities between participation and availability.

## Dun & Bradstreet (D&B)

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

## Federal DBE Program

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

## Federal Transit Administration (FTA)

FTA is an office of the United States Department of Transportation that provides financial and technical assistance to local public transportation systems.

## Firm

See *business*.

## FTA-funded Contract

An FTA-funded contract is any contract, procurement, or project funded in whole or in part with FTA financial assistance, including loans. The study team considered a contract to be FTA-funded if it included at least \$1 of FTA funding. FTA funding, as it pertains to the disparity study, can be categorized by which federal grant program it comes from.

**Section 5310.** Section 5310 funding provides grant funds for capital and operating expenses related to improving the mobility of seniors and disabled individuals, as well as expanding transportation options for those individuals.

**Section 5311.** Section 5311 funding provides grant funds for rural transit and intercity bus systems. Approximately 75 percent is allocated to non-urbanized areas and 15 percent to intercity buses, with the remainder used for administrative expenses.

**Section 5339.** Section 5339 funding provides capital funding to replace, repair, or purchase buses and other transit vehicles, as well as to construct bus-related facilities.

## Industry

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

## Local Marketplace

See *relevant geographic market area*.

## Narrow Tailoring

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

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

## Overall DBE Goal

As part of the Federal DBE Program, every three years, agencies are required to set overall aspirational percentage goals for DBE participation in their United States Department of Transportation-funded contracts and procurements, which they must work towards achieving each year through various efforts. If DBE participation in their United States Department of Transportation-funded work is less than their overall DBE goals in a particular year, then they must analyze the reasons for any shortfalls and establish specific measures that will enable them to meet the goal in the next year. The United States Department of Transportation sets forth a two-step process agencies must use in establishing their overall DBE goals. First, agencies must develop *base figures* for their overall DBE goals. Second, agencies must consider whether step 2 adjustments are necessary to their base figures to ensure their overall DBE goals are as precise as possible.

## Participation

See *utilization*.



## **Person of Color (POC)**

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

## **POC-owned Business**

A POC-owned business is a business with at least 51 percent ownership and control by one or more individuals who identify with one of the following racial/ethnic groups: Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, or other non-white racial or ethnic groups. The study team considered businesses owned by men of color and women of color as POC-owned businesses.

## **Potential DBE**

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

## **Prime Consultant**

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

## **Prime Contract**

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

## **Prime Contractor**

A prime contractor is a construction business that performs prime contracts directly for an end user, such as Caltrans.

## **Procurement**

See *contract*.

## **Project**

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

## **Proposition 209**

Proposition 209, which California voters passed in 1996 and became effective in 1997, amended Section 31, Article 1 of the California Constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. Proposition 209 does not prohibit those the use of those measures if an agency is required to implement

them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state,” which is why Caltrans can legally use race- and gender-conscious measures as part of its implementation of the Federal DBE Program.

## **Race- and Gender-conscious Measures**

Race- and gender-conscious measures are contracting measures specifically designed to increase the participation of POC- and woman-owned businesses in government contracting. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but other businesses would not. Similarly, businesses owned by women might be eligible for such measures but businesses owned by men would not. An example of race- and gender-conscious measures is an agency’s use of DBE participation goals on individual contracts.

## **Race- and Gender-neutral Measures**

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

## **Rational Basis**

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

## **Relevant Geographic Market Area**

The relevant geographic market area is the geographic area in which the businesses to which Caltrans and subrecipient local agencies award most of their contracting dollars are located. Case law related to contracting programs and disparity studies requires disparity study analyses to focus on the relevant geographic market area. The relevant geographic market area for the 2022 Caltrans FTA Disparity Study is the state of California.

## **Statistically Significant Difference**

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

## **Step-2 Adjustment**

In accordance with United States Department of Transportation requirements, in setting their overall DBE goals, agencies must consider conditions in the local marketplace for POC- and woman-owned businesses as well as other factors and determine whether upward or

downward adjustments to their base figures are necessary to ensure their overall DBE goals are as precise as possible. The United States Department of Transportation sets forth several factors agencies must consider when assessing whether to make step-2 adjustments to their base figure:

- Current capacity of DBEs to perform work;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.

Agencies are not required to make step-2 adjustments to their base figures, but they are required to consider various relevant factors and explain their decisions to the United States Department of Transportation as part of the goal-setting process.

### **Strict Scrutiny**

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

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

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

### **Study Period**

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. Caltrans and subrecipient local agencies had to have awarded a contract during the study period for the contract to be included in the study team's analyses. The study period for the disparity study was October 1, 2017 through September 30, 2020.

### **Subconsultant**

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

### **Subcontract**

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

## **Subcontractor**

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

## **Subindustry**

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

## **Subrecipient Local Agency**

A subrecipient local agency is a California agency that receives passthrough FTA funds from Caltrans via grants or other means for transit-related projects. Subrecipient local agencies that receive passthrough FTA funds must comply with Caltrans' implementation of the Federal DBE Program when awarding associated contracts.

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

USDOT is one of the executive departments of the United States federal government and comprises 13 offices, including FTA. It is responsible for developing and coordinating policies to provide an efficient and economical national transportation system. USDOT operates the Federal DBE Program.

## **Utilization**

Utilization refers to the percentage of total dollars associated with a particular set of contracts Caltrans or subrecipient local agencies awarded to a specific group of businesses. The study team uses the term *utilization* synonymously with *participation*.

## **Vendor**

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

## **Woman-owned Business**

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

# **APPENDIX B.**

---

## **Legal Framework and Analysis**

# Table of Contents

APPENDIX B. LEGAL FRAMEWORK AND ANALYSIS .....	1
EXECUTIVE SUMMARY .....	1
A. Introduction .....	1
B. U.S. Supreme Court Cases.....	7
1. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) .....	7
2. Adarand Constructors, Inc. v. Peña (“Adarand I”), 515 U.S. 200 (1995) .....	9
C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE and ACDBE Programs.....	10
1. Strict scrutiny analysis.....	16
2. Intermediate scrutiny analysis.....	33
3. Rational basis analysis.....	36
4. Pending cases (at the time of this report) and Informative Recent Orders.....	38
SUMMARIES OF RECENT DECISIONS .....	73
D. Recent Decisions Involving State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE Program in the Ninth Circuit Court of Appeals .....	73
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 (9 <sup>th</sup> 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).....	73
2. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women’s Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017).....	75
3. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9 <sup>th</sup> Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).....	80
4. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9 <sup>th</sup> Cir. 2013).....	86
5. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9 <sup>th</sup> Cir. 2013) .....	93
6. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013) .....	96
7. Braunstein v. Arizona DOT, 683 F.3d 1177 (9 <sup>th</sup> Cir. 2012).....	98
8. Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9 <sup>th</sup> Cir. 2005), cert. denied, 546 U.S. 1170 (2006) .....	100
9. Western States Paving Co. v. Washington DOT, USDOT & FHWA, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion) .....	104

10. Monterey Mechanical v. Wilson, 125 F.3d 702 (9 <sup>th</sup> Cir. 1997) .....	106
11. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9 <sup>th</sup> Cir. 1991) .....	107
12. Coral Construction Co. v. King County, 941 F.2d 910 (9 <sup>th</sup> Cir. 1991).....	110
13. Coral Construction, Inc. v. City and County of San Francisco, et. al., 50 Cal. 4th 315, 235 P.3d 947, 113 Cal.Rptr.3d 279 (S. Ct. Cal. 2010).....	114
14. Hi-Voltage Wire Works, Inc. v. City of San Jose, 101 Cal.Rptr.2d 653, 12 P.3d 1068 (Cal. 2000) .....	115
E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions .....	118
Recent Decisions in Federal Circuit Courts of Appeal .....	118
1. H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al., 615 F.3d 233 (4 <sup>th</sup> Cir. 2010) .....	118
2. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2 <sup>d</sup> Cir. 2006).....	129
3. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7 <sup>th</sup> Cir. 2006).....	130
4. Viridi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11 <sup>th</sup> Cir. 2005) (unpublished opinion).....	131
5. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10 <sup>th</sup> Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari).....	133
6. In re City of Memphis, 293 F.3d 345 (6 <sup>th</sup> Cir. 2002) .....	145
7. Builders Ass’n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7 <sup>th</sup> Cir. 2001) .....	146
8. Associated Gen. Contractors v. Drabik, 214 F.3d 730 (6 <sup>th</sup> Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998).....	148
9. W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5 <sup>th</sup> Cir. 1999) .....	152
10. Eng’g Contractors Ass’n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11 <sup>th</sup> Cir. 1997).....	155
11. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3 <sup>d</sup> Cir. 1996).....	166
12. Contractor’s Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3 <sup>d</sup> Cir. 1993).....	179
13. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9 <sup>th</sup> Cir. 1991).....	190
14. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10 <sup>th</sup> Cir. 1994).....	193
15. Coral Construction Co. v. King County, 941 F.2d 910 (9 <sup>th</sup> Cir. 1991).....	204
Recent District Court Decisions.....	207
16. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017) .....	207
17. Kossman Contracting Co., Inc. v. City of Houston, 2016 WL 1104363 (S.D. Tex. 2016).....	212
18. H. B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al., 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4 <sup>th</sup> Cir. 2010).....	219
19. Thomas v. City of Saint Paul, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8 <sup>th</sup> Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009).....	224
20. Thompson Building Wrecking Co. v. Augusta, Georgia, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.).....	226
21. Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F. Supp.2d 1305 (S.D. Fla. 2004).....	228

22. Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp.2d 1307 (N.D. Fla. 2004).....	233
23. The Builders Ass'n of Greater Chicago v. The City of Chicago, 298 F. Supp.2d 725 (N.D. Ill. 2003).....	235
24. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 218 F. Supp.2d 749 (D. Md. 2002).....	236
25. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001).....	237
26. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000).....	242
27. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000).....	249
28. Associated Gen. Contractors v. Drabik, 50 F. Supp.2d 741 (S.D. Ohio 1999).....	252
29. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998).....	254
F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments.....	255
Recent Decisions in Federal Circuit Courts of Appeal.....	255
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).....	255
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).....	266
3. Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007).....	271
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).....	273
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).....	277
Recent District Court Decisions.....	286
6. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).....	286
7. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014).....	296
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).....	305
9. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013).....	309
10. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010).....	312
11. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009).....	318
12. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008).....	321
13. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007).....	324



14. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004)..... 329

15. Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp.2d 1296 (D. Kan. 2002) ..... 331

16. Sherbrooke Turf, Inc. v. Minnesota DOT, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), affirmed 345 F.3d 964 (8<sup>th</sup> Cir. 2003)..... 332

17. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8<sup>th</sup> Cir. 2003)..... 333

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs..... 334

1. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015) ..... 334

2. Rothe Development Corp. v. U.S. Dept. of Defense, et al., 545 F.3d 1023 (Fed. Cir. 2008) ..... 337

3. Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016)..... 346

4. DynaLantic Corp. v. United States Dept. of Defense, et al., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014) ..... 351

5. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007)..... 360

# APPENDIX B.

## Legal Framework and Analysis

### EXECUTIVE SUMMARY

#### A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,<sup>1</sup> reviews instructive guidance and authorities regarding the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,<sup>2</sup> and provides an analysis of the implementation of the Federal DBE and ACDBE Programs by local and state governments. The Federal DBE Program was continued and reauthorized by the 2015 Fixing America’s Surface Transportation Act (FAST Act).<sup>3</sup> In October 2018, Congress passed the FAA Reauthorization Act.<sup>4</sup> The appendix also reviews recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise (“MBE/WBE/DBE”) programs, which are instructive to the study and MBE/WBE/DBE programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the California DOT (Caltrans).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.<sup>5</sup> *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,<sup>6</sup> (“*Adarand I*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and Federal ACDBE Program and their implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. In particular, this analysis reviews in Section D below

---

<sup>1</sup> 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.*

<sup>2</sup> 49 CFR Part 23 (*Participation of Disadvantaged Business Enterprises in Airport Concessions*).

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

<sup>4</sup> Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

<sup>5</sup> *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

<sup>6</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

recent Ninth Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*<sup>7</sup> and *Western States Paving Co. v. Washington State DOT*,<sup>8</sup> *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women’s Business Enterprise, U.S. DOT, et al.*<sup>9</sup> and the recent non-published decision in *Mountain West Holding Co. v. Montana, Montana DOT, et al.*<sup>10</sup>, and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*<sup>11</sup>.

In addition, the analysis reviews in Section E below recent federal cases from other jurisdictions that have considered the validity of the Federal DBE Program and its implementation by state DOTs and local or state government agencies and the validity of local and state DBE programs, including: *Dunnet Bay Construction Co. v. Illinois DOT*,<sup>12</sup> *Northern Contracting, Inc. v. Illinois DOT*,<sup>13</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*,<sup>14</sup> *Geyer Signal, Inc. v. Minnesota DOT*,<sup>15</sup> *Adarand Constructors, Inc. v. Slater*<sup>16</sup> (“Adarand VII”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>17</sup> *Geod Corporation v. New Jersey Transit Corporation*,<sup>18</sup> and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.<sup>19</sup>

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

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged

---

<sup>7</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013).

<sup>8</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

<sup>9</sup> *Orion Insurance Group, a Washington Corporation, Ralph G. Taylor, an individual, Plaintiffs v. Washington State Office of Minority & Woman’s Business Enterprises, United States DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which is pending.

<sup>10</sup> *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. 2017). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

<sup>11</sup> *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

<sup>12</sup> *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

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

<sup>14</sup> *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).

<sup>15</sup> *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

<sup>16</sup> *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“Adarand VII”).

<sup>17</sup> *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).

<sup>18</sup> *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010).

<sup>19</sup> *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

Business Enterprise (Federal ACDBE) Program,<sup>20</sup> and the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence.<sup>21</sup> In October 2018, Congress passed the FAA Reauthorization Act, which also provides Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence.<sup>22</sup> Congress is currently at the time of this report considering legislation (H.R. 2, Section 1101, Moving Forward Act) again to reauthorize the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The analyses of these and other recent cases summarized below, including the Ninth Circuit decisions in Section D below, *AGC, SDC v. Cal. DOT*, *Western States Paving*, *Mountain West Holding, Inc.*, *M.K. Weeden and Orion Insurance Group*, are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to the Federal DBE and ACDBE Programs and their implementation by local and state governments receiving U.S. DOT funds, disparity studies, MBE/WBE/DBE Programs, and construing the validity of government programs involving MBE/WBE/DBE/ACDBEs. They also are pertinent in terms of an analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of a narrowly tailored DBE Program by a state DOT implementing the Federal DBE Program and local or state government MBE/WBE/DBE programs submitted in compliance with the case law, and applicable federal regulations, including 49 CFR Part 26.

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

Following *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their

---

<sup>20</sup> 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

<sup>21</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

<sup>22</sup> Pub. L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

DBE Program to comply with the Federal DBE Program.<sup>23</sup> The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.<sup>24</sup> The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.<sup>25</sup>

The USDOT's Guidance is recognized by the federal regulations as "valid, and express the official positions and views of the Department of Transportation"<sup>26</sup> for states in the Ninth Circuit.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the Court, stated "that [the Federal DBE Program's] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."<sup>27</sup> Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.<sup>28</sup>

The Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' implementation of the Federal DBE Program is constitutional.<sup>29</sup> The Ninth Circuit found that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.<sup>30</sup>

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

---

<sup>23</sup> *Questions and Answers Concerning Response to Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter *USDOT Guidance*], available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm); see 49 CFR § 26.9; see, also, 49 CFR Section 26.45.

<sup>24</sup> *USDOT Guidance*, available at [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006)

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, 49 CFR § 26.9; See, 49 CFR § 23.13.

<sup>27</sup> *Western States Paving*, 407 F.3d at 996; see, also, *Br. for the United States*, at 28 (April 19, 2004).

<sup>28</sup> *DOT Guidance*, available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006).

<sup>29</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F.3d 1187 (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013).

<sup>30</sup> *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*,<sup>31</sup> the Ninth Circuit and the district court applied the decision in *Western States*<sup>32</sup>, and the decision in *AGC, San Diego v. California DOT*,<sup>33</sup> 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.<sup>34</sup> 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.”<sup>35</sup> 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.”<sup>36</sup>

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.’”<sup>37</sup> 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.”<sup>38</sup>

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

The District Court decision in the Ninth Circuit in Montana, *M.K. Weeden*,<sup>39</sup> followed the *AGC, SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana Department of Transportation’s implementation of the Federal DBE Program.

---

<sup>31</sup> 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

<sup>32</sup> 407 F.3d 983 (9th Cir. 2005)

<sup>33</sup> 713 F.3d 1187 (9th Cir. 2013)

<sup>34</sup> 2014 WL 6686734 at \*2 (D. Mont. 2014)

<sup>35</sup> *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).

<sup>36</sup> *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.

<sup>37</sup> *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99).

<sup>38</sup> *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).

<sup>39</sup> *M.K. Weeden*, 2013 WL 4774517.



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.*<sup>40</sup> Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

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

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

The District court held OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because there was insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

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

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

On appeal, the Ninth Circuit in affirming the District court held it correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity, Taylor’s discrimination claims under 42 U.S.C. §1983 because the federal defendants did not act “under color or state law,” Taylor’s claims for damages because the United States has not waived

---

<sup>40</sup> 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).

its sovereign immunity, and Taylor’s claims for equitable relief under 42 U.S.C. §2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

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

Also, in a split in approach with the Ninth Circuit regarding the legal standard, burden and analysis in connection with a state government implementing the Federal DBE Program, the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>41</sup> and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,<sup>42</sup> upheld the implementation of the Federal DBE Program by the Illinois DOT (IDOT).<sup>43</sup> The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.<sup>44</sup> The Seventh Circuit most recently in *Midwest Fence* also held the Federal DBE Program is facially constitutional, and upheld the implementation of that federal Program by IDOT in its DBE Program following the *Northern Contracting* decision. These cases are reviewed in detail in Section E below. The Seventh Circuit agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.<sup>45</sup>

These decisions regarding a state DOT implementing the Federal DBE Program and MBE/WBE/DBE cases throughout the country will be analyzed in more detail in the Appendix below.

## **B. U.S. Supreme Court Cases**

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

In *Croson*, the U.S. Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.<sup>46</sup> J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In

---

<sup>41</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

<sup>42</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

<sup>43</sup> 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

<sup>44</sup> *Id.*

<sup>45</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016)

<sup>46</sup> 488 U.S. 469 (1989).



enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

The Supreme Court held the City of Richmond's "set-aside" action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the "strict scrutiny" standard, generally applicable to any race-based classification, which requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination and that any program adopted by a local or state government must be "narrowly tailored" to achieve the goal of remedying the identified discrimination.

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."<sup>47</sup> The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors.<sup>48</sup> The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.<sup>49</sup>

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII.<sup>50</sup> But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."<sup>51</sup>

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting

---

<sup>47</sup> 488 U.S. at 500, 510.

<sup>48</sup> 488 U.S. at 480, 505.

<sup>49</sup> 488 U.S. at 507-510.

<sup>50</sup> 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741.

<sup>51</sup> 488 U.S. at 501 quoting *Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

work in public construction projects.”<sup>52</sup> “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”<sup>53</sup>

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its jurisdiction.”<sup>54</sup> The Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”<sup>55</sup>

The Court said: “If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.”<sup>56</sup> “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”<sup>57</sup>

The Court further found “if the City could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”<sup>58</sup>

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

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

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

---

<sup>52</sup> 488 U.S. at 502.

<sup>53</sup> *Id.*

<sup>54</sup> 488 U.S. at 509.

<sup>55</sup> *Id.*

<sup>56</sup> 488 U.S. at 509.

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

<sup>58</sup> 488 U.S. at 492.

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

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

### **The Federal DBE Program (and ACDBE Program) Implemented By State of Local Governments**

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

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.<sup>59</sup> Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21<sup>st</sup> Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (“MAP-21”).<sup>60</sup> In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>61</sup> Most recently, in October 2018, Congress

---

<sup>59</sup> *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing *The Compelling Interest*.

<sup>60</sup> *Pub. L. 112-141, H.R. 4348, § 1101(b)*, July 6, 2012, 126 Stat. 405.

<sup>61</sup> *Pub. L. 114-94, H.R. 22, § 1101(b)*, December 4, 2015, 129 Stat. 1312.

passed the FAA Reauthorization Act.<sup>62</sup> At the present time, pending in Congress is legislation (H.R. 2, Section 1101, Moving Forward Act) to reauthorize the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.<sup>63</sup>

The Federal DBE and ACDBE Programs established responsibility for implementing the DBE and ACDBE Programs to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE and/or ACDBE goals specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE and ACDBE Programs outline certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE and ACDBE programs. The implementation of the Federal DBE and ACDBE Programs are substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45, and 49 CFR §§ 23.41-51.

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.<sup>64</sup> This is accomplished by determining the relative number of ready, willing, and able DBEs and ACDBEs in the recipient's market.<sup>65</sup> Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.<sup>66</sup> There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d) and 49 CFR §23.51(d). These include, among other types, the current capacity of DBEs and ACDBEs to perform work on the recipient's contracts as measured by the volume of work DBEs and ACDBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs and ACDBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs and ACDBEs to obtain financing, bonding, and insurance, as well as data on employment,

---

<sup>62</sup> *Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.*

<sup>63</sup> *49 CFR § 26.51; see 49 CFR § 23.25.*

<sup>64</sup> *49 CFR § 26.45(a), (b), (c); 49 CFR § 23.51(a), (b), (c).*

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

<sup>66</sup> *Id.* at § 26.45(d); *Id.* at § 23.51(d).

education, and training.<sup>67</sup> This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE and ACDBE participation one would expect absent the effects of discrimination.<sup>68</sup>

Further, the Federal DBE and ACDBE Programs require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.<sup>69</sup> A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.<sup>70</sup>

Federal aid recipients are to certify DBEs and ACDBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.<sup>71</sup>

**F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.<sup>72</sup> Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.<sup>73</sup>

#### **F.A.A. Reauthorization Act of 2018 (October 5, 2018)**

- Extends the FAA DBE and ACDBE programs for five years.
- Contains an additional prompt payment provision.
- Increases in the size cap for highway, street, and bridge construction for construction firms working on airport improvement projects.
- Establishes Congressional findings of discrimination that provides a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

---

<sup>67</sup> *Id.*

<sup>68</sup> 49 CFR § 26.45(b)-(d); 49 CFR § 23.51.

<sup>69</sup> 49 CFR § 26.51; 49 CFR § 23.51(a).

<sup>70</sup> 49 CFR § 26.51(b); 49 CFR § 23.25.

<sup>71</sup> 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39

<sup>72</sup> 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.

<sup>73</sup> *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

## **SEC. 150 DEFINITION OF SMALL BUSINESS CONCERN.**

- Section 47113(a)(1) of title 49, United States Code, is amended as follows:

### (1) 'Small business concern'

A. Has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 632); but in the case of a concern in the construction industry, a concern shall be considered a small business concern if the concern meets the size standard for the NAICS Code 237310, as adjusted by the SBA

## **SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.**

(a) Findings. Congress finds the following:

(1) While significant progress has occurred due to the establishment of the airport disadvantaged business enterprise program (sections 47107(e) and 47113 of title 49, United States Code), discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets across the nation. These continuing barriers merit the continuation of the airport disadvantaged business enterprise program.

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

(3) This testimony and documentation demonstrates that discrimination across the nation poses a barrier to full and fair participation in airport-related businesses of women business owners and minority business owners in the racial groups detailed in 49 C.F.R. Parts 23 and 26, and has impacted firm development and many aspects of airport-related business in the public and private markets.

(4) This testimony and documentation provides a strong basis that there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

### **Fixing America's Surface Transportation Act" or the ``FAST Act" (December 4, 2015)**

On December 3, 2015, the Fixing America's Surface Transportation Act" or the ``FAST Act" was passed by Congress, and it was signed by the President on December 4, 2015, as the new five year surface transportation authorization law. It should be noted that the five year 2015 authorization is set to expire in December 2020, unless it is reauthorized. The FAST Act continues the Federal DBE Program and makes the following "Findings" in Section 1101 (b) of the Act:

## **SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.**

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

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

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

Therefore, Congress in the FAST Act passed on December 3, 2015, found based on testimony, evidence and documentation updated since MAP-21 was adopted in 2012 as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.<sup>74</sup>

**MAP-21 (July 2012)** In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.<sup>75</sup> In MAP-21, Congress specifically found as follows:

---

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

<sup>75</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.



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

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

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

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

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”<sup>76</sup>

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there was “a compelling need for the continuation of the” Federal DBE Program.<sup>77</sup>

**USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).**

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

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women

---

<sup>76</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>77</sup> *Id.*



that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”<sup>78</sup>

The United States DOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE program.<sup>79</sup> The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”<sup>80</sup> The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis...”, noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”<sup>81</sup> This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”<sup>82</sup>

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

**1. Strict scrutiny analysis.** A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.<sup>83</sup> The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.<sup>84</sup>

---

<sup>78</sup> 76 F.R. at 5092.

<sup>79</sup> 76 F.R. at 5095.

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

<sup>81</sup> *Id.*

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

<sup>83</sup> *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9<sup>th</sup> Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10<sup>th</sup> Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5<sup>th</sup> Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3<sup>d</sup> Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3<sup>d</sup> Cir. 1993).

<sup>84</sup> *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9<sup>th</sup> Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9<sup>th</sup> Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10<sup>th</sup> Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6<sup>th</sup> Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5<sup>th</sup> Cir. 1999); *Eng’g Contractors*

**a. The Compelling Governmental Interest Requirement.** The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program.<sup>85</sup> State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.<sup>86</sup> Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.<sup>87</sup>

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds, such as state DOTs, do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.<sup>88</sup> The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).<sup>89</sup>

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation

---

*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).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

<sup>87</sup> See, e.g., *Concrete Works I*, 36 F.3d at 1520.

<sup>88</sup> *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376.

<sup>89</sup> *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (*The Compelling Interest*, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. see, also, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.

of minority-owned construction businesses, and of barriers to entry.”<sup>90</sup> The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).<sup>91</sup> The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.<sup>92</sup>
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.<sup>93</sup>
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.<sup>94</sup>
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.<sup>95</sup>
- **F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally-assisted surface transportation

---

<sup>90</sup> *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76 (10<sup>th</sup> Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

<sup>91</sup> *See, e.g., Adarand VII*, 228 F.3d at 1167– 76 (10<sup>th</sup> Cir. 2000); *see also Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>92</sup> *Adarand VII*, 228 F.3d. at 1168-70 (10<sup>th</sup> Cir. 2000); *Western States Paving*, 407 F.3d at 992; *see Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

<sup>93</sup> *Adarand VII*, at 1170-72 (10<sup>th</sup> Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237.

<sup>94</sup> *Id.* at 1172-74 (10<sup>th</sup> Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>95</sup> *Adarand VII*, 228 F.3d at 1174-75 (10<sup>th</sup> Cir. 2000); *see, H. B. Rowe*, 615 F.3d 233, 247-258 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.<sup>96</sup> Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.<sup>97</sup>

**Burden of proof to establish the strict scrutiny standard.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.<sup>98</sup> If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.<sup>99</sup> The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”<sup>100</sup>

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.<sup>101</sup> It is well established that “remedying the effects of past or present racial discrimination” is a compelling interest.<sup>102</sup> In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”<sup>103</sup>

---

<sup>96</sup> 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.

<sup>97</sup> *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

<sup>98</sup> See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (“Adarand VII”)*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *Dynalantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

<sup>99</sup> *Adarand VII*, 228 F.3d at 1166; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>100</sup> See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng’g Contractors Ass’n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>101</sup> *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>102</sup> *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>103</sup> *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”<sup>104</sup> “An inference of discrimination may be made with empirical evidence that demonstrates ‘a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’”<sup>105</sup> Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.<sup>106</sup>

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.<sup>107</sup> Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.<sup>108</sup> Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.<sup>109</sup>

To successfully rebut the government’s evidence, the courts hold that a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence for the necessity of remedial action.<sup>110</sup> This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government’s data is flawed, demonstrating that the

---

<sup>104</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); *see also, Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>105</sup> *See e.g., H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at \*7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>106</sup> *Croson*, 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at \*7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>107</sup> *Adarand Constructors, Inc. v. Peña, (“Adarand III”)*, 515 U.S. 200 at 235 (1995); *see, e.g., Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>108</sup> *Majeske*, 218 F.3d at 820; *see, e.g., Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 \*7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>109</sup> *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

<sup>110</sup> *See, e.g., H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at \*7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.



observed disparities are statistically insignificant, or presenting contrasting statistical data.<sup>111</sup> Conjecture and unsupported criticisms of the government’s methodology are insufficient.<sup>112</sup> The courts have held that mere speculation the government’s evidence is insufficient or methodologically flawed does not suffice to rebut a government’s showing.<sup>113</sup>

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.’”<sup>114</sup> 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.”<sup>115</sup>

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”<sup>116</sup> The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.<sup>117</sup> Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>118</sup> It has been further held by the courts that the statistical evidence be

---

<sup>111</sup> See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at \*7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

<sup>112</sup> *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

<sup>113</sup> *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>114</sup> *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

<sup>115</sup> *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).

<sup>116</sup> *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>117</sup> *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>118</sup> *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

“corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.<sup>119</sup>

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.”<sup>120</sup> In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”<sup>121</sup>

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.<sup>122</sup>

**Statistical evidence.** Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a state or local government recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state or local government recipient level.<sup>123</sup> “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”<sup>124</sup>

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.<sup>125</sup> The federal

---

<sup>119</sup> *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4<sup>th</sup> Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7<sup>th</sup> Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>120</sup> See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10<sup>th</sup> Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

<sup>121</sup> See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10<sup>th</sup> Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

<sup>122</sup> See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10<sup>th</sup> Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10<sup>th</sup> 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).

<sup>123</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> 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 (5<sup>th</sup> Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10<sup>th</sup> Cir. 2003); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

<sup>124</sup> *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 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5<sup>th</sup> Cir. 1999).

<sup>125</sup> *Croson*, 488 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4<sup>th</sup> Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10<sup>th</sup> Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5<sup>th</sup> Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.<sup>126</sup> However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>127</sup>

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.<sup>128</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,<sup>129</sup> “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”<sup>130</sup>
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.<sup>131</sup>
- **Disparity index.** An important component of statistical evidence is the “disparity index.”<sup>132</sup> A disparity index is defined as the ratio of the percent utilization to the percent availability

---

<sup>126</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>127</sup> *Western States Paving*, 407 F.3d at 1001.

<sup>128</sup> See, e.g., *Croson*, 488 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>129</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>130</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>131</sup> See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

<sup>132</sup> *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).



times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”<sup>133</sup>

- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.<sup>134</sup>

In terms of statistical evidence, the courts, including the Ninth Circuit, have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>135</sup>

**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.<sup>136</sup> The court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.<sup>137</sup> 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.”<sup>138</sup> 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.”<sup>139</sup>

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

---

<sup>133</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

<sup>134</sup> See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

<sup>135</sup> *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>136</sup> *Id.* at 973.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

<sup>139</sup> *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

coupled with evidence that it has become a passive participant in that discrimination.<sup>140</sup> Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.<sup>141</sup>

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.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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.<sup>145</sup>

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.<sup>146</sup> (“[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.*”<sup>147</sup> Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”<sup>148</sup> The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.<sup>149</sup>

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

---

<sup>140</sup> *Id.* at 973.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

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

<sup>144</sup> *Id.* at 974.

<sup>145</sup> *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

<sup>146</sup> *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

<sup>147</sup> *Id.* (emphasis added).

<sup>148</sup> *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

<sup>149</sup> *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

private portions of their business.”<sup>150</sup> 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.<sup>151</sup>

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”<sup>152</sup>

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.<sup>153</sup>

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.”<sup>154</sup>

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.<sup>155</sup>

**Anecdotal evidence.** Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination,

---

<sup>150</sup> *Id.*

<sup>151</sup> *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

<sup>152</sup> *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

<sup>153</sup> *Id.* at 977.

<sup>154</sup> *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

<sup>155</sup> *Id.* at 979-80.

standing alone, generally is insufficient to show a systematic pattern of discrimination.<sup>156</sup> But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.<sup>157</sup> It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."<sup>158</sup>

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.<sup>159</sup>

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.<sup>160</sup>

**b. The Narrow Tailoring Requirement.** The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be "narrowly tailored" to reach that objective.

---

<sup>156</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *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'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>157</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>158</sup> *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).

<sup>159</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

<sup>160</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at \*21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

The 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.<sup>161</sup>

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.<sup>162</sup>

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”<sup>163</sup> Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral

---

<sup>161</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10<sup>th</sup> Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>162</sup> 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.

<sup>163</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”<sup>164</sup>

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>165</sup>

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*<sup>166</sup> also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration.”<sup>167</sup> The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

**Implementation of the Federal DBE Program: Narrow tailoring.** The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by state DOTs and state and local government recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular state or local government recipient’s contracting and procurement market.<sup>168</sup> The cases considering challenges to a state government’s implementation of the Federal DBE Program are instructive to the study, as stated above, in connection with establishing a compelling governmental interest and narrow tailoring, which are the two prongs of the strict scrutiny standard. The narrow tailoring requirement has several components.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-

---

<sup>164</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

<sup>165</sup> *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

<sup>166</sup> 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

<sup>167</sup> 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

<sup>168</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.



ethnicity-, or gender-conscious remedial action.<sup>169</sup> Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.<sup>170</sup>

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.<sup>171</sup>

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."<sup>172</sup> The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.<sup>173</sup> The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.<sup>174</sup> The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).<sup>175</sup> Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.<sup>176</sup>

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a

---

<sup>169</sup> *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>170</sup> *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

<sup>171</sup> 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>172</sup> 473 F.3d at 722.

<sup>173</sup> *Id.* at 722.

<sup>174</sup> *Id.* at 723-24.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*; See, e.g., *Midwest Fence*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

showing that the state exceeded its federal authority.<sup>177</sup> The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.<sup>178</sup> The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.<sup>179</sup> In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.<sup>180</sup>

**Race-, ethnicity-, and gender-neutral measures.** To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state’s implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.<sup>181</sup> And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.<sup>182</sup>

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”<sup>183</sup>

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;

---

<sup>177</sup> *Midwest Fence*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at \*\*18-22 (7<sup>th</sup> Cir. 2015).

<sup>178</sup> *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at \*\*18-22.

<sup>179</sup> *Id.*

<sup>180</sup> 840 F.3d 932 (7<sup>th</sup> Cir. 2016).

<sup>181</sup> *See, e.g., Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7<sup>th</sup> 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 (10<sup>th</sup> Cir. 2000); *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

<sup>182</sup> *See, Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also, Eng’g Contractors Ass’n*, 122 F.3d at 927; *Viridi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993).

<sup>183</sup> *Croson*, 488 U.S. at 509-510.



- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>184</sup>

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”<sup>185</sup>

**Additional factors considered under narrow tailoring.** In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.<sup>186</sup> For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should

---

<sup>184</sup> See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10<sup>th</sup> Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

<sup>185</sup> *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

<sup>186</sup> See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

include: (1) built-in flexibility;<sup>187</sup> (2) good faith efforts provisions;<sup>188</sup> (3) waiver provisions;<sup>189</sup> (4) a rational basis for goals;<sup>190</sup> (5) graduation provisions;<sup>191</sup> (6) remedies only for groups for which there were findings of discrimination;<sup>192</sup> (7) sunset provisions;<sup>193</sup> and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.<sup>194</sup>

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.<sup>195</sup>

**2. Intermediate scrutiny analysis.** Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.<sup>196</sup> The Ninth Circuit has applied “intermediate scrutiny” to classifications based on gender.<sup>197</sup>

---

<sup>187</sup> *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality (“AGC of Ca.”)*, 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

<sup>188</sup> *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

<sup>189</sup> *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

<sup>190</sup> *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).

<sup>191</sup> *Id.*

<sup>192</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

<sup>193</sup> *See, e.g., H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . *see also, Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

<sup>194</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>195</sup> *See, e.g., Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

<sup>196</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally, Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

<sup>197</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see generally, Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also, Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)).

Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.<sup>198</sup>

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.<sup>199</sup>

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.<sup>200</sup>

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.<sup>201</sup> The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.<sup>202</sup>

The Tenth Circuit in *Concrete Works*, stated with regard evidence as to woman-owned business enterprises as follows:

---

<sup>198</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, also *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993).

<sup>199</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

<sup>200</sup> *Id.* The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

<sup>201</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

<sup>202</sup> *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

“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.”<sup>203</sup>

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.”<sup>204</sup> The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.<sup>205</sup> The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.<sup>206</sup>

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.<sup>207</sup> 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.<sup>208</sup> But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.<sup>209</sup> The only other testimony on this subject, the Court found in *CAEP I*,

---

<sup>203</sup> 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

<sup>204</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

<sup>205</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

<sup>206</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

<sup>207</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.<sup>210</sup> 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.<sup>211</sup> 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.<sup>212</sup>

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.”<sup>213</sup> So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.<sup>214</sup>

“[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.”<sup>215</sup>

---

<sup>210</sup> *Id.*

<sup>211</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9<sup>th</sup> Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10<sup>th</sup> Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10<sup>th</sup> Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5<sup>th</sup> Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8<sup>th</sup> Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>212</sup> See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5<sup>th</sup> Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8<sup>th</sup> 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); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>213</sup> See, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10<sup>th</sup> Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10<sup>th</sup> Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>214</sup> *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4<sup>th</sup> Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>215</sup> *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4<sup>th</sup> Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup>



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.”<sup>216</sup>

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.”<sup>217</sup> Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”<sup>218</sup>

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.”<sup>219</sup>

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”).<sup>220</sup>

*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

---

1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>216</sup> *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>217</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>218</sup> *Id.*

<sup>219</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8<sup>th</sup> Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (*O’Connor, J., concurring*); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8<sup>th</sup> Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>220</sup> 2012 WL 5939228 (Fed. Cl. 2012).

business[:] 14.5 percent; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”<sup>221</sup>

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.<sup>222</sup> The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”<sup>223</sup>

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors....” Consequently, the court held one rational method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.<sup>224</sup> 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....”<sup>225</sup>

**4. Pending cases (at the time of this report) and Informative Recent Orders.** There are recent pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and federal programs with minority and woman-owned business preferences that may potentially impact and are informative and instructive to the study, including the following:

- **Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration** 2021 WL 2172181 (6th Cir. May 27, 2021).
- **Greer's Ranch Café v. Guzman**, \_\_\_ F.Supp.3d \_\_\_, 2021 WL 2092995 (N.D. Tex. 5/18/21), U.S. District Court for the Northern District of Texas.
- **Faust v. Vilsack**, \_\_\_ F.Supp.3d, \_\_\_ 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).
- **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 Florida.
- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.**, U.S. District Court for the Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.

---

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

- **Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.**, Case No. 502018CA010511; in the 15th Judicial Circuit in and for Palm Beach County, Florida.
- **CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.**; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099.
- **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.
- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appealed to the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.
- **Circle City Broadcasting I, LLC (“Circle City”) and National Association of Black Owned Broadcasters (“NABOB”) (Plaintiffs) v. DISH Network, LLC (“DISH” or “Defendant”)**, U.S. District Court for the Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.
- **Etienne Hardre, and SDG Murray, LTD et al v. Colorado Minority Business Office, Governor of Colorado et al.**, U.S. District Court for the District of Colorado, Case 1:20-cv-03594. Complaint filed in December 2020.
- **Infinity Consulting Group, LLC, et al. V. United States Department of the Treasury, et al.**, Case No.: Gjh-20-981, In The United States District Court for the District Of Maryland, Southern Division. Complaint filed in April 2020.

The following summarizes the above listed pending cases and informative recent decisions:

- **Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration**, 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 women-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 women-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and women-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 of 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 *Crosby*, 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 held, “[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objective and must be substantially related to achievement of those “[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” 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 women-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 women-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 women-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 women-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 Granted by Sixth Circuit. 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" Vitolio'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. But, 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.” But, 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 underinclusivity. The Court considered the requirement that a business must be at least 51 percent 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 percent. 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 percent owned by a Hispanic female. It is far from obvious, the Court stated, why that 1 percent 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.

Women-Owned Businesses. Intermediate Scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of women-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 women-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 women-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 percent women-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 Court held that plaintiffs are entitled to an injunction pending appeal, thus reversing the district court decision. Since the government failed to justify its discriminatory policy, the Court found that plaintiffs likely will win on the merits of their constitutional claim. And, the Court stated, similar to 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.

- **Greer's Ranch Café v. Guzman, F.Supp.3d (2021), 2021 WL 2092995 (N.D. Tex. 5/18/21).** Plaintiff Philip Greer ("Greer") owns and operates Plaintiff Greer's Ranch Café—a restaurant which lost nearly \$100,000 in gross revenue during the COVID-19 pandemic (collectively, "Plaintiffs"). Greer sought monetary relief under the \$28.6-billion Restaurant Revitalization Fund ("RRF") created by the American Rescue Plan Act of 2021 ("ARPA") and administered by the Small Business Administration ("SBA"). See American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003. Greer prepared an application on behalf of his restaurant, is eligible for a grant from the RRF, but has not applied because he is barred from consideration altogether during the program's first twenty-one days from May 3 to May 24, 2021.

During that window, ARPA directed SBA to "take such steps as necessary" to prioritize eligible restaurants "owned and controlled" by "women," by "veterans," and by those "socially and economically disadvantaged." ARPA incorporates the definitions for these prioritized small business concerns from prior-issued statutes and SBA regulations.

To effectuate the prioritization scheme, SBA announced that, during the program's first twenty-one days, it “will accept applications from all eligible applicants, but only process and fund priority group applications”—namely, applications from those priority-group applicants listed in ARPA. Priority-group “[a]pplicants must self-certify on the application that they meet [priority-group] eligibility requirements” as “an eligible small business concern owned and controlled by one or more women, veterans, and/or socially and economically disadvantaged individuals.

Plaintiffs sued Defendants SBA and Isabella Casillas Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the Fund.

Substantial Likelihood of Success on the Merits. Standing. Equal Protection Claims. The court first held that the Plaintiffs had standing to proceed, and then addressed the likelihood of success on the merits of their equal protection claims. As to race-based classifications, Plaintiffs challenged SBA's implementation of the “socially disadvantaged group” and “socially disadvantaged individual” race-based presumption and definition from SBA's Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause. Defendants argued the race-conscious rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

The parties agreed strict scrutiny applies where government imposes racial classifications, like here where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a). Under strict scrutiny, the court stated, government must prove a racial classification is “narrowly tailored” and “furthers compelling governmental interests.”

Defendants propose as the government's compelling interest “remedying the effects of past and present discrimination” by “supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic.” To proceed based on this interest, the court said, Defendants must provide a “strong basis in evidence for its conclusion that remedial action was necessary.”

As its strong basis in evidence, Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s. The court recognized the “well-established principle about the industry-specific inquiry required to effectuate Section 8(a)'s standards.” Thus, the court looked to Defendants' industry specific evidence to determine whether the government has a “strong basis in evidence to support its conclusion that remedial action was necessary.”

According to Defendants, “Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA.” The Defendants evidence was summarized by the court as follows:

- A House Report specifically recognized that “underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic,” that “[w]omen –especially mothers and women of color – are exiting the workforce at alarming rates,” and that “eight out of ten minority-owned businesses are on the brink of closure.”
- Expert testimony describing how “[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses” because of “structural inequities resulting from less wealth compared to whites who were able to accumulate wealth with the support of public policies,” and that having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders.
- Expert testimony explaining that “businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently,” and that minorities are less likely to have such relationships with lenders due to “pre-existing disparities in access to capital.”
- House Committee on Small Business Chairwoman Velázquez’s evidence offered into the record showing that “[t]he COVID-19 public health and economic crisis has disproportionately affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses” and that “minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit.”
- Witness testimony that emphasized the “[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital” and noted that “[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th.”
- Other expert testimony noting that in many cases, minority-owned businesses struggled to access earlier COVID relief funding, such as PPP loans, “due to the heavy reliance on large banks, with whom they have had historically poor relationships.”
- Evidence presented at other hearing showing that minority and women-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier COVID-19 relief funds and also describing “long-standing structural racial disparities in small business ownership and performance.”
- A statement of the Center for Responsible Lending describing present-day “overtly discriminatory practices by lenders” and “facially neutral practices with disparate effects” that deprive minority-owned businesses of access to capital.

This evidence, the court found, “largely falters for the same reasoning outlined above—it lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification.” The court, quoting the *Croson* decision, stated that while it 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.”

Thus, the court concluded that the government failed to prove that it likely has a compelling interest in “remedying the effects of past and present discrimination” in the restaurant industry during the COVID-19 pandemic. For the same reason, the court found that Defendants have failed to show an “important governmental objective” or exceedingly persuasive justification necessary to support a sex-based classification.

Having concluded Defendants lack a compelling interest or persuasive justification for their racial and gender preferences, the court stated it need not address whether the RRF is related to those particular interests. Accordingly, the Court held that Plaintiffs are likely to succeed on the merits of their claim that Defendants’ use of race-based and sex-based preferences in the administration of the RRF violates the Equal Protection Clause of the Constitution.

Conclusion. The court granted Plaintiffs’ motion for temporary restraining order, and enjoins Defendants to process Plaintiffs’ application for an RRF grant.

Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.

- **Faust v. Vilsack, F.Supp.3d, 2021 WL 2409729, US District Court, E.D. Wisconsin (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 for a temporary restraining order.

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 percent 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*, F.3d at, 2021 WL 2172181, at \*4; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (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.”

“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. So 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*, F.3d at, 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*, \_\_\_\_ F.3d at \_\_\_\_, 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), 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.

- **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.** 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., which is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (June 10, (2021) case in district court in Wisconsin, the court granted the Plaintiffs’ 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 ... 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 court in *Faust* granted the Plaintiffs’ Motion for Temporary Restraining Order for similar reasons and as discussed below in an Order issued on July 6, 2021, stayed a Motion for Preliminary Injunction and dissolved the Temporary Restraining Order as not necessary based on the *Wynn* holding imposing a nationwide injunction.



Background. In *Wynn*, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), 2 which provides debt relief 3 to “socially disadvantaged farmers and ranchers” (SDFRs). (Doc 1; Complaint). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120 percent 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 or 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> (last visited June 22, 2021). 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.

Strict Scrutiny. 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 stated, appears insufficient.

Compelling Governmental Interest. The Government stated 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 said 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.

*Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations omitted). Thus, the court found that 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 court noted 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 stated 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. Based on the historical evidence of discrimination, Congress took remedial measures to correct USDA's past discrimination against SDFRs.

Due to the significant remedial measures previously taken by Congress, for purposes of this case, the court pointed out that historical evidence does little to address the need for continued remediation through Section 1005. Rather, for the Government to show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA's past discrimination or that the Government remains a "passive participant" in discrimination in USDA loans and programs. See *Eng'g Contractors*, 122 F.3d at 911. The court found that this is where the evidence of continued discrimination becomes crucial, and may be inadequate.

The Government contends its prior measures were insufficient to remedy the effects of past discrimination, but the court found the actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory. Where a race-neutral basis for a statistical disparity can be shown, the court concluded it can give that statistical evidence less weight. *Eng'g Contractors*, 122 F.3d at 923. Here, the statistical discrepancies presented by the Government, the court found, can be explained by non-race related factors—farm size and crops grown—and the Court finds it unlikely that this evidence, standing alone, would constitute a strong basis for the need for a race-based remedial program.

On the record presented here, the court expressed "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 appears less substantial than that deemed insufficient in *Eng'g Contractors*, 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. *Id.* at 912.”

The court said 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 held that nevertheless, at this stage of the proceedings, it 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, the court found Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest.

Narrowly Tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court stated 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 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 court noted 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).

The court found that 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 stated 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 group 11 who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120 percent debt relief—and no one else receives any debt relief.

Regardless of farm size, an SDFR receives up to 120 percent 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 percent debt relief. Yet, the court said, 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 percent 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 percent 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, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, the court held 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 irradiate 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 court also ordered that the parties confer and submit a proposed expedited schedule to resolve the merits of the action.

- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al., U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.**

This is a challenge to the Shelby County, Tennessee “MWBE” Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.*, the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, 1983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The case at the time of this report is in the middle of discovery. The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

In addition, Plaintiffs on February 17, 2020 filed with the District Court in Tennessee a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District), issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020, compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County’s ability to present proof at trial due to the non-party MTA’s failure to meet its discovery obligations, that nothing in the record attributes MTA’s failure to meet its discovery obligations to the County, and that MTA’s efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA’s appeal to the Ninth Circuit. The district court in Tennessee stated in a footnote: “Now that the Ninth Circuit has dismissed MTA’s appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose.”

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September.



The parties filed on September 25, 2020 with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission, which was provided in October, 2020.

The parties filed a Stipulation of Dismissal with Prejudice with the court on January 4, 2021. The federal court in Tennessee on January 4, 2021 issued an order and Judgment approving the settlement and dismissing the case.

- **Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.**, Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida.

In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also denied a motion by AGC to be elevated to party status and to conduct discovery. The court held a Case Management Conference on August 17, 2020, and ordered that MTA's Motion to Dismiss be scheduled for a hearing at a date mutually agreeable to the parties.

The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether the documents at issue that have been provided by MTA to the court for in-camera inspection are exempted from the Public Records Act.

On February 1, 2021, the court issued a final order finding that the records of MTA sought by the County fell within the trade secret exemption of the state of Florida Public Records Act. The court thus held the County's Complaint for breach of contract and specific performance were dismissed as moot.



- **CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.;** U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege that this cause of action arises from Defendant's Minority and Women's Business Enterprise Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis.

Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs claim the Northern Cherokee Nation is an American Indian Tribe with contacts in what is now known as the State of Missouri since 1721.

Plaintiff alleges the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiff alleges the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs.

The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors to the Equal Protection of Laws in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification and Compliance Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

As a result of the City's deliberate indifference to their rights under the Fourteenth Amendment, Plaintiffs claim they have suffered loss of business, loss of standing in their community, and damage to their reputation by the City's decision to decertify the MBE status of these companies, and incurred attorney's fees and costs.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition a Minority Group Member under its policy and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiffs, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

The court issued a Memorandum and Order, dated July 27, 2020, which provided the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August. The court on September 14, 2020 issued an order over the opposition of the parties referring the case to mediation "immediately," with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

The court in April 2021 issued an Order dismissing this case based on a settlement and consent judgment. The City adopted new rules pertaining to MBE/WBE certification. The City also agreed for this case only to a rebuttable presumption that the plaintiffs in the case are members of a tribe that are Native Americans and socially and economically disadvantaged subject to the City reserving the right to rebut the presumption.

In addition, the City agreed that it will pay plaintiffs \$15000 in attorney's fees, and related orders. The City agreed that it will use best efforts to process Plaintiffs' certification applications and will provide a decision on each application by August 2, 2021. If the Plaintiffs are not certified as an MBE under the revised October 2020 rules, Plaintiffs reserve their right to pursue all claims relating to the decision.

- **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.**, U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants 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 that 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 shall 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 is pending at this time.

- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award 15 percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's

analysis; but the court found persuasive courts that have held “post-enactment evidence may not be used to demonstrate that the government’s interest in remedying prior discrimination was compelling.”

The only evidence clearly considered by the legislature prior to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians, and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio’s MBE program. The last studies Defendants reference to support the legislature’s conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio’s MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could find this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to government procurement contracts only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said

such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts before enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires 15 percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the 15 percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.



Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), 15 percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a 15 percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the 15 percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

The court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lack of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court found R.C. §3796.09(C) is unconstitutional on its face.

The case was appealed in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954. The appeal was voluntarily dismissed in March, 2021.

In the Court of Common Pleas, on March 11, 2021 the parties filed a Joint Motion to Dismiss Remaining Claims and Counterclaims Without Prejudice, and the Court of Common Pleas Ordered the dismissal of the remaining Counts of the Complaint and Counterclaim without prejudice.



- **Circle City Broadcasting I, LLC (“Circle City”) and National Association of Black Owned Broadcasters (“NABOB”) (Plaintiffs) v. DISH Network, LLC (“DISH” or “Defendant”), U.S. District Court, Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.**

This case involves allegations of racial discrimination in contracting by DISH against Plaintiff Circle City. Plaintiffs allege DISH refuses to contract in a nondiscriminatory manner with Circle City in violation of 42 U.S.C. § 1981. Circle City is a small, minority-owned and historically disadvantaged business providing local television broadcasting with television stations located in and serving Indianapolis, Indiana and the surrounding areas.

NABOB is a nonprofit corporation. The Amended Complaint alleges that NABOB represents 167 radio stations owned by 59 different radio broadcasting companies and 21 television stations owned by 10 different television broadcasting companies. The Amended Complaint alleges NABOB is a trade association representing the interests of the African American owned commercial radio and television stations across the country. Plaintiffs allege that as the voice of the African American broadcast industry for the past 42 years, NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success in broadcasting for African Americans and other minorities.

Plaintiffs claim that DISH insists on maintaining the industry’s policies and practices of discriminating against minority-owned broadcasters and disadvantaged business by paying the non-minority broadcasters significant fees to rebroadcast their stations and channels while offering practically no fees to the historically disadvantaged broadcaster or programmer for the same or superior programming.

Plaintiffs assert that DISH’s policies discount the contribution minorities can make in a market by refusing to contract with them on a fair and equal basis, and this policy highlights discrimination against minority businesses.

Plaintiffs allege that DISH refuses to negotiate a television retransmission contract in good faith with a minority owned business, Circle City.

Circle City sues for retransmission fees at a fair market rate, actual and punitive damages, interest, attorneys’ fees and costs resulting from allegations of intentional misconduct by DISH in its alleged disingenuous “negotiations” with Circle City. NABOB also seeks injunctive relief to enjoin the alleged unlawful acts.

The court issued an Order on May 18, 2021, regarding discovery and noted that it does not appear that settlement would be productive at this time; thus, the case will proceed with discovery. The court set a pretrial conference in February 2022, and the case is pending at the time of this report.

- **Etienne Hardre, and SDG Murray, LTD et al v. Colorado Minority Business Office, Governor of Colorado et al., U.S. District Court for District, District of Colorado, Case 1:20-cv-03594. Complaint filed in December 2020.**

This Complaint concerns Senate Bill 20B-001 (“SB1”) signed into law by the Governor of Colorado on December 7, 2020. The Complaint claims unconstitutional race-based classifications in SB1, including those in Section 8 providing economic relief and stimulus only to minority-owned businesses; provisions will be codified at Colo. Rev. Stat. §24-49.5-106. SB1 appropriates \$4 million for COVID-19 relief payments for “minority-owned businesses.”

Plaintiffs allege Caucasian businesses are excluded from participating in these relief payments based on the racial identities of the business owners. The appropriation of \$4 million for use by the Colorado Minority Business Office is to provide “relief payments, grants and loans to minority-owned businesses.”

SB1 directs the Colorado Minority Business Office to use a portion of the funds “to provide technical assistance and consulting support to minority-owned businesses across the state.” SB1 provides three primary forms of economic relief exclusively to minority-owned businesses: direct relief payments, grants and loans for startup capital, and funds to provide minority-owned business leaders with professional development and networking opportunities.

SBE directs Director of CMBO to establish a process for minority-owned businesses to apply for economic stimulus benefits, with a threshold requirement to applying is that the business be “minority owned” as defined by SB1.

Plaintiffs allege SB1’s provision limiting certain economic stimulus payments to minority-owned businesses violates the Equal Protection Clause of the Fourteenth Amendment by unconstitutionally making facial racial classifications.

The Plaintiffs filed a Motion for Preliminary Injunction and Defendants filed a Motion to Dismiss. The court held a hearing on the preliminary injunction on April 6, 2021. Based on the status of the case, the court found the record is undeveloped or the future uncertain, the case is unripe, and the Plaintiffs brought the case before any implementing regulations had been adopted and without information regarding their own eligibility for economic assistance.

Given that the issue is not ripe for review, and it is unclear whether Plaintiffs have standing as a result, the court found that it is inappropriate to address the preliminary injunction factors. Although a preliminary injunction is, by definition, preliminary relief, a litigant still must have standing and the claim must be ripe. Without these two prerequisites, the court stated, it is inappropriate to exercise jurisdiction, whether preliminary or final. Accordingly, the motion for preliminary injunction will be denied. And, the court based on this status of the case, took the further step and dismissed the case in its entirety.

The court thus held on April 19, 2021 that the Plaintiffs’ claims were dismissed without prejudice and granted the Defendants’ Motion to Dismiss, and held that the Plaintiffs’ Motion for Preliminary Injunction is denied.

- **Infinity Consulting Group, LLC, et al. V. United States Department of the Treasury, et al.,** Case No.: Gjh-20-981, In The United States District Court For The District Of Maryland, Southern Division. Complaint filed in April 2020.

This case involved a complaint filed in response to the distribution of PPP funds that “resulted in a disproportionate number of minority-owned and female-owned business owners unfairly left without relief.”

Plaintiffs, two owners of Maryland small businesses, sued Defendants U.S. Department of the Treasury, the U.S. Small Business Administration (“SBA”) regarding the guidelines governing the first round of funding for the Paycheck Protection Program (“PPP”) in April 2020.

Plaintiffs alleged Defendants knowingly and intentionally discriminated against MBE/WBEs by prohibiting businesses without employees from applying for funding until a week after businesses with employees could apply, leaving only a short period before the funds were depleted. In anticipation of legislation authorizing a second round of funding for the PPP, Plaintiffs moved for a temporary restraining order and preliminary injunction halting the entire PPP from proceeding until Defendants took steps to guarantee more equitable distribution of PPP funds before they were exhausted a second time.

Plaintiffs’ asserted claims under the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. §706(2). Court on April 26, 2020 held Plaintiffs’ Emergency Motion for a Temporary Restraining Order and Preliminary Injunction was denied.

Court found Plaintiffs did not demonstrate a likelihood of success on their claims or that their remedy would be in the overall interest of the greater public. Court held Plaintiffs did not show Defendants’ knowingly and intentionally discriminated against MBE/WBEs with no employees, and thus did not prove violation of the equal protection component of the Fifth Amendment’s Due Process Clause. Plaintiffs did not show that an “invidious discriminatory purpose was a motivating factor” behind the Defendants’ decision making in administering the PPP.

Court pointed out that while “a showing of disparate impact on a protected group and the foreseeability of this impact is relevant to prove that the decision maker acted with a forbidden purpose, ‘impact alone is not determinative, and the Court must look to other evidence.”

After the denial of the Temporary Restraining Order and Preliminary Injunction, Motions to Dismiss were filed by Defendants mainly asserting lack of jurisdiction and failure to state a claim. Plaintiffs and Defendants subsequently entered into a Stipulation of Dismissal with prejudice on October 27, 2020.

This list of recent pending and informative cases is not exhaustive, but in addition to the cases cited previously, may potentially have an impact on the study and implementation by state DOTs and state and local governments regarding the implementation of the Federal DBE/ACDBE Programs and MBE/WBE/DBE programs, and related legislation.

**Ongoing review.** The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, the Federal DBE and ACDBE Programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

## SUMMARIES OF RECENT DECISIONS

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

**1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9<sup>th</sup> 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 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

**District Court decision.** The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

**Void for vagueness claim.** Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

**Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State.** Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

**The Ninth Circuit on appeal affirmed the District Court.** The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

**Claims under the Administrative Procedure Act.** The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

**Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d.** The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor's equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

**Petition for Writ of Certiorari.** Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

## **2. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017).**

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at \*1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

**Factual and procedural history.** In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at \*2.



In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at \*2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at \*2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at \*2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African, and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at \*2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at \*3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at \*\*3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at \*4.

This case was filed in 2016. *Id.* at \*4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

**OMWBE did not act arbitrarily or capriciously in denying certification.** The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at \*\*7-12. The court held that



OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at \*8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at \*9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at \*10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff’s application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at \*\*10-11.

**Claims for violation of equal protection.** To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at \*\*12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at \*12, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at \*12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the

regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. *Id.* at \*13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at \*13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at \*13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

**Void for vagueness claim.** Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at \*13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *Id.* at \*14, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at \*14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at \*14. "Otherwise imprecise terms may avoid vagueness problems when

used in combination with terms that provide sufficient clarity.” *Id.* at \*14, quoting, *Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at \*14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, citing, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs’ void for vagueness challenges were dismissed. *Id.*

**Claims for violations of 42 U.S.C. §2000d against the State Defendants.** Plaintiffs’ claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at \*16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations’ requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at \*16, citing, *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at \*17, quoting, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at \*17.

**Holding.** Therefore, the court ordered that Plaintiffs’ Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants’ Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants’ Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants’ Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

**3. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9<sup>th</sup> Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).**

**Note:** The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

**Introduction.** Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

**Factual and procedural background.** *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant”

minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

**AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT.** The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at \*2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at \*2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 997-999.

**MDT study.** MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,”

and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at \*2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at \*3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

**Montana’s DBE utilization after ceasing the use of contract goals.** The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at \*3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana’s overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

**Mountain West’s claims for relief.** Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at \*3. Mountain West’s claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana’s DBE program. *Id.*

**The two-prong test to demonstrate that a DBE program is narrowly tailored.** The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have



actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, May 16, 2017, at 6-7.

**District Court Holding in 2014 and the Appeal.** The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at \*\*1-4 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 8.
2. The study relied on a telephone survey of a sample of Montana contractors. *Mountain West* argued that (a) it is unclear how the study selected that sample, (b) only a small percentage

of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 8-9.
4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 9.

**The post-2005 decline in participation by DBEs.** The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

**Anecdotal evidence of discrimination.** The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and quoting, *Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at \*3.

**Conclusion.** The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at \*4 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 11. The case on remand was voluntarily dismissed by stipulation of parties (March 14, 2018).

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business Enterprise ("DBE") program unconstitutionally provided race- and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

**Court Applies *Western States Paving Co. v. Washington State DOT* decision.** In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9<sup>th</sup> Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the

Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

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

*"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination."* *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

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

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

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

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

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian-Pacific, and Native American firms. *Id.* However, the

research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

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

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

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

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

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

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

**Caltrans' DBE Program held constitutional on the merits.** The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

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

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

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

**Application of strict scrutiny standard articulated in *Western States Paving*.** The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

**Evidence of discrimination in California contracting industry.** The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at \*7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring



“the cold numbers convincingly to life.” *Id.* (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT’s DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington’s data “did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state.” *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.*



The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id. quoting Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1197 *quoting Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at \*9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, *citing Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based

discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

**Program tailored to groups who actually suffered discrimination.** The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

**Consideration of race-neutral alternatives.** The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the

Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

**Certification affidavits for Disadvantaged Business Enterprises.** The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

**Application of program to mixed state- and federally-funded contracts.** The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

**Conclusion.** The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, quoting *Western States Paving*, 407 F.3d at 991, citing *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id.* at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

## 6. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden’s bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden’s mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT’s DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*



**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

**Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from



subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.” *Id.* at 4, *citing Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at \*4, *quoting AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at \*4, *quoting AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

## **7. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012)**

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona’s former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

**Factual background.** ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein’s overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182*. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182*.

**District Court rulings.** Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein’s claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9<sup>th</sup> Cir. 2005). This left only Braunstein’s damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183*.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT’s DBE program had affected him personally. The court noted that “Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract.” *Id. at 1183*. The district court found that Braunstein’s inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

**Lack of standing.** The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT’s DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185*. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government “affirmative action” program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein’s surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is “able and ready” to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded

Braunstein's ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

**Summary judgment granted to ADOT.** The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9<sup>th</sup> Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Equity Act for the 21<sup>st</sup> Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

**Facial challenge (Federal Government).** The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

**As-applied challenge (State of Washington).** Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their

local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6<sup>th</sup> Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, citing *Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9<sup>th</sup> Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7<sup>th</sup> Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6<sup>th</sup> Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*



WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

**9. Western States Paving Co. v. Washington DOT, USDOT & FHWA, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion)**



This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored

and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

#### **10. Monterey Mechanical v. Wilson, 125 F.3d 702 (9<sup>th</sup> Cir. 1997)**

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9<sup>th</sup> Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme [did] not involve racial or gender quotas, set-asides or preferences," the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court's finding, such a difference was not *de minimis*. *Id.*

The 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 (10<sup>th</sup> Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5<sup>th</sup> Cir. 1996). The court held that the statute violated the Equal Protection Clause.

#### **11. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9<sup>th</sup> Cir. 1991)**

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city’s bid preference program. 950 F.2d 1401 (9<sup>th</sup> Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional

claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, citing *Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this subpart of strict scrutiny review." *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9<sup>th</sup> Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 quoting *Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied

contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

## **12. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)**

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9<sup>th</sup> Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County’s MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of



discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where “gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.” *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out



that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing Croson, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services

and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

**13. Coral Construction, Inc. v. City and County of San Francisco, et. al., 50 Cal. 4th 315, 235 P.3d 947, 113 Cal.Rptr.3d 279 (S. Ct. Cal. 2010)**

In *Coral Construction, Inc. v. the City and County of San Francisco* (“*Coral Construction*”), the Supreme Court of the State of California considered an action brought against the City and County of San Francisco for declaratory and injunctive relief from an ordinance establishing an MBE/WBE program, which established race- and gender-based remedies on construction contracts. 235 P.3d at 952-956. The parties filed cross-motions for summary judgment in the Superior Court of the City and County of San Francisco. 235 P.3d at 955-56. The Superior Court struck down the MBE/WBE ordinance as violative of California’s constitutional amendment (Proposition 209) prohibiting race- and gender-based preferences in public contracting. 235 P.3d at 956.

The City and County of San Francisco (the “City”) appealed to the California Court of Appeals, which affirmed in part, reversed in part, and remanded the case back to the Superior Court of the City and County of San Francisco. 235 P.3d at 956. The Court of Appeals remanded the case for adjudication of the City’s claim that the federal equal protection clause required the ordinance. *Id.* The Supreme Court of the State of California granted review, superseding the opinion of the California Court of Appeals. *Id.*

**Political structure doctrine.** Article I, section 31 of the California Constitution (“section 31”) prohibits a city awarding public contracts to discriminate or grant preferential treatment based on race or gender. 235 P.3d at 952. The Court stated that the City of San Francisco, “whose public contracting laws expressly violate section 31 challenges its validity under the so-called political structure doctrine, a judicial interpretation of the federal equal protection clause.” 235 P.3d at 952. The Court held that section 31 does not violate the political structure doctrine. *Id.* The Court also held that section 31 prohibits race- and gender-conscious programs the federal equal clause permits but does not require. 235 P.3d at 957. The Court stated that section 31 prohibits discrimination and preferential treatment, but poses no obstacle to race- or gender-conscious measures required by federal law or the federal Constitution. *Id.*

The Court, joining with the United States Court of Appeals for the Sixth and Ninth Circuits, concluded that the political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender and other similar classifications. *Id.* at 958-9. The Court found that a generally applicable rule forbidding preferences and discrimination not required by equal protection, such as section 31, does not require the same justification as a remedy in which racial preferences are required by equal protection as a remedy for discrimination. *Id.* at 960.

**Federal funding exception.** The Court also rejected the City’s argument that the MBE/WBE ordinance is unaffected by section 31 because the ordinance falls within the exception set out in subdivision (e) of section 31, which provides the section shall not be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state. 235 P.3d at 961. The Court rejected the City’s argument that its MBE/WBE ordinance invokes the federal funding exception to section 31 in subdivision (e). *Id.* The Court concluded that the relevant federal regulations do

not require racial preferences by the City. *Id.* The Court only addressed the question whether the relevant federal regulations, independently of the federal equal protection clause, required the City's MBE/WBE ordinance. *Id.* at n. 14.

The Court found that the federal regulations did not compel the City to adopt the MBE/WBE ordinance to avoid a loss of federal funding. *Id.* at 962. The Court made a distinction between regulations that mention race-based remedies which are permissive from regulations that require race-based remedies. *Id.* The Court held that the federal funding exception under subdivision (e) of section 31 does not exempt the MBE/WBE ordinance from section 31's general prohibition of racial preferences. *Id.* at 962.

**Federal compulsion argument.** Finally, the Court considered the City's argument that the federal equal protection clause requires the MBE/WBE ordinance as a remedy for the City's own discrimination. 235 P.3d at 962. The Court held the California Court of Appeals ruled correctly and affirmed its judgment remanding the case for the limited purpose of adjudicating the issue of whether the federal equal protection clause requires the MBE/WBE ordinance as a remedy for the City's own discrimination under the federal compulsion doctrine. *Id.*

The Court stated that unlike the political structure and federal funding issues, which it may resolve as questions of law, the federal compulsion claim is largely factual and depends on the evidence supporting the City's decision to adopt race-conscious legislation. *Id.* at 963.

The Court offered certain "comments" to assist the superior court in resolving the federal compulsion issue on remand. 235 P.3d at 963-965. The Court stated that the relevant decisions hold open the possibility that race-conscious measures might be required as a remedy for purposeful discrimination in public contracting. *Id.* at 963. The Court said that the "only possibly compelling governmental interest implicated by the facts of this case is the interest in providing a remedy for purposeful discrimination." *Id.* at 964.

The Court held that for the City to defeat plaintiff's motion for summary judgment, the City must show that triable issues of fact exist on each of the factual predicates for its federal compulsion claim, namely: (1) that the City has purposely or intentionally discriminated against MBE's and WBE's; (2) that the purpose of the City's MBE/WBE ordinance is to provide a remedy for such discrimination; (3) that the ordinance is narrowly tailored to achieve that purpose; and (4) that a race- and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury. 235 P.3d at 964. The City, the Court stated, must establish all of these points to establish the federal compulsion doctrine. *Id.*

#### **14. Hi-Voltage Wire Works, Inc. v. City of San Jose, 101 Cal.Rptr.2d 653, 12 P.3d 1068 (Cal. 2000)**

In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court held the City of San Jose's Nondiscrimination/Nonpreferential Treatment Program Applicable to Construction Contracts in Excess of \$50,000 (the "Program"), a goals oriented program requiring utilization of minority and women subcontractors or documentation of best efforts at utilization, violated Article I, Section 31 of the California Constitution as amended by Proposition 209.

**Background.** The Program at issue was adopted after the passage of Proposition 209 and sought to clarify the City's earlier goals oriented program that was enacted after the City commissioned a disparity study in 1990 that reported a disparity in as to the amount of contract dollars awarded to MBE subcontractors. The Program required contractors to fulfill an outreach or a participation requirement and applied to all contractors, including MBEs and WBEs and those not planning to subcontract out any portion of the contract. Hi-Voltage bid on a contract and because it intended to perform all of the work itself and not hire any subcontractors, it did not comply with the terms of the Program and was deemed a non-responsive bidder. Upon challenge thereto, the trial court held the Program violated Article I, Section 31; the Court of Appeals affirmed.

In affirming the lower courts and holding the Program unconstitutional, the California Supreme Court looked specifically to Title VII of the Civil Rights Act ("Title VII") and found that Article I, Section 31 "closely parallels this provision in both language and purpose;" the Court thus examined U.S. Supreme Court cases interpreting Title VII.

The Court found the Supreme Court's decision in *Steelworkers v. Weber*, 443 U.S. 193 (1979) marked a substantial modification in the interpretation and application of Title VII. In *Weber* and its progeny, the Supreme Court "interpreted Title VII to permit race-conscious action whenever the job category in question is traditionally segregated." 12 P.3d at 1077 (internal quotations omitted). The Court determined its own jurisprudence indicated a "fundamental shift from a staunch anti-discrimination jurisprudence to approval, sometimes endorsement, of remedial race- and sex- conscious government decision making." *Id.* at 1081

**Proposition 209.** In 1996, voters approved Proposition 209, adding Section 31 to Article I of the California Constitution and providing as follows:

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The Court found the language of the amendment was clear and found nothing in the ballot arguments or legislative analysis to indicate "discriminate" or "preferential treatment" should have any special meaning. The Court determined the intent of Proposition 209 was to "reinstigate the interpretation of the Civil Rights Act and equal protection that predated *Weber*."

**Document and Outreach Component violated Proposition 209.** The Court concluded the Program violated Proposition 209 inasmuch as the participation component is discriminatory against non-M/WBE's and the outreach component grants preferential treatment to M/WBE's. Specifically, the Court found the outreach component "requires contractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-MBE's/WBE's." *Id.* at 1068.

The Court did note however that not all outreach efforts are unlawful; rather the Court found "voters intended to preserve outreach efforts to disseminate information about public

employment, education, and contracting not predicated on an impermissible classification." *Id.* The Court expressed no opinion regarding the scope of such efforts.

In light of the analysis of Proposition 209 contained in the ballot pamphlet, the court found it is clear that the voters reasonably would have believed that an outreach program targeted to specific individuals or groups on the basis of their race or gender would be considered a program that grants preferential treatment within the meaning of article I, section 31. Interpreting the language of article I, section 31, to effectuate the voters' intent, the court said it must conclude that an outreach program directed to an audience on the basis of its members' race or gender constitutes a program that grants preferential treatment for purposes of article I, section 31. In view of this conclusion, the court stated it is clear that the Documentation of Outreach component that is challenged in this case violates the newly enacted constitutional provision.

As noted, the outreach component in question places an obligation on prime contractors to solicit bids from, and make follow-up contacts to, a specified number of MBE or WBE subcontractors, but the provision places no similar obligation on prime contractors to undertake outreach efforts to non-MBE or non-WBE subcontractors. The court concluded this aspect of the outreach component in itself grants preferential treatment to subcontractors on the basis of race and gender.

Moreover, the court said the city's outreach component contains an additional feature that requires a prime contractor to negotiate in good faith with and to justify any rejection of an offer made by any one of the MBE/WBE subcontractors that expresses an interest in participating in the project, while the provision places no similar requirements upon a prime contractor with regard to proposals made by a non-MBE or non-WBE subcontractor. These additional features of the outreach component, according to the court, similarly grant preferential treatment to subcontractors on the basis of race or gender. As a practical matter, the court pointed out, these features may create a significant incentive for a prime contractor to grant preferential treatment to an MBE/WBE subcontractor that expresses interest in participating in the project, in order to avoid a claim that the contractor's negotiation or justification for rejection was inadequate.

The Court also found that federal law did not require a different result as the "federal courts have held Proposition 209 does not conflict with Titles VI, VII, or IX of the Civil Rights Act of 1964."



## **E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions**

### **Recent Decisions in Federal Circuit Courts of Appeal**

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

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.) The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation (“NCDOT”). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, citing, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual



goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

**Strict scrutiny.** The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 *quoting* *Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, *quoting* *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting*, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, *quoting* *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir.

2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4<sup>th</sup> Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

**Intermediate scrutiny.** The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.*, *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id.* at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id.* at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.’ 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on

“reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 quoting *Hogan*, 458 U.S. at 726.

**Plaintiff’s burden.** The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

**Statistical evidence.** The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8<sup>th</sup> Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program’s suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff’s argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

**Anecdotal evidence.** The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due,



did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

**Strong basis in evidence that the minority participation goals were necessary to remedy discrimination.** The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that



such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by “disturbing” anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

**Narrowly tailored.** The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State’s compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

**Neutral measures.** The Court held that narrowly tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” but a state need not “exhaust [ ] ... every conceivable race-neutral alternative.” 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

**Duration.** The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

**Program’s goals related to percentage of minority subcontractors.** The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

**Flexibility.** The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

**Burden on non-MWBE/DBEs.** The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

**Overinclusive.** The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State’s compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

**Women-owned businesses overutilized.** The study’s public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Asheville, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector

disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was “the result of mere chance.” *Id.* at 255. The Court found troubling the “evidentiary gap” that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program “must always tie private discrimination to public action.” 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data’s probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program’s current inclusion of women subcontractors in setting participation goals. *Id.*

**Holding.** The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme’s flexibility and responsiveness to the realities of the marketplace, and given the State’s strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State’s application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court’s judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

**Concurring opinions.** It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

## **2. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006)**

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent

assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

### **3. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7<sup>th</sup> Cir. 2006)**

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties’ dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that “§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate.”

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the

Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

#### **4. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11<sup>th</sup> Cir. 2005) (unpublished opinion)**

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11<sup>th</sup> Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.'" *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.



*Id.* The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.



Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious ... policies must be limited in time." *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5<sup>th</sup> Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

#### **5. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)**

This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

**Case history.** Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10<sup>th</sup> Cir. 2003). The ordinance established participation

goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

**The studies.** Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than

majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

**The legal framework applied by the court.** The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in



preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, *citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

#### **The Court’s rejection of CWC’s arguments and the district court findings.**

**Use of marketplace data.** The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured



discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability

of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

**Variables.** CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because of* industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest [ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

**Specialization.** The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

**Utilization of MBE/WBEs on City projects.** CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program

and “reflect[ed] the intended remedial effect on MBE and WBE utilization.” *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver’s position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

**Anecdotal evidence.** The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver’s witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC’s argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. The court stated that anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. *Id.*

After considering Denver’s anecdotal evidence, the district court found that the evidence “shows that race, ethnicity and gender affect the construction industry and those who work in it” and that the egregious mistreatment of minority and women employees “had direct financial consequences” on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver’s initial burden. *Id.* at 989-90, citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

**Summary.** The court held the record contained extensive evidence supporting Denver’s position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver’s evidence, the court stated CWC was required to “establish that Denver’s evidence did not constitute strong evidence of such discrimination.” *Id.* at 991, quoting *Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver’s evidence. Rather, it must present “credible, particularized evidence.” *Id.*, quoting *Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

**Narrow tailoring.** Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver’s program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found *Concrete Works* did not challenge the district court’s conclusion with respect to the second prong of *Croson’s* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, citing *Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court’s earlier determination that Denver’s affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

## **6. In re City of Memphis, 293 F.3d 345 (6th Cir. 2002)**

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis’ MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.



The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6<sup>th</sup> Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 F.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

## **7. Builders Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001)**

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7<sup>th</sup> Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("VMI"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id.* The



court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, quoting in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11<sup>th</sup> Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against

nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

#### **8. Associated Gen. Contractors v. Drabik, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)**

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733.

The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

**Strict scrutiny.** The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, citing *Croson*, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, quoting *Croson*, 488 U.S. at 497.

**Statistical evidence: compelling interest.** The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio's most "compelling" statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio's statistical comparison was that the percentage of minority-owned businesses in Ohio "did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts." *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore "made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size." *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id.* at 736. "If MBEs comprise 10 percent of the total number of contracting firms in the state, but only get 3 percent of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete." *Id.* at 736.

The Court stated the only cases found to present the necessary "compelling interest" sufficient to justify a narrowly tailored race-based remedy, are those that expose "pervasive, systematic, and obstinate discriminatory conduct. ..." *Id.* at 737, quoting *Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

**Narrow tailoring.** A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting ...." *Id.* at 737, quoting *Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from "overinclusiveness." *Id.* at 737, quoting *Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen

in Ohio until recently, receive 10 percent of state contracts, while African-Americans receive none. *Id.*

In addition, the Court found that Ohio's own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

## 9. W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999)

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

**City of Jackson MBE Program.** In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5 percent of all city contracts. 199 F.3d at 208. *Id.* The 5 percent goal was not based on any objective data. *Id.* at 209. Instead, it was a “guess” that was adopted by the City. *Id.* The goal was later increased to 15 percent because it was found that 10 percent of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program’s adoption, the City’s Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15 percent participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5 percent participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20 percent of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City’s adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15 percent. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15 percent MBE goal and did not adopt the disparity study. *Id.*

**W.H. Scott did not meet DBE goal.** In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5 percent WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1 percent. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City’s Financial Legal Departments, approved Scott’s bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the



DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

**District court decision.** The district court granted Scott’s motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15 percent minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City’s construction contracts only. *Id.* at 211. The district court found that Scott’s bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City’s budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

**Standing.** The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, “injury in fact” for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15 percent DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15 percent of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

**Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program.** The court first rejected the City’s contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is



immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City’s argument that the DBE classification created a preference based on “disadvantage,” not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the “relevant statistical pool,” of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* at 218, n.11. The sufficiency of a municipality’s findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study’s findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City’s Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City’s construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City’s construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City’s 15 percent DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

**Lost profits and damages.** Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott’s low bid because Scott failed to meet the Special Notice’s

DBE-participation goal, not because Scott's bid exceeded the City's budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

### **10. Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997)**

*Engineering Contractors Association of South Florida v. Metropolitan Dade County* is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11<sup>th</sup> Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBes, 19 percent for HBes, and 11 percent for WBEs. *Id.* at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." *Id.* Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

*Id.* at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

*Id.* (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11<sup>th</sup> Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

**The statistical evidence.** The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

**County contracting statistics.** The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”

*Id.* at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10<sup>th</sup> Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”

*Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The

Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id.*

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id.* (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id.*

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBes and HBes. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods



failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

**County subcontracting statistics.** The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of



its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

*Id.* The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id.*

**Marketplace data statistics.** The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

**The Wainwright Study.** The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.* The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." *Id.* "The study concluded that blacks, Hispanics, and women are less likely to

own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

**The Brimmer Study.** The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and

“complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

**Anecdotal evidence.** In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

*Id.* at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by

sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

**Narrow tailoring.** “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit

flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of

medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

*Id.* at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

*Id.*, quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

**Substantial relationship.** The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

### **11. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)**

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming*, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

**The Ordinance.** The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51 percent 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 2 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 15 percent goal was appropriate. The City maintained that the goal of 15 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 15 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 *Crosby*: 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 percent 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 percent 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 percent 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 percent 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 percent figure. That figure did not provide a strong basis in evidence for concluding that a 15 percent 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 percent set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City’s program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a “strong basis in evidence for its conclusion that [the] remedial action was necessary.” *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not “merely the product of unthinking stereotypes or a form of racial politics.” *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

## **12. Contractor’s Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993)**

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, 735 F.Supp. 1274 (E.D. Phila. 1990), granted summary judgment for the contractors 739 F.Supp. 227, and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, 945 F.2d 1260 (3d. Cir. 1991), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

**Procedural history.** Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this

lawsuit and invalidating the Ordinance in all respects. *Contractors Association v. City of Philadelphia*, 735 F.Supp. 1274 (E.D.Pa.1990). In an earlier opinion, the Third Circuit affirmed the district court's ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. *Contractors Association v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established "goals" for the participation of "disadvantaged business enterprises." § 17-503. "Disadvantaged business enterprises" (DBEs) were defined as those enterprises at least 51 percent owned by "socially and economically disadvantaged individuals," defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17-501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, 735 F.Supp. at 1283 & n. 3.

Turning to the merits of the Contractors' equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.



Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a “compelling government interest.” *Id.* at 995, *quoting*, 735 F.Supp. at 1295–98. The court also held the Ordinance was not “narrowly tailored,” emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; 735 F.Supp. at 1298–99. The court held the Ordinance’s preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, 735 F.Supp. at 1299–1309.

On appeal, the Third Circuit in 1991 affirmed the district court’s ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d Cir.1991). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

**Standing.** The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

**Standards of equal protection review.** The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

**Race, ethnicity, and gender.** The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged.” *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic



criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *Id.* at 999.

**A. Strict scrutiny.** Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

**B. Intermediate scrutiny.** The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, *citing*, *Hogan* 458 U.S. at 728. The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, *Coral Constr. Co. v. King County*, 941 F.2d 910, 930 (9th Cir.1991), *cert. denied*, 502 U.S. 1033 (1992); *Michigan Road Builders Ass’n, Inc. v. Milliken*, 834 F.2d 583, 595 (6th Cir.1987), *aff’d mem.*, 489 U.S. 1061(1989); *Associated General Contractors of Cal. v. City and County of San Francisco*, 813 F.2d 922, 942 (9th Cir.1987); *Main Line Paving Co. v. Board of Educ.*, 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance’s gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court’s choice of intermediate scrutiny to review the Ordinance’s gender preference. *Id.*

**Handicap.** The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* 735 F.Supp. at 1307. That standard validates the classification if it is “rationally related to a legitimate governmental purpose.” *Id.* at 1001, *citing* *Cleburne*, 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

**Constitutionality of the ordinance: race and ethnicity.** Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, *quoting*, 488 U.S. at 492, 509. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1002, *quoting*, 488 U.S. at 492.

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, citing 488 U.S. at 502.

Ruling the Philadelphia Ordinance’s racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance “possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan,” *Id.* at 1002, *quoting*, 735 F.Supp. at 1298. As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia’s population, the Ordinance’s declaration it was remedial, and “conclusory” testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting*, 1295-98.

In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. 735 F.Supp. at 1295. The Court said this reading overlooked the statement in *Croson* that a City can be a “passive participant” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, *quoting*, 488 U.S. at 492.

**Anecdotal evidence of racial discrimination.** The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, *quoting*, 488 U.S. at 480.

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, *quoting*, 735 F.Supp. at 1296.

The Third Circuit held, however, given *Croson's* emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, quoting, *Coral Constr.*, 941 F.2d at 919 (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” *Coral Constr.*, 941 F.2d at 919, the Court considered the statistical evidence proffered in support of the Ordinance.

**Statistical evidence of racial discrimination.** There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

**Pre-Enactment statistical evidence.** The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only 0.09 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, six firms owned by Asian-American persons, three firms owned by persons of Pacific Islands descent, and one other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented 0.15 percent of the available firms and Asian-American, Pacific-Islander, and "other" minorities represented 0.12 percent 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 0.27 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 15 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 15 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 15 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 15 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 10 percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.



The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

**Handicap and rational basis.** The Court then addressed the 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 2 percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses

testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

**Holding.** The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

### **13. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC"), 950 F.2d 1401 (9th Cir. 1991)**

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9<sup>th</sup> Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, citing *Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this subpart of strict scrutiny review." *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9<sup>th</sup> Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 quoting *Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to

discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides

and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

#### **14. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 1994).

**Background.** In, 1990, the Denver City Council enacted Ordinance (“Ordinance”) to enable certified racial minority business enterprises (“MBEs”) and women-owned business enterprises (“WBEs”) to participate in public works projects “to an extent approximating the level of [their] availability and capacity.” *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC’s findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver’s summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver’s program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

**Standing.** At the outset, the Tenth Circuit on appeal considered Denver’s contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance’s constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated “injury in fact” because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance’s requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating “injury in fact,” Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver’s race- and gender-conscious contract program. *Id.*

**Equal Protection Clause Standards.** The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance’s race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

**Permissible Evidence and Burdens of Proof.** In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509, The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id. citing, Croson* at 492.

**A. Geographic Scope of the Data.** Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan



Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works (“DPW”) construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body’s strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver’s contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id.* at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

**B. Anecdotal Evidence.** Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors’ experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver’s construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality’s institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring “cold numbers convincingly to life.” *Id.* at 1520, *quoting, International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus



deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

**C. Post–Enactment Evidence.** Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver’s enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality “must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief.” *Id.* at 1521, *quoting*, *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson*’s evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court’s determination of whether an ordinance’s deviation from the norm of equal treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

**D. Burdens of Production and Proof.** The court stated that the Supreme Court in *Croson* struck down the City of Richmond’s minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, *citing*, *Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments “must identify that discrimination ... with some specificity before they may use race-conscious relief.” *Id.*, *citing* *Croson*, at 504. The court said that the Supreme Court’s benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation was whether there exists a “*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.” *Id.*, *quoting*, *Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a “strong basis in evidence” that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, *citing*, *Wygant*, 476 U.S. at 292 (O’Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, *citing*, *Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

**E. Evidentiary Predicate Underlying Denver’s Ordinance.** The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid–1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

**1. Discrimination in the Award of Public Contracts.** The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

**(a) Federal Agency Reports of Discrimination in Denver.** Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, 0.7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was 0.05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

**(b) Denver's Reports of Discrimination.** Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects

funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report's description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained "no information about the number of minority or women owned firms that were used" on these bond projects. *Id.* at 1525. However, the court concluded the Report's description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver's data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore "tainted" and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. "non-goals public projects." *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

**DGS data.** The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services ("DGS") contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. Nevertheless, the court concluded Denver's data indicated significant WBE underutilization such that the Ordinance's gender classification arose from

“reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

**DPW data.** The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

**Empirical data.** The third evidentiary item supporting Denver’s contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver’s program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver’s empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver’s argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

**Availability data.** The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver’s data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a

more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted *Croson* impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id.* at 1527 citing, *Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id.* at 1529.



**(c) Evidence of Private Discrimination in the Denver MSA.** In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver’s expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from “financ[ing] the evil of private prejudice.” *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.



**(d). Anecdotal Evidence.** The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

**2. Summary.** The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size

of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

### **15. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)**

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9<sup>th</sup> Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at

919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing Croson, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if

the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

## **Recent District Court Decisions**

### **16. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017)**

In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising

out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

**Procedural and case history.** This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

**Defendant's contentions.** This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

**Federal government position.** The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

**Material facts in Indictment.** The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by,



among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of \$1.89 million." *Id.* at 746 . These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

**Motion to Dismiss—challenges to Federal DBE Regulations.** Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, *citing*, 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the



definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id.* at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)–(2). The phrases “industry practices” and “other relevant factors” are undefined, the court said, but “an undefined word or phrase does not render a statute void when a court could ascertain the term’s meaning by reading it in context.” *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, *quoting*, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

*Id.* at 756, *quoting*, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. 49 C.F.R. § 26.55(c)(2). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of

the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

*Id.* at 756, quoting, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

**Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts.** The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, 49 U.S.C. § 322(a) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); 23 U.S.C. § 304 (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); 23 U.S.C. § 315 (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, *Midwest Fence Corp.*, 840 F.3d at 942 (citing *Western States Paving Co. v. Washington State Dep’t of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000) ).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

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

sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

**17. Kossman Contracting Co., Inc. v. City of Houston, 2016 WL 1104363 (S.D. Tex. 2016).**

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at \*1. Kossman brought this action as an equal protection challenge to the City of Houston’s Minority and Women Owned Business Enterprise (“MWBE”) program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston’s construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at \*1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman’s expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston’s motion to exclude Kossman’s expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at \*1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at \*2.

**District court order adopting Memorandum & Recommendation of Magistrate Judge.**

**Dun & Bradstreet underlying data properly withheld and Kossman’s proposed expert properly excluded.** The district court first rejected Kossman’s objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court’s affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman’s proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman’s proposed

expert articulated no method and relied on untested hypotheses. *Id.* at \*2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at \*2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

**Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic.** The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at \*3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at \*3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at \*3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

**The anecdotal evidence is valid and reliable.** The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at \*3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at \*3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and

including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

**The data relied upon by the study was not stale.** The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at \*4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

**The Houston MWBE program is narrowly tailored.** The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at \*4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at \*4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to 4 percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than 4 percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

**Native-American-owned businesses.** The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at \*4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at \*5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at \*5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at \*5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at \*5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id.* at \*5.

**Conclusion.** The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at \*5.

**Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.**

**Kossman's proposed expert excluded and not admissible.** Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*



The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

**Relevant geographic market area.** The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

**Availability of MWBEs.** The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*



In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

**Disparity analysis.** The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by

industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

**Anecdotal evidence.** Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

**Regression analyses.** Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

**Narrow Tailoring factors.** The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to 4 percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to

meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the 34 percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the 4 percent substitution provision. *Id.* at 62. The MJ noted another district court’s opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

**Holding.** The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

**18. H. B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al., 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)**

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* (“Rowe”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

**Background.** In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and

requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

**September 28, 2007 Order of the District Court.** On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina's MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced



them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

**Compelling interest.** The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

**Narrowly tailored.** The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal



cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4<sup>th</sup> Cir. 2010), discussed above.

**19. Thomas v. City of Saint Paul, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)**

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City

contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

**The VOP.** Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

**Analysis and Order of the Court.** The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific

groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

**Plaintiff's claims.** The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8<sup>th</sup> Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

## **20. Thompson Building Wrecking Co. v. Augusta, Georgia, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)**

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification

and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at \*9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined “Georgia’s racist history” in contracting and procurement, and examined certain data related to Augusta’s contracting and procurement. *Id.* at \*1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City’s implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a “good faith effort” to ensure DBE participation. *Id.* at \*6. The court rejected this argument noting that bidders were required to submit a “Proposed DBE Participation” form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: “Because a person’s business can qualify for the favorable treatment based on that person’s race, while a similarly situated person of another race would not qualify, the program contains a racial classification.” *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing to Croson*), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at \*7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at \*7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at \*8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at \*9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

## **21. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)**

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the

Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994." *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id.* at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction." *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

*Id.* The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.



The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*



The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id.* (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is

accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors*

*Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

## **22. Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp.2d 1307 (N.D. Fla. 2004)**

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided

that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng’g Contractors Ass’n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’” *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

### **23. The Builders Ass’n of Greater Chicago v. The City of Chicago, 298 F. Supp.2d 725 (N.D. Ill. 2003)**

This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ...” *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City’s MWBE Program could not stand in its

present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a “compelling interest in not having its construction projects slip back to near monopoly domination by white male firms.” The court ruled a brief continuation of the program for six months was appropriate “as the City rethinks the many tools of redress it has available.” Subsequently, the court declared unconstitutional the City’s MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

#### **24. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 218 F. Supp.2d 749 (D. Md. 2002)**

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The



court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

## **25. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)**

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10<sup>th</sup> Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

**Compelling state interest.** The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial



prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6<sup>th</sup> Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

**Narrow tailoring.** The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 citing *Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program

was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state’s goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

## **26. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000)**

Plaintiff Associated Utility Contractors of Maryland, Inc. ("AUC") filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance ("the Ordinance"). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. ("MMCA") opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment ("the December injunction"). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City's 1999 numerical set-aside goals for Minority-and Women-Owned Business Enterprises ("MWBs"), which had been established at 20 percent and 3 percent, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff's facial attack on the constitutionality of the Ordinance, concluding that there existed "a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action." *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

**Facts and Procedural History.** In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20 percent of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3 percent to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises....” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*



In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20 percent MBE and 3 percent WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20 percent MBE and 3 percent WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20 percent and 3 percent goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

**AUC has associational standing.** AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “ ‘injury in fact’ is the inability to compete on an equal footing in the bidding process ...” *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 quoting, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City’s set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

**Strict scrutiny analysis.** AUC complained that since their initial promulgation in 1990, the City’s set-aside goals required AUC members to “select or reject certain subcontractors based upon the



race, ethnicity, or gender of such subcontractors” in order to bid successfully on City public works contracts for work exceeding \$25,000 (“City public works contracts”). *Id.* at 618. AUC claimed, therefore, that the City’s set-aside goals violated the Fourteenth Amendment’s guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, *citing United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 619, *quoting Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id.* *citing Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

*Id.* at 619, *quoting Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, *citing Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 619, *quoting Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a “two step analysis for evaluating a race-conscious remedy.” *Id.* at 619 *citing Maryland Troopers Ass’n*, 993 F.2d at 1076. “First, the [government] must have a ‘strong basis in evidence for its conclusion that remedial action [is] necessary....’ ‘Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ ” *Id.* at 619, *quoting Maryland Troopers Ass’n*, 993 F.2d at 1076 (*citing Croson* ).

The second step in the Croson analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

*Id.* at 620, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

**Intermediate scrutiny analysis.** The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 quoting *Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[ ] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, quoting *Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying Croson’s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, quoting *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10 percent gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

**Preenactment versus postenactment evidence.** In evaluating the first step of the Croson test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial

action was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, quoting *Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20 percent MBE participation in City construction subcontracts, and for analogous reasons, the 3 percent WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* “strong basis in evidence.” *Id.* at 621, n.6, citing *Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

**City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established.** In this case. the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20 percent for MBEs and 3 percent for WBEs. *Id.* at 621. Based on the absence of any record of what

evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20 percent preference is not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3 percent preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20 percent MBE and 3 percent WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

**Holding.** The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

## **27. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000)**

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro Dade County*, 122 F.3d 895 (11<sup>th</sup> Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the

County must show that it was a “passive participant” in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are “exacerbating a pattern of prior discrimination that can be identified with specificity.” *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

*Id.* The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County’s standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that “[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common



complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity .... *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County’s argument that its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program’s gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present “sufficient probative evidence” of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County’s M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating



only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11<sup>th</sup> Cir. 2000).

## **28. Associated Gen. Contractors v. Drabik, 50 F. Supp.2d 741 (S.D. Ohio 1999)**

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

**Strict Scrutiny.** The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

(1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

(2) a program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id.*

(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially “worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report.” *Id.* at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7%) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio’s program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

**Narrow Tailoring.** The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to “race-based quotas”. *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas”. *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the

availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

**Conclusion.** The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

## **29. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998)**

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support

the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

## **F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments**

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

### **Recent Decisions in Federal Circuit Courts of Appeal**

#### **1. Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017)**

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at \*1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment

right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at \*1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (see discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at \*1.

**Procedural history.** Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

*Id.* at \*3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at \*4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at \*4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no "affirmative evidence" that IDOT's implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at \*4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at \*4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at \*4.

**Standing to challenge the DBE Programs generally.** The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at \*5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at \*5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at \*5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at \*5.

**Standing to challenge the IDOT Target Market Program.** The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at \*6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at \*6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

**Facial versus as-applied challenge to the USDOT Program.** In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at \*6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at \*6 citing *Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*



The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at \*6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at \*6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

**Federal DBE Program: Narrow Tailoring.** The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at \*7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at \*7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under- inclusiveness. *Id.* at \*7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at \*7, citing 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at \*7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at \*7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at \*8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at \*8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at \*8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE

participation you would expect absent the effects of discrimination. *Id.* at \*8, citing § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at \*8.

**Midwest Fence “mismatch” argument: burden on third parties.** Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at \*8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at \*8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at \*8, citing § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at \*8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “only on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, quoting § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at \*8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at \*8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at \*8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at \*9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less

frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at \*9, citing § 26.39(b). The court also noted that the federal program contemplates DBEs' ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at \*9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at \*9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at \*9.

**Over-Inclusive argument.** Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at \*9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence's criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at \*9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at \*9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at \*10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

**Claims against IDOT and the Tollway: void for vagueness.** Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of

DBEs. *Id.* at \*11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at \*11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at \*12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at \*12.

**Equal Protection challenge: compelling interest with strong basis in evidence.** In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at \*12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

**IDOT program.** IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at \*13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at \*13. The study found that DBEs made

up 25.55 percent of prime contractors in the construction field, received 9.13 percent of prime contracts valued below \$500,000 and 8.25 percent 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 percent of available subcontractors, and in the construction industry they receive 44.62 percent of available subcontracts, but those subcontracts amounted to only 10.65 percent 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 percent 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 percent.

**Tollway program.** Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at \*13. The study examined the Tollway's historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at \*14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at \*14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at \*14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at \*14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01 percent across all construction contracts. *Id.* In

addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

**Midwest Fence’s criticisms.** Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at \*14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at \*14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at \*15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at \*15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at \*15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at \*15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at \*15.

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at \*15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence’s strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at \*15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at \*15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at \*15.



The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at \*15. The court found Midwest Fence’s expert’s “speculation” that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence’s argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, an

d that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at \*15. The court also rejected Midwest Fence’s attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants’ statistical analyses. *Id.* at \*15.

In connection with Midwest Fence’s argument relating to the Tollway defendant, Midwest Fence argued that the Tollway’s supporting data was from before it instituted its DBE program. *Id.* at \*16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at \*16. The court found this point persuasive even assuming some of the Tollway’s data were not exact. *Id.* The court said that while every single number in the Tollway’s “arsenal of evidence” may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence’s “abstract criticisms” do not undermine that core of evidence. *Id.* at \*16.

**Narrow Tailoring.** The court applied the narrow tailoring factors to determine whether IDOT’s and the Tollway’s implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at \*16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants’ strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at \*17. The court rejected Midwest Fence’s arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the

evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at \*17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at \*17. In addition, the Tollway granted at least some front-end waivers involving 1.02 percent of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at \*17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at \*17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at \*17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at \*18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at \*18. "Evidence that subcontractors were being frozen out of

the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting.” *Id.* at \*18. The court concluded that Midwest Fence “has shown how the Illinois program *could* yield that result but not that it actually does so.” *Id.*

In light of the IDOT and Tollway programs’ mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at \*18. The court stated that the “theoretical possibility of a ‘mismatch’ could be a problem, but we have no evidence that it actually is.” *Id.* at \*18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at \*18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* “So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination”, according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact “on this point.” *Id.*

**Petition for a Writ of Certiorari.** Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

**2. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016).**

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at 680. Under IDOT’s DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as “waivers.” *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In

calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77 percent contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at \*30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

**Dunnet Bay lacks standing to raise an equal protection claim.** The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being

forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

**Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority.** The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 percent 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 percent goal was “arbitrary” and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT’s methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court’s conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 percent of the waiver requests. *Id.* The court stated that IDOT’s record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay’s challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT’s determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT’s supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay’s efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

**Conclusion.** The court affirmed the district court’s grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

**Petition for a Writ of Certiorari Denied.** Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7<sup>th</sup> Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government .... If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution."

*Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7<sup>th</sup> Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26 ). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska

Department of Roads (“Nebraska DOR”) under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT’s and Nebraska DOR’s implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side’s position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state’s implementation becomes relevant to a reviewing court’s strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal “must be based on demonstrable evidence” as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state’s determination that more DBEs would

be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the “maximum feasible portion” of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state’s failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court’s narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contacting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is



available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that

prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*.)

**5. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001)**

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court's vacation of the Tenth Circuit's dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause ("SCC"), which employs race-conscious presumptions designed to favor minority enterprises and other "disadvantaged business enterprises" ("DBEs"). The court's evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

**“Compelling Interest” in race-conscious measures defined.** The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O’Connor explicitly states: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that “remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions” (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that “the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry’ by allowing tax dollars ‘to finance the evil of private prejudice.’” *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as “remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups.” *Id.*

**Evidence required to show compelling interest.** While the government’s articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The “benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation [i]s whether there exists a ‘*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.’” *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, citing *Concrete Works*, 36 F.3d at 1520–21.

After the government’s initial showing, the burden shifted to Adarand to rebut that showing: “Notwithstanding the burden of initial production that rests” with the government, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* at 1166, quoting *Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, citing, *Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166-67 citing, *Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

**Evidence in the present case.** There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051-52 & nn. 12-21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program.

*Id.* at 1167, quoting, *Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government’s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local

disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

**a. Barriers to minority business formation in construction subcontracting.** As to the first kind of barrier, the government’s evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to “old boy” networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors’ unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government’s evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

**b. Barriers to competition by existing minority enterprises.** With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government’s evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up “anticipated costs, and therefore the bid, for minority-owned businesses.” *Id.* at 1172.

Contrary to Adarand’s contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government’s evidence as to the kinds of obstacles minority subcontracting businesses face

constituted a strong basis for the conclusion that those obstacles are not “the same problems faced by any new business, regardless of the race of the owners.” *Id.* at 1172.

**c. Local disparity studies.** The court noted that following the Supreme Court’s decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government’s review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area “minority firms still receive only 87 cents for every dollar they would be expected to receive” based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government’s] prime contractors, an inference of discriminatory exclusion could arise.” *Id.* quoting, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

The court said that it was mindful that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 1172, quoting, *Croson* at 501–02. But the court found that here, it was unaware of such “special qualifications” aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, citing, *Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13 percent disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, quoting, *Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court



found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

**d. Results of removing affirmative action programs.** The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, quoting, *Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, citing, *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

**Adarand’s rebuttal failed to meet their burden.** Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand’s contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* “Race” the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.” *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O’Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government’s initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court’s finding of a compelling interest. *Id.*

**Narrow Tailoring.** The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

*Id.* at 1177, *quoting*, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O’Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, citing, *Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.” 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

*Id.* at 1177.

Justice O’Connor’s majority opinion in *Croson* added a further factor to the court’s analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because “there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, quoting, *Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, quoting, *Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); *see also* 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, *see* 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. *See* 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186.

The court stated that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

**Holding.** Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III*'s strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id.* at 1178.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff *Adarand* "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188. Therefore, the court did not address the constitutionality of an as applied attack on the implementation of the federal program by the Colorado DOT or other local or state governments implementing the Federal DBE Program.

The court thus reversed the district court and remanded the case.

## Recent District Court Decisions

### **6. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7<sup>th</sup> Cir. 2016).**<sup>226</sup>

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants’ Motion to Dismiss Midwest Fence’s request for punitive damages.

**Equal protection framework, strict scrutiny and burden of proof.** The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court

---

<sup>226</sup> 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.

decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

**Standing.** The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

**Facial challenge to the Federal DBE Program.** The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said,



presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727, *citing Rothe*, 545 F.3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race- and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10<sup>th</sup> Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

**Federal DBE Program is narrowly tailored.** Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly

tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program’s goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program’s presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become “overconcentrated” in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

**As-applied challenge to IDOT's implementation of the Federal DBE Program.** In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7<sup>th</sup> Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

**IDOT's evidence of discrimination and DBE availability in Illinois.** The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.*

According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

**Court rejected Midwest arguments as to the data and evidence.** The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

**Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations.** The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or

contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing* to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

**Burden on non-DBE subcontractors; overconcentration.** The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set



in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

**Use of race-neutral alternatives.** The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

**Duration and flexibility.** The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

**Facial and as-applied challenges to the Tollway program.** The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the

Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

**Midwest's challenges to the Tollway evidence insufficient and speculative.** In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

**Tollway Program is narrowly tailored.** As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

**Notice of Appeal.** Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is discussed above in the Seventh Circuit decision in 2016.

## **7. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)**

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs

Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

**Procedural background.** Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race-based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at \*10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* \*10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

**Constitutional claims.** The Court states that the “heart of plaintiffs’ claims is that the DBE Program and MnDOT’s implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work.” *Id.* at \*11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they “simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of “correcting discrimination”, while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

**A. Strict scrutiny.** It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at \*12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at \*12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at \*12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

**B. Facial challenge based on overconcentration.** The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at \*12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at \*.

**1. Compelling governmental interest.** The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* \*13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at \*13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

**Congressional evidence of discrimination: disparity studies and barriers.** Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at \*13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* \*14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* \*14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at \*14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at \*6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* \*6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at \*5.



The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at \*14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at \*14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at \*14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at \*14.

**Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.**

The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at \*14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at \*14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at \*15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at \*15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971-73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE

Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at \*15.

**2. Narrowly tailored.** The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at \*15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

**Overconcentration.** Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at \*15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at \*16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at \*16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at \*16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already

overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at \*16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at \*16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at \*16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at \*17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at \*17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

**C. Facial challenged based on vagueness.** The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at \*17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

**D. As-Applied Challenges to MnDOT’s DBE Program: MnDOT’s program held narrowly tailored.**

Plaintiffs brought three as-applied challenges against MnDOT’s implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at \*17.

**1. Alleged failure to find evidence of discrimination.** The Court held that a state’s implementation of the Federal DBE Program must be narrowly tailored. *Id.* at \*18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that “better data was available” and the recipient of federal funds “was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results.” *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs’ expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at \*18. Plaintiffs’ expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

**Plaintiffs present no affirmative evidence that discrimination does not exist.** The Court held that plaintiffs’ disputes with MnDOT’s conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT’s implementation of the Federal DBE Program is not narrowly tailored. *Id.* at \*18. First, the Court found that it is insufficient to show that “data was susceptible to multiple interpretations,” instead, plaintiffs must “present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.” *Id.* at \*18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs’ expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota’s public contracting. *Id.* at \*18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at \*18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient’s calculation of success in meeting the overall goal. *Id.* at \*18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT’s compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at \*18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at \*18. Accordingly, the Court granted the State defendants’ motion for summary judgment with respect to this claim.

**2. Alleged inappropriate goal setting.** Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at \*19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at \*19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

**3. Alleged overconcentration in the traffic control market.** Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at \*20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at \*20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at \*20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify

overconcentration or failing to address it. *Id.* at \*20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

**III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000.** Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at \*21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

**Holding.** Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

**8. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7<sup>th</sup> Cir. 2015).**

*In Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.*

**Motion to Dismiss certain claims granted.** IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

**Motions for Summary Judgment.** Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at \* 1. IDOT also filed a Motion for Summary Judgment, alleging that



all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

**Factual background.** Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at \*3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at \*4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at \*4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at \*9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at \*23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the

decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at \*23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at \*25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

**IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority.** The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at \*26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7<sup>th</sup> Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at \*26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at \*26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*." *Id.* at \*26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at \*27.

**The "no-waiver" policy.** The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at \*27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay's assertion that IDOT adopted a "no-waiver" policy was unsupported and contrary to the record evidence. *Id.* at \*27. The Court found the undisputed facts established that IDOT did not have a "no-waiver" policy, and that IDOT did not exceed its federal authority because it did not adopt a "no-waiver" policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

**IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law.** The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a "judgment call" regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at \*28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at \*29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at \*24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

**Dunnet Bay lacked standing to raise an equal protection claim.** The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id.* at \*29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at \*30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at \*30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at \*30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at \*30.

**Dunnet Bay did not establish equal protection violation even if it had standing.** The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the “injury in fact” in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at \*31. Dunnet Bay, the Court said, implied that but for the alleged “no-waiver” policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a “no-waiver” policy. *Id.* at \*31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at \*31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at \*31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at \*51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at \*31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

**Conclusion.** The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at \*32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

## **9. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013)**

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden

sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the

capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

**Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court,



also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

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

Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

**New Jersey Transit Program and Disparity Study.** NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy

variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7<sup>th</sup> Cir. 2007).

**Applying *Northern Contracting v. Illinois*.** The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653,

quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (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 (8<sup>th</sup> Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, citing 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, *quoting Western States Paving*, 407 F.3d at 997.

**Applying *Western States Paving*.** The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*



Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

### **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 5<sup>th</sup> and 14<sup>th</sup> Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at \*4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9<sup>th</sup> Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at \*5. In contrast, the NJT

relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at \*5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at \*5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at \*6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at \*6, *citing* 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at \*6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at \*6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at \*6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at \*6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at \*7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at \*7. The court

held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at \*7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at \*8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

## **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 (9<sup>th</sup> Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007). The plaintiffs disagreed, and

contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (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 (6<sup>th</sup> Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10<sup>th</sup> Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.



Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

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

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at \*1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at \*4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

**Statistical evidence.** To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at \*6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as

DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at \*6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at \*7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at \*8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at \*9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at \*11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at \*12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. "Unbundling" large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

*Id.* (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. *Id.* at \*13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

**Anecdotal evidence.** A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at \*13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." *Id.* at \*14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." *Id.* A number of

non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at \*15.

**Strict scrutiny.** The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at \*16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at \*17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at \*16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at \*17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at \*18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at \*19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at \*21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at \*21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at \*21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.’

*Id.* at \*21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at \*22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "plausible lower-bound estimate" of DBE participation in the absence of discrimination." *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

*Id.* at \*23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7<sup>th</sup> Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at \*23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at \*24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at \*25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater “Adarand VII”*, 228 F.3d 1147, 1177 (10<sup>th</sup> Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

#### **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 (8<sup>th</sup> Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) (“*Adarand VII*”), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at \*34, *citing Adarand VII*, 228 F.3d at 1175.



In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at \*36, citing and quoting *Sherbrooke Turf*, 345 F.3d at 972, quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

#### **15. Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp.2d 1296 (D. Kan. 2002)**

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries

**16. Sherbrooke Turf, Inc. v. Minnesota DOT, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), affirmed 345 F.3d 964 (8<sup>th</sup> Cir. 2003)**

*Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at \*1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part,

by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

*Sherbrooke*, 2001 WL 1502841 at \*10 (D. Minn.).

The court rejected plaintiff’s claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson’s* strict scrutiny standard. The court held that the “Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program.” *Id.* at \*11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, “relieves the state of any burden to independently carry the strict scrutiny burden.” *Id.* at \*11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

**17. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8<sup>th</sup> Cir. 2003)**

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR’s proposed DBE goals for fiscal year 2001, pending completion of USDOT’s review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist “in the construction industry” and that racial and gender discrimination “within the construction industry” is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently “narrowly tailored” to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

## G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

### 1. **Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.**, 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, **Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.**, 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at \*1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* \*1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, quoting 15 U.S.C. § 627(a)(5).

**The Section 8(a) statute is race-neutral.** The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* \*1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* \*2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at \*2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id* \*2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* \*2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* \*2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* \*3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id* \*3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id* \*3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* \*4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* \*4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* \*5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id* \*6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.



The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* \*8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id.* at \*7.

**The SBA statute does not trigger strict scrutiny.** The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* \*10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* \*9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* \*10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* \*10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* \*11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

**Other issues.** The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* \*11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

**Dissenting Opinion.** There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* \*12. The dissenting judge said that

the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* \*13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* \*16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* \*22.

## **2. Rothe Development Corp. v. U.S. Dept. of Defense, et al., 545 F.3d 1023 (Fed. Cir. 2008)**

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court

to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (*Rothe*) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

**2007 Order of the District Court (499 F.Supp.2d 775).** In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff *Rothe* did not qualify as an SDB because it was owned by a Caucasian female. Although *Rothe* was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* *Rothe* claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious

remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, *Rothe's* claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, *Rothe* must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, *Rothe* may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with *Rothe's* argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most

recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

*Id.* The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

**November 4, 2008 decision by the Federal Circuit Court of Appeals.** On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court



found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

**Strict scrutiny framework.** The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

**Compelling interest – strong basis in evidence.** The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

**Six state and local disparity studies.** The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such

contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

**Staleness.** The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

**Before Congress.** The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of

discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 quoting *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5<sup>th</sup> Cir. 2006).

**Methodology.** The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11<sup>th</sup> Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit

explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 citing to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

**Geographic coverage.** The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied

on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

**Anecdotal evidence.** The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

**Narrowly tailoring.** The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

### **3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016).**

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at \*1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

***DynaLantic Corp. v. Department of Defense.*** The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at \*4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at \*5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at \*5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at \*5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that *DynaLantic* had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at \*5, *citing DynaLantic*, at 279.



With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

**Defendants’ expert evidence.** One of Defendants’ experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a “logit model” to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at \*9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants’ expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe’s contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at \*10. The court found convincing the expert’s response to Rothe’s critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert’s reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the

evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at \*11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at \*12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

**Plaintiff's expert's testimony rejected.** The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at \*13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at \*14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

**The Section 8(a) Program is constitutional on its face.** The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at \*15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at \*17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at \*17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at \*17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at \*17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at \*17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at \*18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2-5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at \*18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at \*18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at \*18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at \*18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at \*19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at \*19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

**Conclusion.** The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at \*20.

#### **4. DynaLantic Corp. v. United States Dept. of Defense, et al., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)**

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at \*1, \*37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at \*1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at \*1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

**The Section 8(a) Program.** The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at \*2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at \*2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at \*3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 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 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at \*3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at \*3-4; 13 CFR 124.501(b).

**Plaintiff’s business and the simulation and training industry.** *DynaLantic* performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at \*5.

**Compelling interest.** The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at \*9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at \*9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to *DynaLantic* to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at \*10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10<sup>th</sup> Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at \*10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at \*11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at \*11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at \*11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at \*11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10<sup>th</sup> Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at \*11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at \*11, citing *Concrete Works IV*, 321 F.3d at 958.



**Evidence before Congress.** The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at \*16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at \*17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10<sup>th</sup> Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at \*17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at \*17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at \*21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

**State and local disparity studies.** Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at \*25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at \*26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at \*26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at \*26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not

probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at \*26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at \*26, n. 10.

**Analysis: Strong basis in evidence.** Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at \*29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at \*29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at \*31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at \*31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at \*31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at \*31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at \*31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at \*31, n. 13.

**Rejection of DynaLantic’s rebuttal arguments.** The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at \*32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that

fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at \*32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at \*34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at \*35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at \*35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at \*35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at \*35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at \*35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at \*35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at \*36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at \*36.

**Facial challenge: Conclusion.** The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that

discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at \*37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

**As-applied challenge.** *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at \*37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at \*38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at \*38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at \*38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson’s* reasoning. *DynaLantic*, at \*38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at \*38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson’s* evidentiary requirement to show an inference of discrimination. *DynaLantic*, at \*39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at \*40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at \*40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at \*40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts

and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at \*40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at \*40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at \*40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at \*40.

**Narrowly tailoring.** In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at \*41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at \*41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at \*42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at \*43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at \*44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at \*44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at \*44.



The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at \*45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at \*46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 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 2-5 percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at \*47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at \*48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at \*51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

**Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court.** A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal



Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

### **5. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007)**

*DynaLantic Corp.* involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of

the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government’s proffered “compelling government interest,” the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties’ Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

# **APPENDIX C.**

---

## **Quantitative Analyses of Marketplace Conditions**

# APPENDIX C.

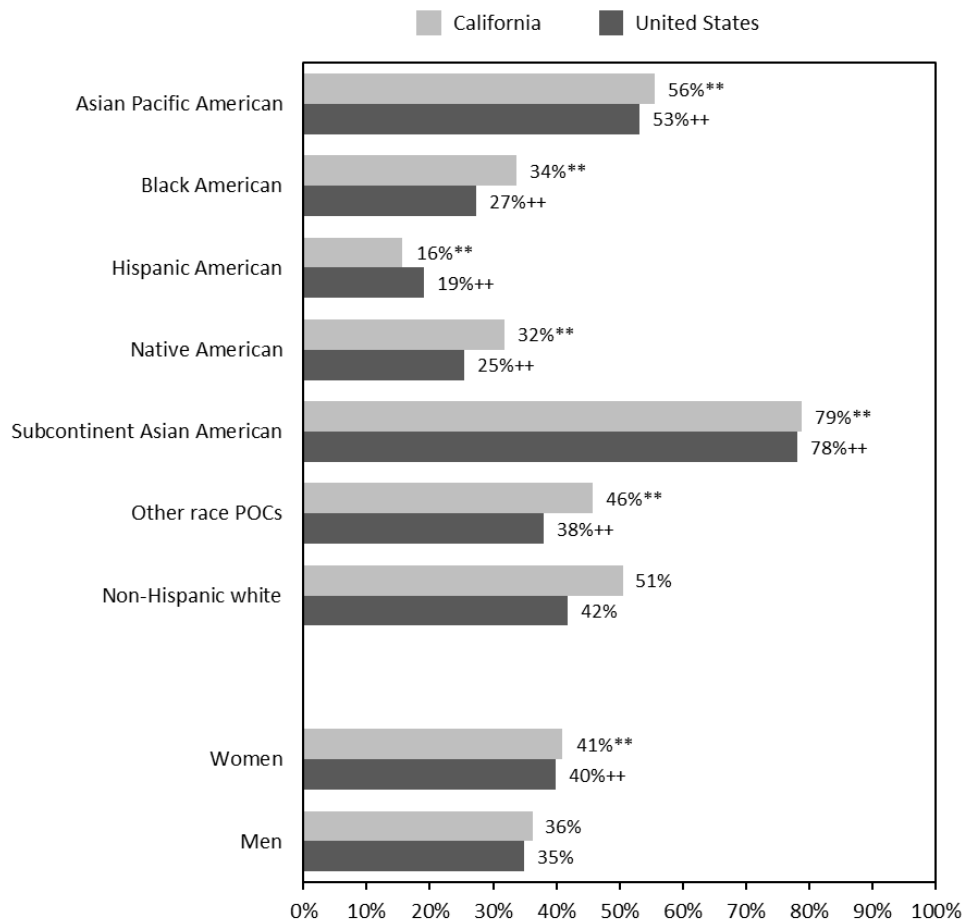
## Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted quantitative analyses of marketplace conditions in California to assess whether person of color (POCs), women, and POC- and woman-owned businesses face any barriers in the marketplace in the California transportation-related construction, professional services, goods and services and transit services industries. BBC examined local marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs and women face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether POCs and women face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership** to assess whether POCs and women own businesses at rates comparable to non-Hispanic whites and men; and
- **Business success** to assess whether POC- and woman-owned businesses have outcomes similar to those of other businesses.

Appendix C presents a series of figures that show results from those analyses. Key results along with information from secondary research are presented in Chapter 3.

**Figure C-1.**  
**Percent of all workers 25 and older with at least a**  
**four-year degree in California and the United States. 2015-2019**

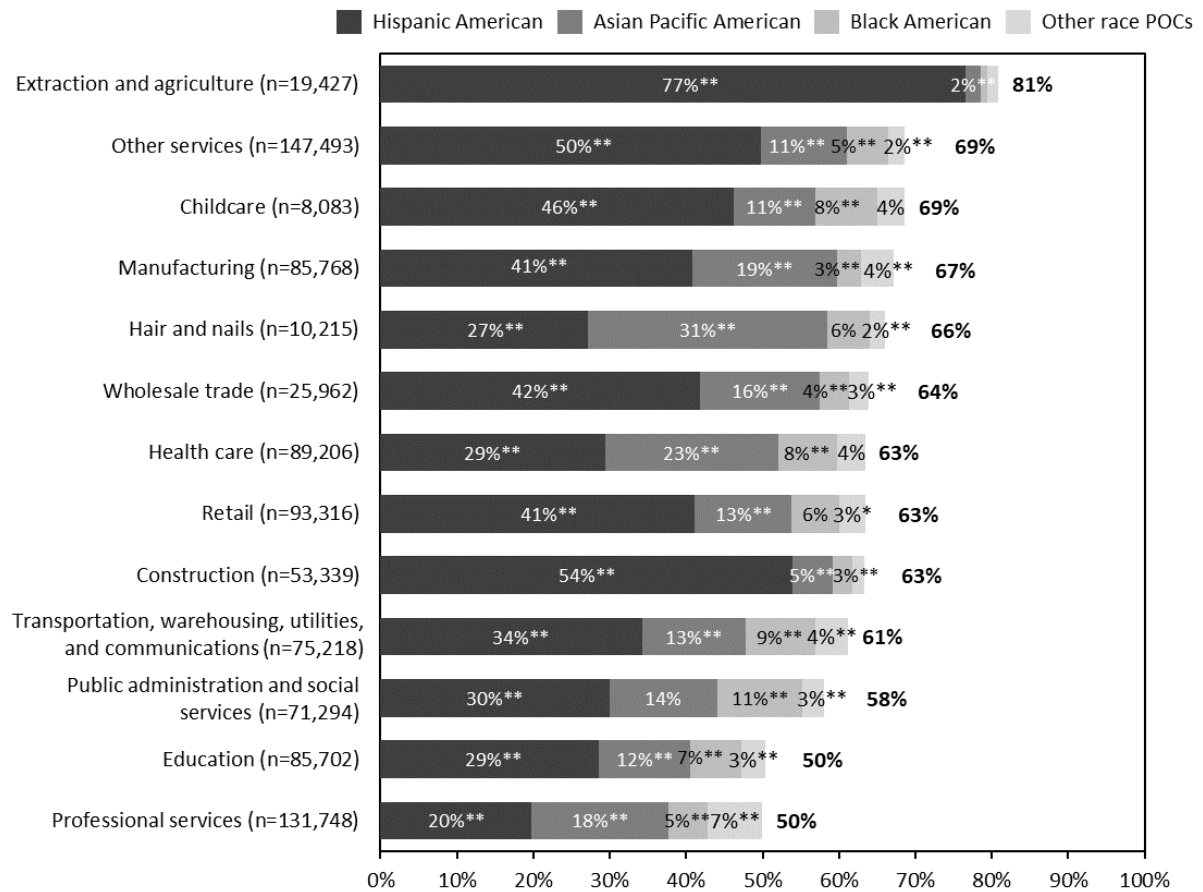


Note: \*\*/++ Denotes that the difference in proportions between the POC group and non-Hispanic whites (or between women and men) is statistically significant at the 90% and 95% confidence levels, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-1 indicates that smaller percentages of Black American, Hispanic American, Native American, and other race POC workers in the California have four-year college degrees than non-Hispanic white workers.

**Figure C-2.**  
**Percent representation of POCs in various industries in California, 2015-2019**



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

The representation of POCs among all California workers is 14% for Asian Pacific Americans, 6% for Black Americans, 38% for Hispanic Americans, 4% for Other race POCs and 61% for all POCs considered together.

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

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

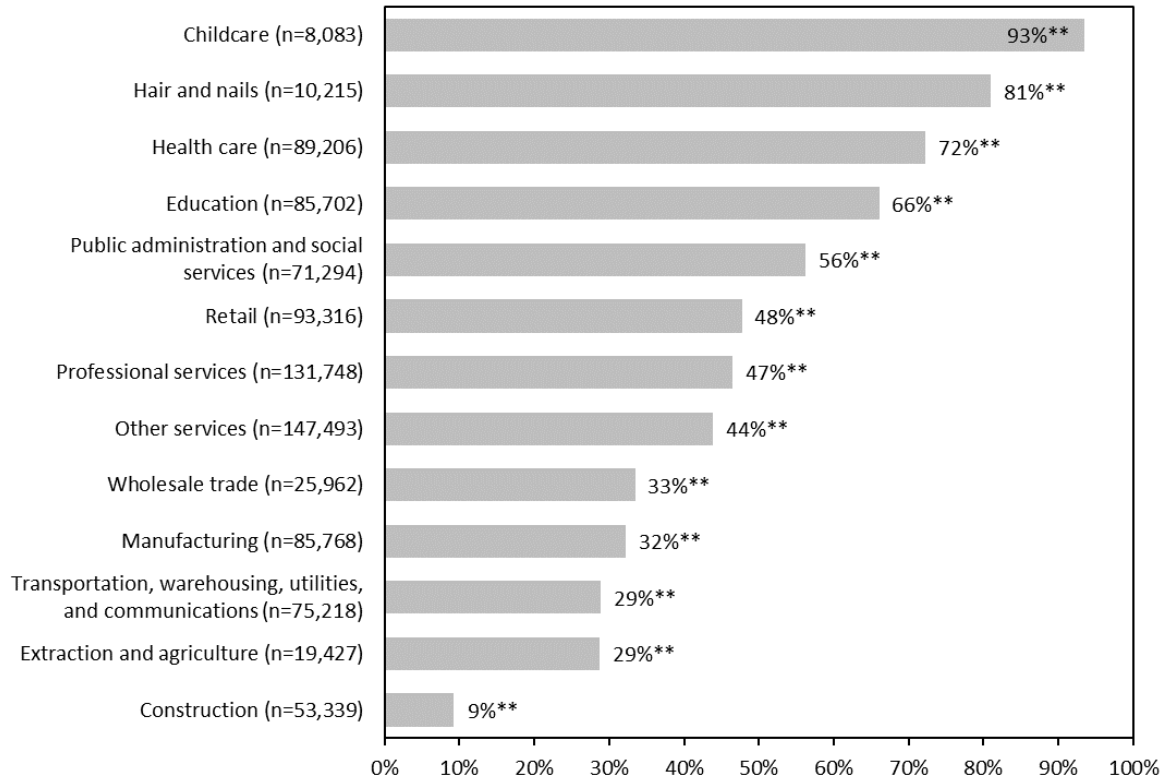
All labels lower than 2% were removed due to poor visibility.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-2 indicates that California industries with the highest representations of POC workers are extraction and agriculture, other services, and childcare. The California industries with the lowest representations of POC workers are public administration and social services, education, and professional services.



**Figure C-3.**  
**Percent representation of women in various industries in California, 2015-2019**



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

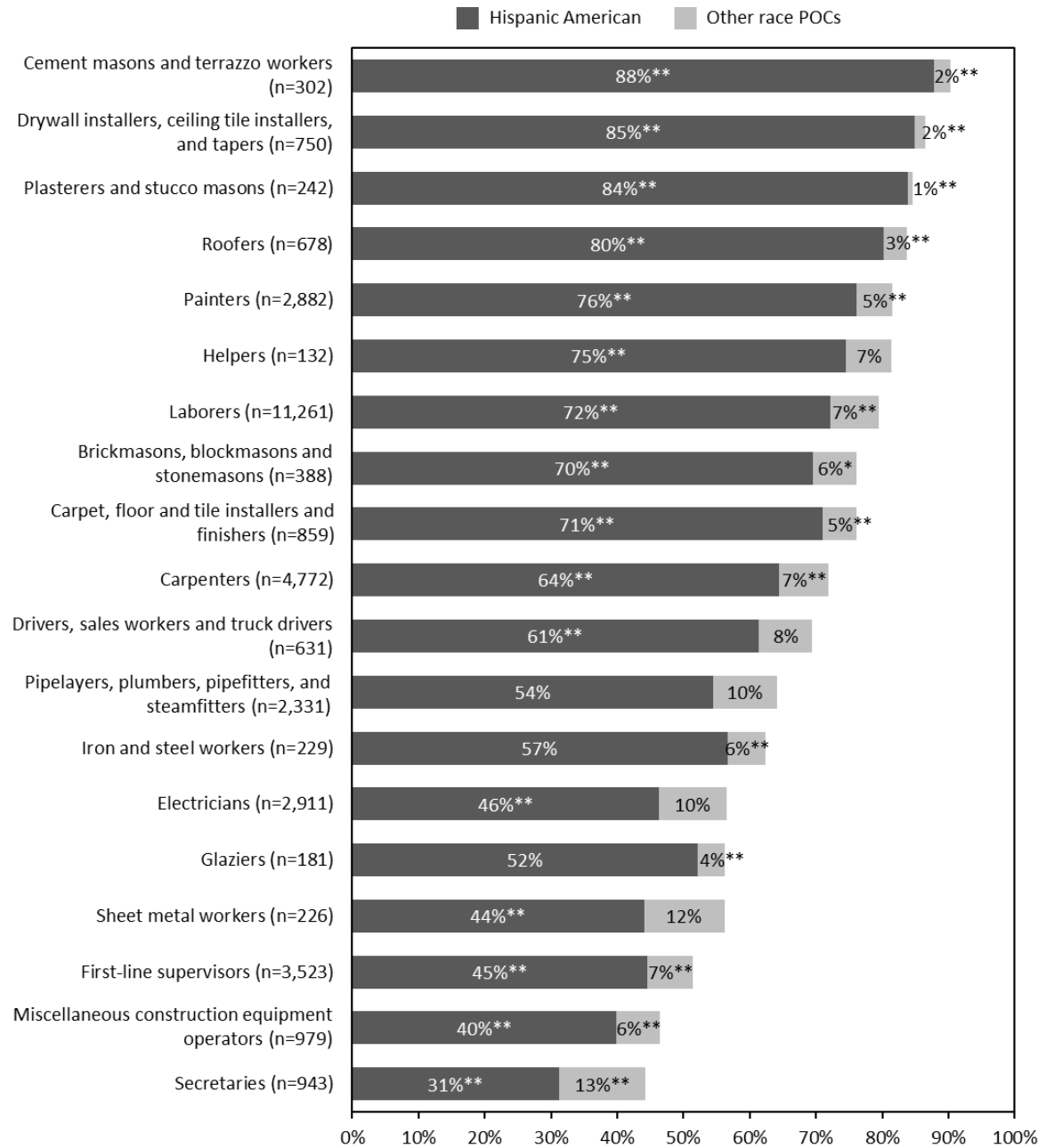
The representation of women among all California workers is 46%.

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-3 indicates that the California industries with the highest representations of women workers are childcare, hair and nails, and health care. The industries with the lowest representations of women are transportation, warehousing, utilities, and communications; extraction and architecture; and construction.

**Figure C-4.**  
**Percent representation of POCs in selected construction occupations in California, 2015-2019**



Notes: \*, \*\* Denotes that the difference in proportions between POC workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

The representation of POCs among all California construction workers is 54% for Hispanic Americans, 9% for Other race POCs and 63% for all POCs considered together.

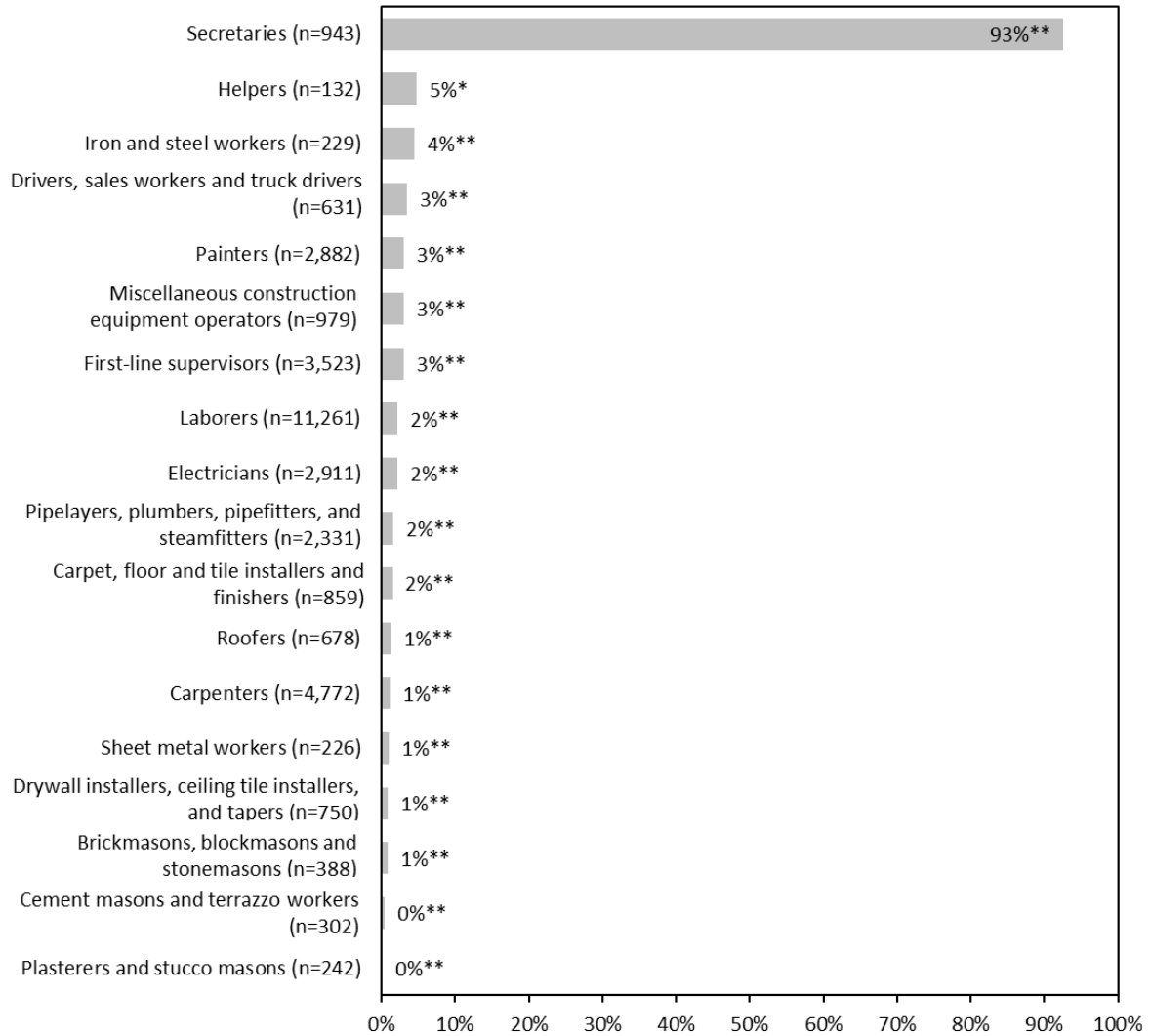
"Other race POCs" includes Asian Pacific Americans, Black Americans, Native Americans, Subcontinent Asian Americans, and other races.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2015-2019 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that the construction occupations with the highest representations of POC workers in California are cement masons and terrazzo workers; drywall installers, ceiling tile installers, and tapers; and plasterers and stucco masons. The construction occupations with the lowest representations of POC workers are first-line supervisors, miscellaneous construction equipment operators, and secretaries.

**Figure C-5.**  
**Percent representation of women in selected construction occupations in California, 2015-2019**



Notes: \*, \*\* Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

The representation of women among all California construction workers is 9%

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2015-2019 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-5 indicates that the construction occupations in California with the highest representations of women workers are secretaries, helpers, and iron steel workers. The construction occupations with the lowest representations of women workers are brickmasons, blockmasons, and stonemasons; cement masons and terrazzo workers; and plasterers and stucco masons.

**Figure C-6.**  
**Demographic characteristics of workers in study-related industries and all industries,**  
**California and the United States, 2015-2019**

<b>California</b>					
Group	All Industries (n=935,956)	Construction (n=53,339)	Professional Services (n=10,180)	Transit Services (n=2,986)	Goods and Other Services (n=10,796)
<b>Race/ethnicity</b>					
Asian Pacific American	14.2 %	5.3 % **	18.9 % **	13.7 %	8.5 % **
Black American	6.1 %	2.6 % **	3.0 % **	22.8 % **	2.6 % **
Hispanic American	37.5 %	53.9 % **	17.5 % **	35.8 %	53.4 % **
Native American	0.9 %	1.0 %	0.9 %	0.8 %	0.6 % **
Subcontinent Asian American	2.4 %	0.3 % **	3.1 % **	1.7 % **	1.3 % **
Other race POCs	0.3 %	0.2 % **	0.2 % **	0.4 %	0.2 % **
<b>Total minority</b>	<b>61.4 %</b>	<b>63.2 %</b>	<b>43.6 %</b>	<b>75.3 %</b>	<b>66.7 %</b>
Non-Hispanic white	38.6 %	36.8 % **	56.4 % **	24.7 % **	33.3 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>					
Women	45.8 %	9.3 % **	27.5 % **	33.0 % **	12.3 % **
Men	54.2 %	90.7 % **	72.5 % **	67.0 % **	87.7 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>United States</b>					
Group	All Industries (n=7,818,941)	Construction (n=485,217)	Professional Services (n=81,687)	Transit Services (n=26,887)	Goods & Other Services (n=95,868)
<b>Race/ethnicity</b>					
Asian Pacific American	5.0 %	1.8 % **	6.2 % **	3.5 % **	2.7 % **
Black American	12.6 %	5.9 % **	5.3 % **	32.1 % **	7.5 % **
Hispanic American	17.3 %	28.6 % **	9.5 % **	16.4 % **	22.1 % **
Native American	1.2 %	1.3 % **	0.8 % **	1.2 %	1.1 %
Subcontinent Asian American	1.6 %	0.3 % **	2.1 % **	1.2 % **	0.6 % **
Other race POCs	0.2 %	0.3 %	0.2 % **	0.4 % **	0.2 % *
<b>Total minority</b>	<b>37.9 %</b>	<b>38.3 %</b>	<b>24.0 %</b>	<b>54.8 %</b>	<b>34.2 %</b>
Non-Hispanic white	62.1 %	61.7 % **	76.0 % **	45.2 % **	65.8 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>					
Women	47.2 %	9.7 % **	25.9 % **	38.5 % **	13.3 % **
Men	52.8 %	90.3 % **	74.1 % **	61.5 % **	86.7 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

Note: \*, \*\* Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other race POCs work in the California construction industry. In addition, a smaller percentage of women work in the California construction industry.
- Smaller percentages of Black Americans, Hispanic Americans, and other race POCs work in the California professional services industry. In addition, a smaller percentage of women work in the California professional services industry.

- Smaller percentages of Subcontinent Asian Americans work in the California transit services industry. In addition, a smaller percentage of women work in the California transit services industry.
- Smaller percentages of Asian Pacific Americans, Black Americans, Native American, Subcontinent Asian Americans, and other race POCs work in the California goods and services industry. In addition, a smaller percentage of women work in the California goods and services industry.



**Figure C-7.**  
**Percentage of workers who worked as a manager in each study-related industry, California and the United States, 2015-2019**

<b>California</b>					
Group	Construction	Professional Services	Transit Services	Goods and Other Services	
<b>Race/ethnicity</b>					
Asian Pacific American	9.5 % **	2.1 % **	3.1 %	1.6 % *	
Black American	5.5 % **	4.9 %	0.9 % *	0.9 % **	
Hispanic American	2.6 % **	1.7 % **	1.3 %	0.3 % **	
Native American	12.9 %	7.4 %	5.2 %	0.0 %	
Subcontinent Asian American	16.6 %	2.7 %	2.3 %	0.7 % **	
Other race POCs	3.0 % **	0.0 % †	0.0 % †	0.0 % †	
Non-Hispanic white	13.6 %	3.8 %	2.3 %	2.5 %	
<b>Gender</b>					
Women	8.2 % **	1.8 % **	1.3 %	0.5 % **	
Men	6.7 %	3.6 %	1.9 %	1.3 %	
<b>All individuals</b>	<b>6.8 %</b>	<b>3.1 %</b>	<b>1.7 %</b>	<b>1.2 %</b>	
<b>United States</b>					
Group	Construction	Professional Services	Transit Services	Goods and Other Services	
<b>Race/ethnicity</b>					
Asian Pacific American	8.1 % **	2.1 % **	2.3 %	1.3 %	
Black American	3.4 % **	1.9 % **	0.9 % **	0.6 % **	
Hispanic American	2.6 % **	1.8 % **	1.0 % **	0.4 % **	
Native American	5.3 % **	2.9 %	1.0 % *	1.6 %	
Subcontinent Asian American	10.4 %	4.2 %	2.0 %	0.7 %	
Other race POCs	2.4 % **	2.4 %	0.9 %	0.0 %	
Non-Hispanic white	9.2 %	3.5 %	1.9 %	1.5 %	
<b>Gender</b>					
Women	6.4 % **	1.6 % **	1.1 % **	0.9 % **	
Men	6.8 %	3.7 %	1.7 %	1.2 %	
<b>All individuals</b>	<b>6.7 %</b>	<b>3.1 %</b>	<b>1.4 %</b>	<b>1.2 %</b>	

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

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

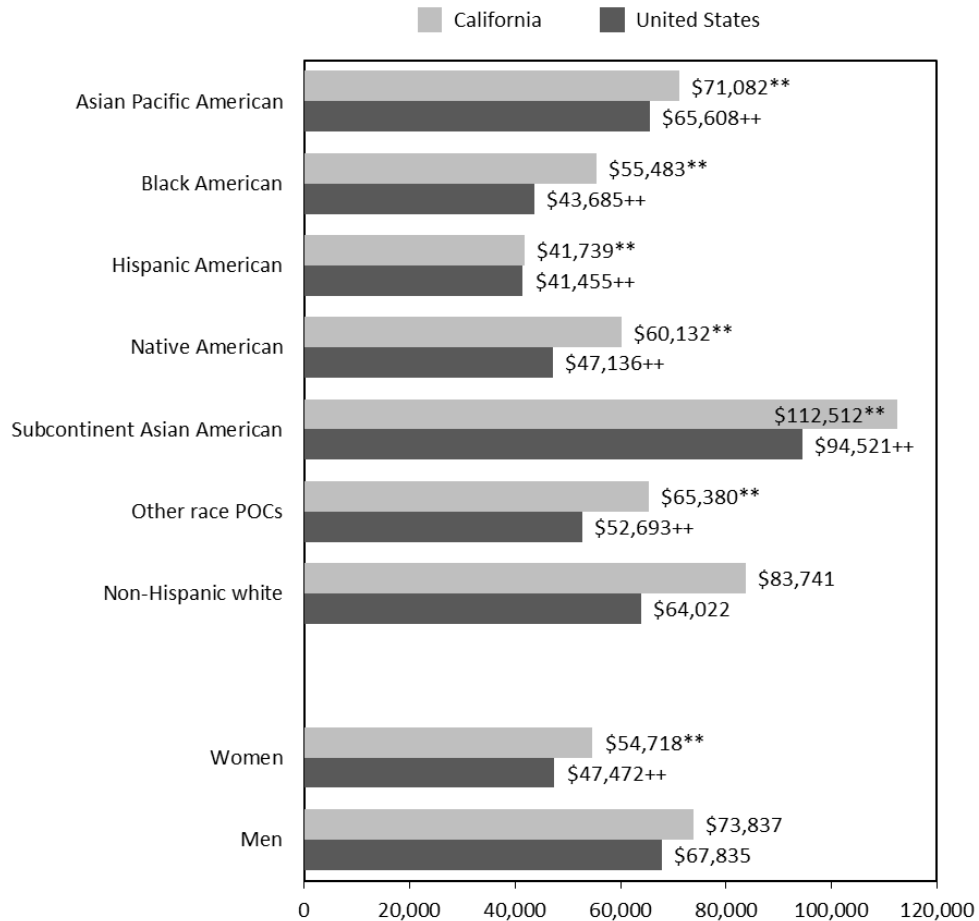
Figure C-7 indicates that:

- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, Hispanic Americans, and other race POCs work as managers in the California construction industry.
- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans and Hispanic Americans work as managers in the California professional services industry. In

addition, compared to men, a smaller percentage of women work as managers in the California professional services industry.

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

**Figure C-8.**  
**Mean annual wages, California and the United States, 2015-2019**



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

\*\*/++ Denotes statistically significant differences from non-Hispanic whites (for POC groups) and from men (for women) at the 95% confidence level for California and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-8 indicates that, compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and other race POCs in the California earn substantially less in wages. In addition, compared to men, women earn less in wages.

**Figure C-9.  
Predictors of annual wages  
(regression), California, 2015-2019**

**Notes:**

The regression includes 472,279 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

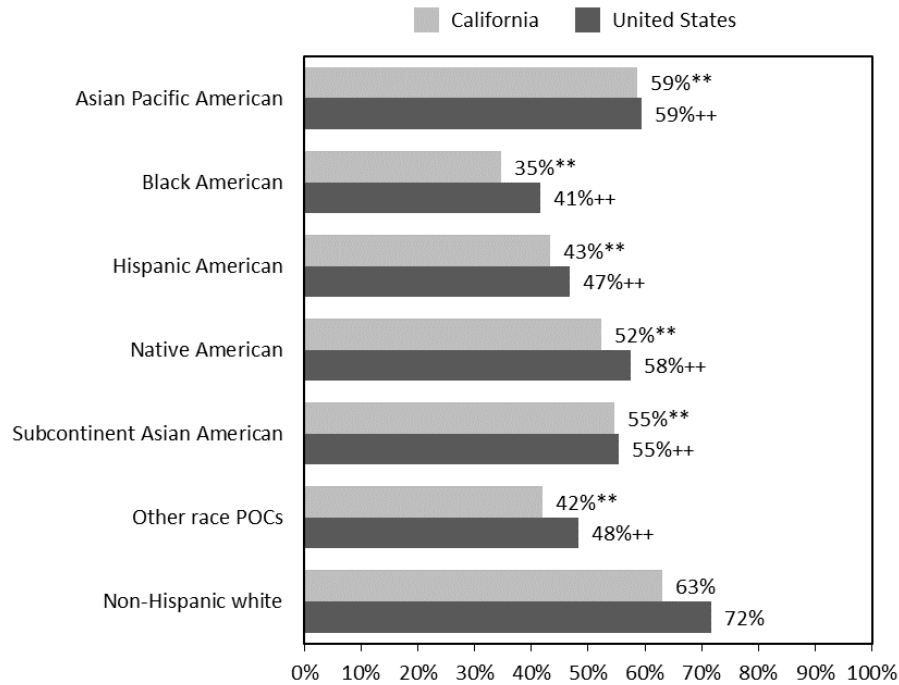
**Source:**

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	6868.755 **
Asian Pacific American	0.889 **
Black American	0.825 **
Hispanic American	0.843 **
Native American	0.899 **
Subcontinent Asian American	0.990
Other race POCs	0.887 **
Women	0.801 **
Less than high school education	0.872 **
Some college	1.205 **
Four-year degree	1.701 **
Advanced degree	2.334 **
Disabled	0.787 **
Military experience	1.016 **
Speaks English well	1.371 **
Age	1.069 **
Age-squared	0.999 **
Married	1.120 **
Children	1.003 **
Number of people over 65 in household	0.910 **
Public sector worker	1.132 **
Manager	1.294 **
Part time worker	0.379 **
Extraction and agriculture	0.761 **
Construction	0.987 **
Wholesale trade	0.934 **
Retail trade	0.778 **
Transportation, warehouse, & information	1.055 **
Professional services	1.131 **
Education	0.688 **
Health care	1.054 **
Other services	0.755 **
Public administration and social services	0.809 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in California, being Asian Pacific American, Black American, Hispanic American, Native American, or another race POC is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.83 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, compared to being a man in California, being a woman is related to lower annual wages.

**Figure C-10.**  
**Home ownership rates, California and the United States, 2015-2019**



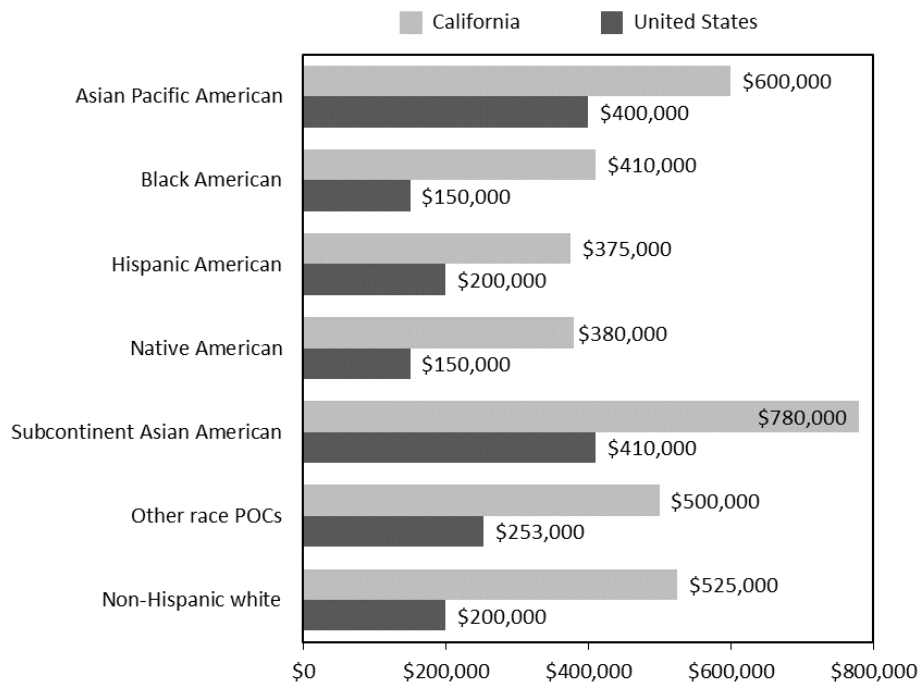
Note: The sample universe is all households.

\*\*/++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for California and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-10 indicates that all relevant POC groups in California exhibit homeownership rates lower than that of non-Hispanic whites.

**Figure C-11.**  
**Median home values, California and the United States, 2015-2019**



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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-11 indicates that Black American, Hispanic American, Native American, and other race POC homeowners in California own homes that, on average, are worth less than those of non-Hispanic white homeowners.



**Figure C-12.**  
**Denial rates of conventional**  
**purchase loans for high-**  
**income households,**  
**California and the United**  
**States, 2019**

Note:

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). For 2012 and forward, the MFI data are calculated by the FFIEC.

Source:

FFIEC HMDA data 2019. The 2019 raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfpb.gov/data-browser/>.

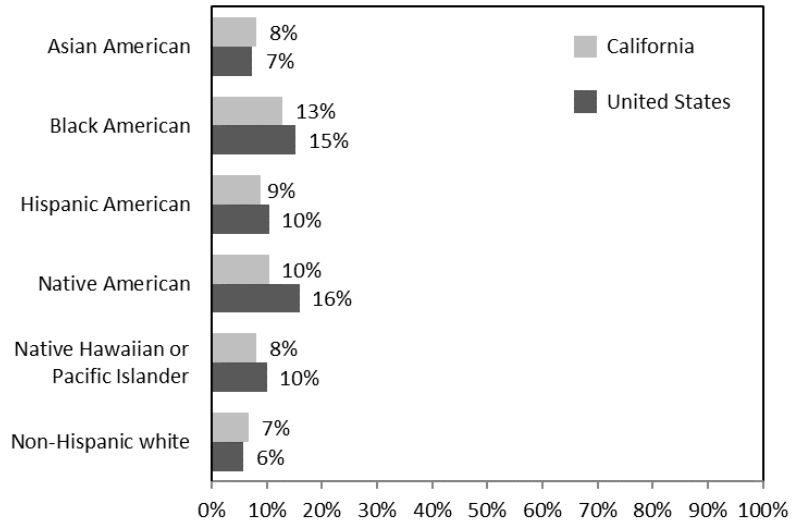


Figure C-12 indicates that all relevant POC groups in California appear to be denied home loans at higher rates than non-Hispanic whites.

**Figure C-13.**  
**Percent of conventional**  
**home purchase loans that**  
**were subprime, California**  
**and the United States, 2019**

**Note:**

Subprime loans are those with a rate spread of 1.5 or more. Rate spread is the difference between the covered loan's annual percentage rate (APR) and the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set.

**Source:**

FFIEC HMDA data 2019. Thee 2019 raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfpb.gov/data-browser/>.

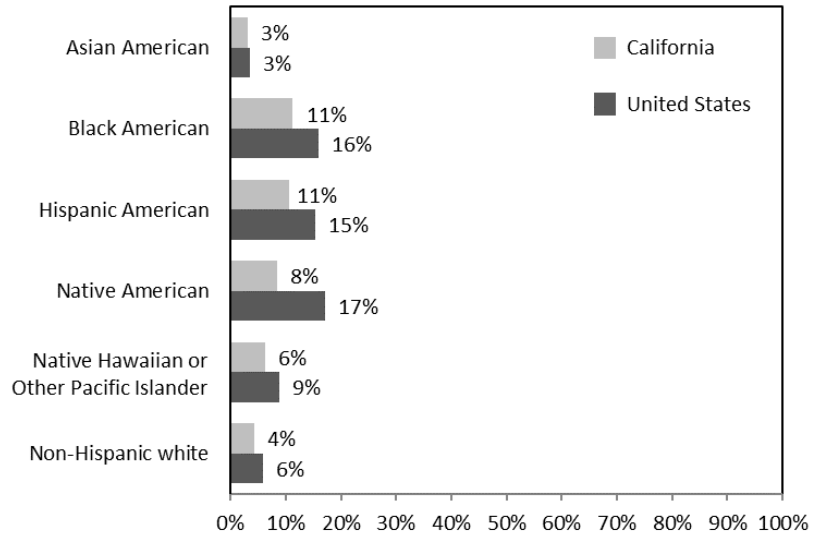


Figure C-13 indicates that Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or other Pacific Islanders in California receive subprime conventional home purchase loans at greater rates than non-Hispanic whites.

**Figure C-14  
Business loan denial  
rates, Pacific Division  
and the United  
States, 2003**

Notes:

\*\* Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

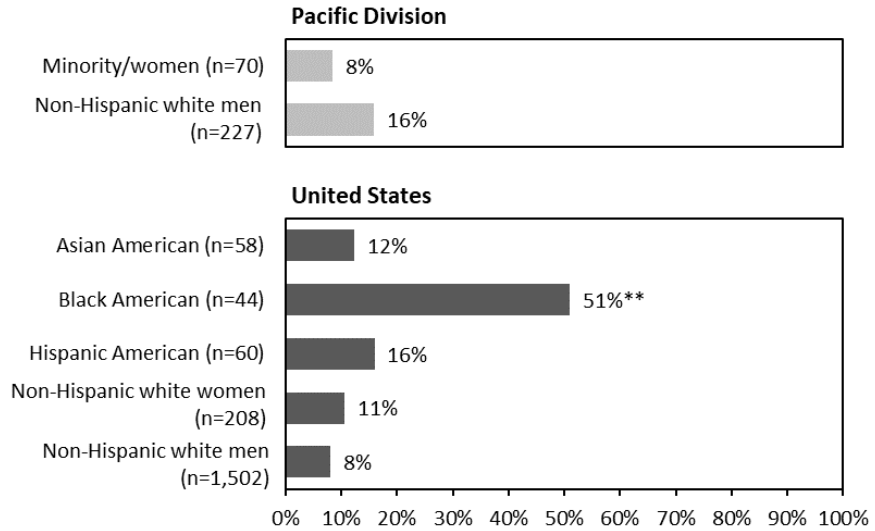


Figure C-14 indicates that in 2003 in the United States, Black American-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

**Figure C-15.**  
**Businesses that did not apply for loans due to fear of denial, Pacific Division and the United States, 2003**

Notes:

\*\* Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

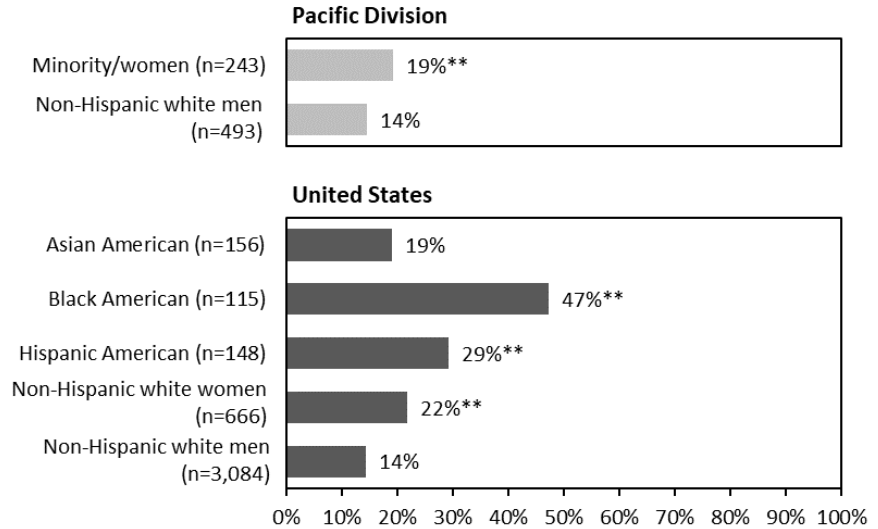


Figure C-15 indicates that in 2003, Black American-owned businesses, Hispanic American-owned businesses, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial. Additionally, POC- and woman-owned businesses in the Pacific Division were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

**Figure C-16.**  
**Mean values of approved**  
**business loans, Pacific Division**  
**and the United States, 2003**

Note:

Denotes statistically significant differences from non-Hispanic white men (for POC groups and women) at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

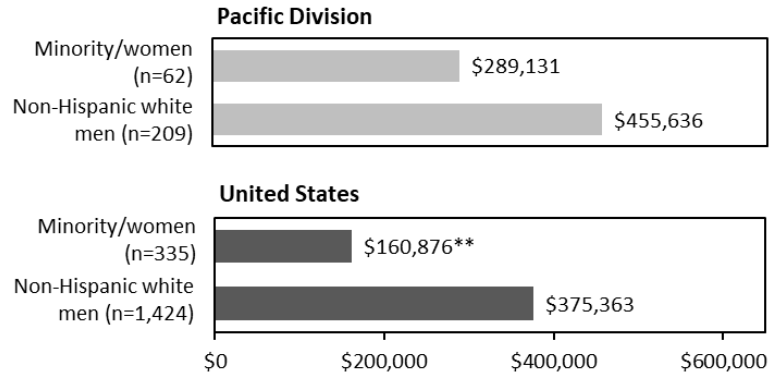


Figure C-16 indicates that in 2003, POC- and woman-owned businesses in the United States as a whole that received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

**Figure C-17.**  
**Business ownership rates in study-related industries, California and the United States, 2015-2019**

California				
Group	Construction	Professional Services	Transit Services	Goods and Other Services
<b>Race/ethnicity</b>				
Asian Pacific American	28.9 %	9.5 % **	3.5 %	20.7 % **
Black American	16.1 % **	7.6 % **	0.1 % **	16.0 % **
Hispanic American	18.2 % **	9.4 % **	0.9 % **	15.8 % **
Native American	22.0 % **	11.1 % **	2.5 %	18.5 % **
Subcontinent Asian American	22.3 % **	6.3 % **	0.0 %	24.8 % **
Other race POCs	16.4 % **	9.6 % †	0.0 % †	9.1 % †
Non-Hispanic white	29.8 %	18.6 %	4.3 %	22.9 %
<b>Gender</b>				
Women	14.3 % **	11.5 % **	1.2 %	13.2 % **
Men	23.9 %	15.6 %	2.2 %	19.4 %
<b>All individuals</b>	<b>23.0 %</b>	<b>14.5 %</b>	<b>1.9 %</b>	<b>18.7 %</b>
United States				
Group	Construction	Professional Services	Transit Services	Goods and Other Services
<b>Race/ethnicity</b>				
Asian Pacific American	22.5 % **	7.3 % **	2.7 %	17.8 % **
Black American	16.4 % **	6.4 % **	1.5 % **	14.1 % **
Hispanic American	17.8 % **	9.2 % **	2.1 %	16.8 % **
Native American	19.6 % **	9.0 % **	2.2 %	15.1 % **
Subcontinent Asian American	20.9 % **	7.6 % **	3.3 %	22.3 % **
Other race POCs	26.3 %	7.4 % **	0.0 %	16.9 % **
Non-Hispanic white	25.3 %	12.5 %	2.4 %	18.2 %
<b>Gender</b>				
Women	16.0 % **	7.6 % **	1.8 % **	12.1 % **
Men	23.2 %	12.7 %	2.2 %	18.4 %
<b>All individuals</b>	<b>22.5 %</b>	<b>11.4 %</b>	<b>2.1 %</b>	<b>17.6 %</b>

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

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-17 indicates that:

- Compared to non-Hispanic whites, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race POCs working in the California construction industry own businesses at a lower rate. In addition, compared to men, women working in the California construction industry own businesses at a lower rate.
- Compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans working in the California



professional services industry own businesses at a lower rate. In addition, compared to men, women working in the professional services industry own businesses at a lower rate.

- Compared to non-Hispanic whites, Black Americans and Hispanic Americans working in the California transit services industry own businesses at a lower rate.
- Compared non-Hispanic whites, Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans working in the California goods and other services industry own businesses at a lower rate. In addition, compared to men, women working in the California goods and other services industry own businesses at a lower rate.

**Figure C-18.**  
**Predictors of business ownership in**  
**construction (regression), California,**  
**2015-2019**

Note:

The regression included 45,609 observations.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-2.0153 **
Age	0.0416 **
Age-squared	-0.0001 **
Married	-0.0031
Disabled	-0.0131
Number of children in household	-0.0076
Number of people over 65 in household	0.0097
Owns home	-0.2083 **
Home value (\$000s)	0.0001 **
Monthly mortgage payment (\$000s)	0.0193 **
Interest and dividend income (\$000s)	0.0018 **
Income of spouse or partner (\$000s)	0.0003
Speaks English well	-0.0211
Less than high school education	0.0569 **
Some college	0.0122
Four-year degree	-0.0217
Advanced degree	-0.1334 **
Asian Pacific American	-0.0044
Black American	-0.4021 **
Hispanic American	-0.2671 **
Native American	-0.1713 **
Subcontinent Asian American	-0.0883
Other race POCs	-0.3177
Women	-0.4658 **

Figure C-18 indicates that being Black American, Hispanic American, or Native American is associated with a lower likelihood of owning a construction business in California compared to being a non-Hispanic white American. In addition, being a woman is associated with a lower likelihood of owning a construction business in California compared to being a man.

**Figure C-19.**  
**Disparities in business ownership rates for California construction workers, 2015-2019**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	16.2%	26.1%	62
Hispanic American	18.2%	25.8%	71
Native American	21.8%	26.5%	82
Non-Hispanic white women	18.1%	32.7%	55

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-19 indicates:

- Black Americans own construction businesses at a rate that is 62 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Hispanic Americans own construction businesses at a rate that is 71 percent that of similarly-situated non-Hispanic white men.
- Native Americans own construction businesses at a rate that is 82 percent that of similarly-situated non-Hispanic white men.
- Women own construction businesses at a rate that is 55 percent that of similarly-situated non-Hispanic white men.

**Figure C-20.  
Predictors of business ownership in  
professional services (regression),  
California, 2015-2019**

Note:

The regression included 9,075 observations.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.1462 **
Age	0.0497 **
Age-squared	-0.0002
Married	0.0488
Disabled	-0.0582
Number of children in household	0.0015
Number of people over 65 in household	0.0978 **
Owns home	-0.2795 **
Home value (\$000s)	0.0002 **
Monthly mortgage payment (\$000s)	0.0145
Interest and dividend income (\$000s)	0.0004
Income of spouse or partner (\$000s)	0.0009 **
Speaks English well	0.0415
Less than high school education	-0.0371
Some college	0.1362
Four-year degree	0.1703 *
Advanced degree	0.1697 *
Asian Pacific American	-0.2815 **
Black American	-0.3875 **
Hispanic American	-0.0985 *
Native American	-0.0394
Subcontinent Asian American	-0.5522 **
Other race POCs	-0.4861
Women	-0.1508 **

Figure C-20 indicates that, after statistically accounting for various factors, being Asian Pacific American, Black American, Hispanic American, or Subcontinent Asian American is related to a lower likelihood of owning a professional services business in California relative to being non-Hispanic white. In addition, being a woman is related to a lower likelihood of owning a professional services business in California relative to being a man.

**Figure C-21.**  
**Disparities in business ownership rates for California professional services workers, 2015-2019**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	9.6%	15.7%	61
Black American	7.8%	14.7%	53
Hispanic American	9.7%	13.8%	71
Subcontinent Asian American	5.8%	13.1%	44
Non-Hispanic white women	15.2%	19.4%	78

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-21 indicates that:

- Asian Pacific Americans own professional services businesses in California at a rate that is 61 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Black Americans own professional services businesses in California at a rate that is 53 percent that of similarly situated non-Hispanic white men.
- Hispanic Americans own professional services businesses in California at a rate that is 71 percent that of similarly situated non-Hispanic white men.
- Subcontinent Asian Americans own professional services businesses in California at a rate that is 44 percent that of similarly situated non-Hispanic white men.
- Women own professional businesses in California at a rate that is 78 percent that of similarly situated non-Hispanic white men.

**Figure C-22.  
Predictors of business ownership in  
transit services (regression),  
California, 2015-2019**

Note:

The regression included 2,483 observations.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

Subcontinent Asian American and Other race POCs omitted from the regression due to small sample size.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.0226 *
Age	0.0386
Age-squared	-0.0004
Married	-0.1640
Disabled	0.1303
Number of children in household	0.0826
Number of people over 65 in household	0.1793
Owns home	-0.1899
Home value (\$000s)	0.0001
Monthly mortgage payment (\$000s)	0.0322
Interest and dividend income (\$000s)	-0.0020
Income of spouse or partner (\$000s)	-0.0001
Speaks English well	-0.4742 *
Less than high school education	0.2084
Some college	-0.2846
Four-year degree	-0.3335
Advanced degree	-0.0997
Asian Pacific American	-0.2197
Black American	-1.6233 **
Hispanic American	-0.8717 **
Native American	-0.1975
Women	-0.1514

Figure C-22 indicates that being Black American or Hispanic American is associated with a lower likelihood of owning a transit services business in California compared to being non-Hispanic white.



**Figure C-23.**  
**Disparities in business ownership rates for California transit services workers, 2015-2019**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	0.0%	4.4%	1
Hispanic American	0.8%	6.4%	13

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-23 indicates that:

- Black Americans own transit services businesses in California at a rate that is one percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Hispanic Americans own transit services businesses in California at a rate that is 13 percent that of similarly situated non-Hispanic white men.

**Figure C-24.**  
**Predictors of business ownership in**  
**goods and other services (regression),**  
**California, 2015-2019**

Note:

The regression included 9,235 observations.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.9635 **
Age	0.0703 **
Age-squared	-0.0005 **
Married	0.1499 **
Disabled	0.0806
Number of children in household	0.0442 **
Number of people over 65 in household	-0.0064
Owns home	-0.0396
Home value (\$000s)	0.0001 *
Monthly mortgage payment (\$000s)	0.0815 **
Interest and dividend income (\$000s)	0.0034 **
Income of spouse or partner (\$000s)	0.0005
Speaks English well	0.0216
Less than high school education	0.0995 *
Some college	-0.0054
Four-year degree	-0.0923
Advanced degree	-0.2898 *
Asian Pacific American	-0.0921
Black American	-0.0634
Hispanic American	-0.1764 **
Native American	0.0542
Subcontinent Asian American	0.2210
Other race POCs	-0.8759 *
Women	-0.3085 **

Figure C-24 indicates that being Hispanic American or another race POC is associated with a lower likelihood of owning a goods and services business in California compared to being non-Hispanic white. In addition, being a woman is associated with a lower likelihood of owning a goods and services business in California compared to being a man.

**Figure C-25.**  
**Disparities in business ownership rates for California goods and other services workers, 2015-2019**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Hispanic American	16.1%	22.3%	72
Other race POCs	6.6%	22.9%	29
Non-Hispanic white women	15.9%	25.7%	62

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-25 indicates that:

- Hispanic Americans own goods and services businesses in California at a rate that is 72 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Other race POCs own goods and services businesses in California at a rate that is 29 percent that of similarly situated non-Hispanic white men.
- Women own goods and services businesses in California at a rate of 62 percent that of similarly situated non-Hispanic white men.

**Figure C-26.**  
**Rates of business closure,**  
**expansion, and contraction,**  
**California and the United**  
**States, 2002-2006**

Note:

Data include only non-publicly held businesses.

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

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

Source:

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

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

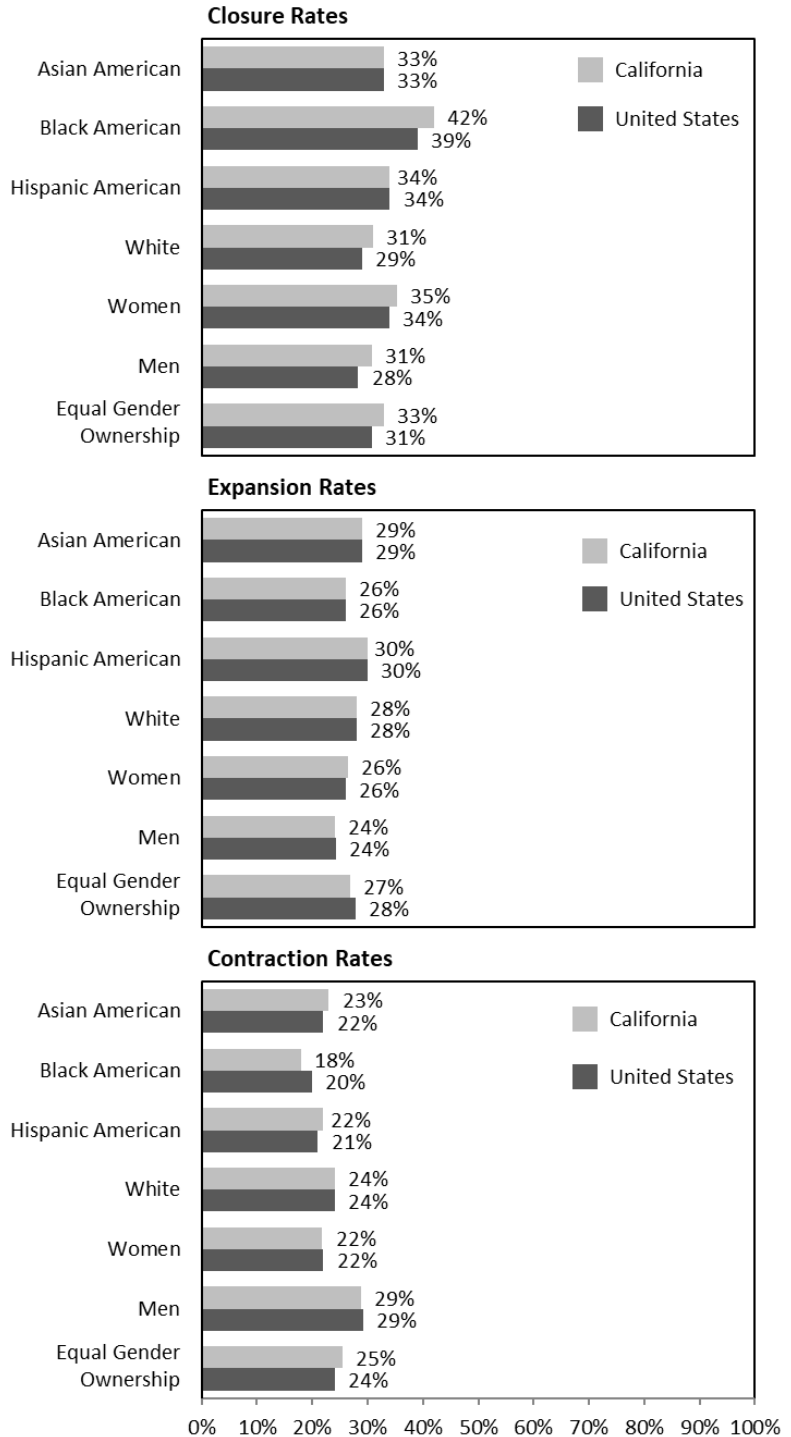
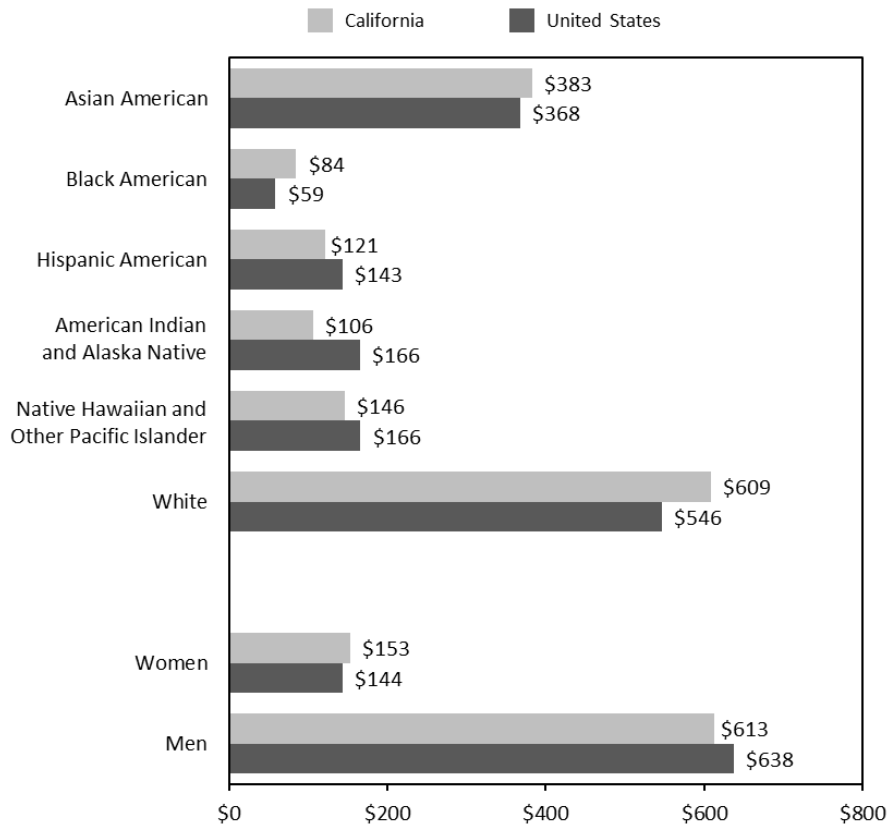


Figure C-26 indicates that Asian American-, Black American-, and Hispanic American-owned businesses in California appear to close at higher rates than non-Hispanic white-owned businesses and male-owned businesses respectively. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men. With regard to expansion rates, Asian American- and Hispanic American-owned businesses in California appear to expand at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses

appear to expand at higher rates than businesses owned by men. With regard to contraction rates, Asian American-, Black American-, and Hispanic American-owned businesses appear to contract at lower rates than white-owned businesses. In addition, woman-owned businesses appear to contract at a lower rate than male-owned businesses.

**Figure C-27.**  
**Mean annual business receipts (in thousands), California and the United States**

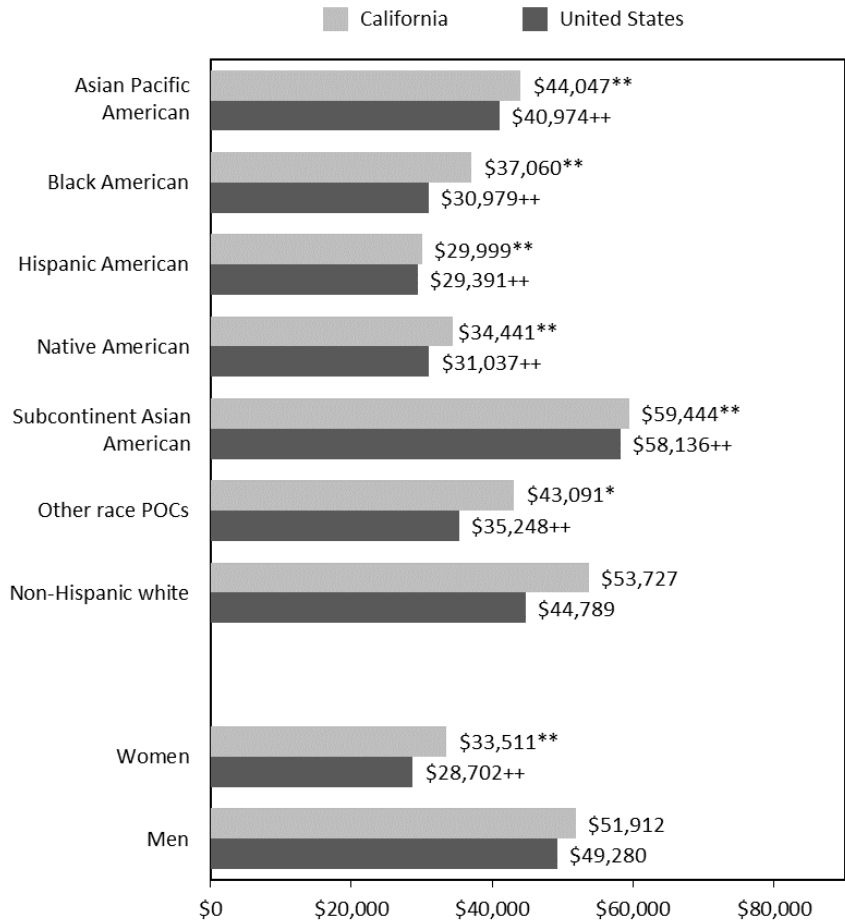


Note: Includes employer firms. Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.

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

Figure C-27 indicates that in 2012, all relevant POC-owned business groups in California showed lower mean annual business receipts than businesses owned by non-Hispanic whites. In addition, woman-owned businesses in California showed lower mean annual business receipts than businesses owned by men.

**Figure C-28.**  
**Mean annual business owner earnings, California and United States, 2015-2019**



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2019 dollars.

\*\*, ++ Denotes statistically significant differences from non-Hispanic whites (for POC groups) and from men (for women) at the 95% confidence level for California and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-28 indicates that the owners of Asian Pacific American-, Black American-, Hispanic American-, Native American-, and other race POC-owned businesses in California earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in California earn less on average than businesses owned by men.



**Figure C-29.  
Predictors of business owner earnings  
(regression), California, 2015-2019**

**Notes:**

The regression includes 66,034 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners aged 16 and over who reported positive earnings.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

**Source:**

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	1,027.946 **
Age	1.124 **
Age-squared	0.999 **
Married	1.196 **
Speaks English well	1.273 **
Disabled	0.640 **
Less than high school	0.816 **
Some college	1.045 **
Four-year degree	1.334 **
Advanced degree	1.776 **
Asian Pacific American	0.918 **
Black American	0.794 **
Hispanic American	0.971
Native American	0.693 **
Subcontinent Asian American	1.144 **
Other race POCs	0.887
Women	0.585 **

Figure C-29 indicates that, compared to a non-Hispanic white owned business owner in California, being an Asian Pacific American, Black American, or Native American businesses owner is related to lower business earnings. Similarly, compared to being a male business owner, being a woman business owner is related to lower business earnings.

# **APPENDIX D.**

---

## **Anecdotal Information about Marketplace Conditions**

# APPENDIX D.

## Anecdotal Information about Marketplace Conditions

Appendix D presents anecdotal information that BBC Research & Consulting (BBC) collected from business owners and other stakeholders as part of the 2022 California Department of Transportation (Caltrans) Federal Transit Authority (FTA) Disparity Study. Appendix D summarizes the key themes that emerged from their insights, organized into the following sections:

- A. **Introduction** describes the process for gathering and analyzing the anecdotal information summarized in Appendix D;
- B. **Background on the construction, professional services, and goods and other services industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;
- C. **Ownership and certification** presents information about businesses' statuses as disadvantaged, person of color- (POC-), and woman-owned businesses, certification processes, and business owners' experiences with the California Unified Certification Program (CUCP), California Public Utilities Commission (CPUC) and other certification programs;
- D. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;
- E. **Doing business as a prime contractor or subcontractor** summarizes information about businesses' experiences working as prime contractors and subcontractors, how they obtain that work, and experiences working with disadvantaged, POC-, and woman-owned businesses;
- F. **Doing business with public agencies** describes business owners' experiences working with or attempting to work with Caltrans and local agencies and identifies potential barriers to doing work for them;
- G. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in California and what it takes for businesses to be successful;
- H. **Potential barriers to business success** describes barriers and challenges businesses face in the local marketplace;
- I. **Information regarding effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects disadvantaged, POC-, or woman-owned businesses;

- J. **Insights regarding business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other steps to remove barriers for businesses in California; and
- K. **Insights regarding race- and gender-based measures** includes business owners' comments about current or potential race- or gender-based programs.

## A. Introduction

Throughout the study business owners, trade association representatives, and other stakeholders had the opportunity to discuss their experiences working with Caltrans and other organizations in the region. The study team collected that information between May and August 2022 using one of the following methods:

- In-depth interviews (20 participants);
- Availability surveys (250 participants who submitted anecdotal information);
- Focus groups (2 focus groups with 2 participants);
- Oral or written testimony during a public forum (2 participants); and
- Written testimony via fax or e-mail (1 participant).

**1. In-depth interviews.** From May to August 2022, the study team conducted 20 in-depth interviews with owners and representatives of California businesses. The interviews included discussions about interviewees' perceptions of, and experiences with, the local contracting industry, CUCP's and CPUCP's certification programs, and businesses' experiences working, or attempting to work, with other public agencies in California.

Interviewees included individuals representing construction businesses, professional services businesses, and goods and other services suppliers. BBC identified interview participants primarily from a random sample of businesses stratified by business type, location, and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. All of the businesses that participated in the interviews conduct work in California.

All interviewees are identified by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a Small Business Enterprise- (SBE-), Disadvantaged Business Enterprise- (DBE-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), Veteran-owned Business Enterprise- (VBE-) or other certified business.

**2. Availability surveys.** The study team conducted availability surveys for the disparity study from May to June 2022. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the California marketplace. A total of 250 businesses provided anecdotal information as part of the surveys. Availability survey comments are denoted by the prefix “AV”.

**3. Focus groups.** The study team conducted two focus groups. During the focus groups the study team asked participants to share their insights about working in the California marketplace and with public sector and private sector organizations. The prefix “FG” denotes comments from the focus groups.

**4. Public forums.** Caltrans and the study team solicited written and verbal testimony at five virtual public forums for the disparity study. The meetings were held on June 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, and 16<sup>th</sup> of 2022. The study team reviewed and analyzed all public comments from the five meetings and included many of those comments in Appendix D. The prefix “PT” denotes comments from those forums.

**5. Written testimony.** Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or email. Written testimony is denoted by the prefix “WT”.

## **B. Background on the Construction, Professional Services, and Goods and Other Services Industries**

Part B includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Employment size of businesses;
5. Growth of the firm; and
6. Marketing.

**1. Business characteristics.** The business owners interviewed for the study represented a variety of different business types and business histories, from well-established firms to newly established firms, and worked on small-to-large contracts in the California marketplace. Interviewees described the types of work that their firm performs.

**Industry.** The study team interviewed 4 construction firms, 5 firms providing professional services, and 11 firms supplying goods and services.

**Four firms worked in the construction industry** [#5, #6, #7, #20]. For example:

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "[We do] concrete cutting demo. We do bridge demolition concrete, cutting wire sliding, wall sign, full service." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "We do underground construction and heavy civil construction." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "We furnish and install rebar for concrete structures" [#7]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Our primary business model [is] to do as needed contracting." [#20]

**Five firms worked in the professional services industry** [#2, #4, #8, #10, #13]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "We offer land surveying." [#2]
- The Black American owner of a DBE-certified professional services company stated, "We are management consultants, consulting municipalities and corporations on their operations and strategic planning." [#4]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "I'm a civil engineer." [#8]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "We do engineering work." [#10]
- The owner of a WBE- and SB-certified professional services company stated, "We are full-service advertising agency." [#13]

**Eleven firms worked in the goods and services industry** [#1, #3, #9, #10, #11, #12, #14, #15, #16, #17, #18]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "We are a metal material supplier for electrical traffic signals, wiring type of material." [#1]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "We are in the business of distributing an environmental lubricant." [#3]
- A representative from a WBE- and DBE-certified goods and services company stated, "We are a commercial tire dealer, but we also we sell industrial tires, farm tires, you know agricultural tires, everything except for motorcycle tires and plane tires. We also have a frontend alignment shop, and we are also a commercial re-treader." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "We repair trucks, trailers, and semis. We also have a body shop, and it pretty much only has to

do with trucks and trailers. Also work on refrigerated units, containers, custom fabrication." [#11]

- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We're an apparel distributor. ... we do provide a service. We do the embroidery of the logos on uniforms for businesses, so that is our service." [#12]
- The owner of a transit company stated, "We are a medical transportation company. It's an emergency transportation. We provide transportation service for patients to transport them from their residence, nursing home, to their doctor appointments." [#14]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "We are a material supplier. We supply permanent construction materials to bridge and highway contractors. And so, we've got a warehouse and a store and an office and a big yard that we have inventory of the kind of things that we sell to the contractors." [#15]
- The woman owner of a goods and services firm stated, "I like to drive, and I know there's a need for airport transportation in the city. I used to drive motor homes cross country, dropping them off, picking them up for a company that rented out RVs and I just enjoy driving, I've always been a really good driver so when COVID happened, I panicked like everybody else, and just decided that this would be a good job for me, and so I decided to start this business, and I'd like to make it profitable the first year." [#16]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "We are a janitorial commercial cleaning company." [#17]
- The co-owner of a SB- and VBE-certified goods and services company stated, "Communications, specifically two-way radios." [#18]

**Years in business.** Nineteen businesses reported their date of establishment. The majority of firms (14 out of 19 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Three out of the 19 businesses had been in business for between five and ten years. Two firms were newly established, having been in business for less than five years.

**Two firms reported they had been in business for fewer than five years** [#14, #17]. For example:

- The owner of a transit company stated, "It's been three years [in business]." [#14]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "We incorporated January of 2019." [#17]

**Three firms reported they had been in business for five to ten years** [#6, #7, #11]. For example:

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "We've been in business for eight years, but we've been a contractor for six." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "Since 2016, so it's six years." [#7]



- The Hispanic American owner of an MBE-certified goods and services firm stated, "Under the current name it's been six years. And overall, in the industry, I'm going on 23 years." [#11]

**Fourteen firms reported they had been in business for more than ten years** [#1, #2, #3, #4, #5, #8, #9, #10, #12, #13, #15, #18, #20, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "[We started in] 2009." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "30 years in business." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "30 years. ... 1994 is when I incorporated, but I started the company technically about 1988." [#3]
- The Black American owner of a DBE-certified professional services company stated, "38 [years]." [#4]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "My husband [and I], we were founders and started the company in 1980." [#5]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "15 years [in business]." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "Since 1952." [#9]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "Since 1996." [#10]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "Thirty-four years." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "16 years." [#13]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I started the company about 20 well, 22 to 20 years ago ... we originally were incorporated in Washington, but then opened up in California in 2002." [#15]
- The co-owner of a SB- and VBE-certified goods and services company stated, "Since 1979. I finally just went into work on my own and opened up my own business in 1979." [#18]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "In 2002, we started the firm." [#20]
- A representative of a majority-owned goods and services company stated, "We incorporated here in 1991 with no problems." [#AV177]

**2. Business formation and establishment.** Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

**The majority of business owners and founders had worked in the industry or a related industry before starting their own businesses.** This experience helped founders build up industry contacts and expertise. Businesspeople often found motivation to start their own firms from the prospects of self-sufficiency and business improvement [#2, #4, #5, #7, #9, #11, #15, #18, #19, #20]. Here are some of the founder stories from interviews:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "[We] were founded in 1957. I started working here in 1992 after I graduated with my degree, I earned my license and I work[ed] my way through the company and I purchased the stock and the company in 2010." [#2]
- The Black American owner of a DBE-certified professional services company stated, "I came out of a consulting firm." [#4]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "My husband [and I], we were founders, started the company in 1980, primarily did work for public work agencies." [#5]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "I myself come from the trades; I started in 2009 as an apprentice ironworker and journeyed out in 2013." [#7]
- A representative from a WBE- and DBE-certified goods and services company stated, "It was an individual who started it years ago. He then sold to his son and then the current owner... purchased it in 2013 from the [founder's son]." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "My brother was already doing it. He was already working in the company. He had done it since he was a child, his father was a mechanic. His grandfather was a mechanic. And then I was just fresh out of high school, I had a classic car I was fixing up and he would see that I was always working on something. One day he just asked me, do you want to help me out? [I] want[ed] to do kind of my own thing. And I told him yeah, he's just so kind that's when he started teaching me and he's been doing it ever since that was in 2001 or 2000." [#11]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I've been working in this particular company for 20 years, but I was in the industry prior to that for about 15 years, worked for a bearing pad manufacturer where I learned, you know, a lot about how bridges are designed and built and the kind of materials that go into bridges. ... I needed to have a little bit more flexible working life because at the time my husband was working for a large contractor and was never home. And so, I had to have the ability to, you know, pick up kids and take kids to practice and that kind of thing. And so, I would, you know, be able to work late at night or early in the ... morning. When I didn't have that to do so, I needed something flexible, so that something flexible became my own thing. And so, I started working, just kind of supplying the product that I was working in, but also a lot of the other products had kind of come to understand and that sort of thing." [#15]

- The co-owner of a SB- and VBE-certified goods and services company stated, "I finally got the job and went to work at a two-way radio shop in San Jacinto California and I worked there, let me see, I guess about 3 years, and then finally I left, and I worked at another company. And finally, just went on, went into work on my own and opened up my own business in 1979. So, I've been in two-way radio all these years." [#18]
- The Black American owner of a transit company stated, "I've had this dream since I got into the industry at 18, so for 30 plus years I've worked on establishing policy procedure manuals of how I want the business run, the structure and everything else, and over the years since the industry has changed. I've modified it as my own experiences increase in all levels of the industry from EMT to upper management and things of that nature. I've incorporated all of this in order to build the structure of how I want the business to run." [#19]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "So, I've been in construction since my teens. Out of high school, [I] was able to secure an apprenticeship program in the Carpenter's Union. I proceeded to become a journeyman and the next 10 years, worked various locations throughout the Bay Area. [I] made the decision to seek employment as an administrator, project manager with a small DBE mechanical firm in San Francisco, and worked for the firm for three years, and then worked for another DBE for the next 10 years. Then in 2002, [I] made the decision to venture out on my own, based on those 12 years of experience in management and having a fairly good handle on building things through my experience as a tradesman. The timing was right, and so in 2002, we started the firm." [#20]

**Other motivations.** There were also other reasons and motivations for the establishment of their business [#10, #16, #17]. For example:

- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "I was in the restaurant business before. Then I was in homecare after that. ... I grew up in business, that's why I did it. My parents had their own business, I grew up working at it. I went to school with MBA, in the navy, and I want[ed] to go in business so I started a restaurant business. ... Well, my wife is a nurse, and so they have a need for caregivers for immobilized people that need care, so that's why I get started, getting out from restaurant." [#10]
- The woman owner of a goods and services firm stated, "I like to drive, and I know there's a need for airport transportation in the city. I used to drive motor homes cross country, dropping them off, picking them up for a company that rented out RVs and I just enjoy driving. I've always been a really good driver so when COVID happened, I panicked like everybody else, and just decided that this would be a good job for me, and so I decided to start this business, and I'd like to make it profitable the first year." [#16]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "What the impetus for starting the business, oddly enough, is just that I was interested in starting a business, and so I have been saving my money for a little while to do so and ran across someone who had a janitorial business and said that I would be great as an owner of one, and so there, started the journey and start." [#17]

**3. Types, locations, and sizes of contracts.** Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

**Three firms reported working on contracts with an average value under \$100,000** [#2, #12, #15]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "They're usually in the neighborhood of \$3,000 to \$10,000." [#2]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "I mean it could be anywhere from \$10 to several thousand dollars, I mean it just depends on who it is and how big that business is." [#12]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "A typical contract for us is probably, somewhere in the neighborhood of twenty to eighty thousand dollars." [#15]

**Five firms reported working on contracts with an average value between \$500,000 and \$1 million** [#1, #4, #5, #10, #17]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "They could start at anywhere from \$20,000 up to \$1,000,000." [#1]
- The Black American owner of a DBE-certified professional services company stated, "From zero to almost \$1,000,000." [#4]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Big contracts can start at \$100,000 and up; our biggest one was \$6,000,000." [#5]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "Oh it ranges from \$3,000 to over \$1 million." [#10]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "Our capabilities right now to handle any government contracts, I would say, would be like up to \$1 million at this point." [#17]

**Four firms reported working on contracts with an average value between one and ten million dollars** [#5, #6, #13, #20]. For example:

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "We primarily do public works projects, but we're not a large company. We have less than \$10 million, but we're not small, like super small." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "[We do] jobs ranging from like a million to \$3 million." [#6]
- The owner of a WBE- and SB-certified professional services company stated, "We could work with half a million dollars, and we can work all the way up to whatever, ten million dollars." [#13]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "We rarely win projects beyond 5 to 6 million

dollars, unless they're multi-task contracts. Those tend to be about \$7 million. That's a contract vehicle which are made up of multiple task orders up to 20 or 30 tasks. They get you to \$7 million. So, that's our primary business model, to do as needed contracting. So, once you have the contract, there's a steady source of income based on the task orders that you are selected to perform by the agency." [#20]

**Three businesses did not perform work on contracts with pre-determined values** [#9, #11, #14]. For example:

- A representative from a WBE- and DBE-certified goods and services company stated, "Basically, it's a service contract with our rates, our hourly rate, our in-shop rate, and then also being that they are government entities they get discounts through Michelin, so their pricing that is set by Michelin for their tires. So, it's something that we don't negotiate necessarily on the tire prices, it would be Michelin and those are set for a duration of one year and so it's renegotiated tied every year." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "We normally charge by the hour. ... A lot of time these places have their own shops. They give us a lot of their overflow, a lot of it it's time consuming, or don't have their own people do that." [#11]
- The owner of a transit company stated, "No, they don't pay like this [by a contract amount]. It depends for the trips; they pay you for trips on mileage. They don't pay like this, which is part of the difficulty." [#14]

**Four firms reported working on contracts solely in their Caltrans District or within 100 miles of their home office** [#9, #11, #14, #17]. For example:

- A representative from a WBE- and DBE-certified goods and services company stated, "We try to stay within an hour like radius of [our city]. But we often go outside that radius, sometimes as far as 150 miles, 160 miles. We have certain customers that refuse to call anybody else to fix their tires, so we have to go to them wherever they're at." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Yeah, mainly majority of Southern California, we have been all the way up to Bakersfield. We're close all the way to Indio, and we have covered much of San Diego. ... [For other contracts that are] quite a distance [away], I would have to create a team that will be able to help me on that side of town. Because everything that we have been here has been a lot with LA and Orange County. But we still work with San Fernando Valley, but that is now having to send someone to do a bit on certain particular equipment there. And we know that the hard part is sending someone paying them to do that, without getting anything back. It's investment hopefully they get it, but only thing is not until you get it, is it going to pay it back." [#11]
- The owner of a transit company stated, "We cover all the east count[ies]. We cover all San Diego area. Sometimes, we are taking trips close to Temecula, close to Orange County, so we cover all this area." [#14]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "It would be Los Angeles County." [#17]

**Six firms reported working on contracts solely in California** [#1, #2, #5, #8, #15, #20]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I can work anywhere in California. Let's just say I have a job in San Diego or even further than that, it costs more money to do that job because you have to deliver the material. ... it's the cost of gas. It's the cost of labor. ... the prices go up, it's more expensive ... That, uh, you know, Caltrans has out there for small businesses and DBEs." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "We typically work within two to three hours of our office and try not to work out of town if we don't need to." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Southern California from like Fresno down. But we have performed services throughout the state first special contractors that we have a good relationship with." [#5]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "The majority of our workers are here in Southern California." [#8]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "We do from time to time, but there is so much to do in California, and we're very familiar with the, you know, our customers and our vendors and the plans and specs, the standard plans and specs for the state of California quite frankly. We sort of know them, you know, very thoroughly. And each state seems to have slightly different requirements for even the same product. So, we've really just tried to focus on California, but we do business in other states." [#15]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "We've scaled back the business, closed out operations outside of anything outside of California. We've closed those offices and primarily focus now on the greater northern California region." [#20]

**Five businesses reported working in the California marketplace and with clients outside of the state** [#3, #4, #10, #12, #13]. For example:

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "We cover all the United States and Canada." [#3]
- The Black American owner of a DBE-certified professional services company stated, "National. ... In my recent years as a personal preference, I've tailored to West Coast in California where possible." [#4]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "Our customer base is all over the country." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "We can do it nationwide. Typically, we get business regionally, so the State of California, the whole state, Arizona, Nevada. We've done deals in Texas, Omaha. We can do it anywhere. But that's where we typically have been." [#13]

**4. Employment size of businesses.** The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (18 of 19 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

**The majority (10 of 19) of businesses had 1-10 employees** [#1, #2, #3, #4, #10, #13, #14, #15, #16, #18]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "At the moment I have two [employees]." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Right now I am the only full-time employee and I have three-part time employees." [#2]
- The Black American owner of a DBE-certified professional services company stated, "Right now we only use private contractors who have specific technical and industry skills." [#4]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "I don't have employees." [#10]
- The owner of a WBE- and SB-certified professional services company stated, "Five employees and about five contractors." [#13]
- The owner of a transit company stated, "I think eight [employees]." [#14]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I think it's five employees." [#15]
- The woman owner of a goods and services firm stated, "No employees yet." [#16]
- The co-owner of a SB- and VBE-certified goods and services company stated, "We only have two employees now, during COVID we had to get smaller, but we're still alive." [#18]

**Five interviewees reported that their businesses had 11-25 employees** [#8, #9, #11, #12, #17]. For example:

- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "18 [employees]." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "It would be 23 [employees]." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Employees including myself, I would say about 18 of us." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "Thirteen [employees]." [#12]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "I have 24, but 3 of which are full time, right, and then the others are part time janitorial." [#17]



**Three businesses had 26-50 employees** [#5, #7, #20]. For example:

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Currently we have 42 [employees]." [#5]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "[We have] about 35 [employees] right now." [#7]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "We employ approximately 35 to 40 employees full time." [#20]

**One business had 51-100 employees** [#6]. For example:

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "I would say 58 [employees]." [#6]

**5. Growth of the firm.** Business owners and managers mentioned the growth of the firm over time [#2, #3, #7, #9, #10, #14, #15, #20]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "My company[’s growth] has decreased because of a variety of factors. Partially because an employee went to work for Caltrans. ... Partially because I had a bad experience with Caltrans, and I chose to redirect my company and I'm not pursuing that type of work anymore." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "After I lost [our previous large contract], that was about a \$140,000 a year loss there, and we're coming back from that loss. That was very heavy. But now that our product is getting to be known around the country. We're getting calls from all over the country, including Canada." [#3]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "I would like to scale. I'd like to, you know, be able to estimate where I'm estimating about two jobs a week. Now, I would like to estimate or bid on five projects a week, but you know that like I said, that costs money. So, finding capital to assist in scaling has been a barrier." [#7]
- A representative from a WBE- and DBE-certified goods and services company stated, "I think we've gained more customers and I really can't say as to why. If I had to say it's because of our customer service, so but I don't know why other people wouldn't be providing customer service [is] what I'm saying, I guess. Maybe they were short staffed. You know I don't know. We didn't lose anybody. So, maybe I can't speak on why they [do not do it] .... You know maybe they didn't have the staff to provide good service[s], therefore, that's why they lost the customers, and we gained them, I don't, I can't say what it was." [#9]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "It depends. Last year, I had the volume of sales and then this year a little less. It depends on the needs again and it's very competitive, so you

really have to be out there and outbid better service to disabled veterans. It is [a] competition." [#10]

- The owner of a transit company stated, "We [bought] a new van that we added. Our company, as soon as we signed [a new contract], we increased our drivers. We've been increasing. ... They called me, and they were like, 'Hey, you're really doing well with us, and we have another account we can add it. We're going to add more trips, so [you] can add more cars. We can give you more trips. We can increase your volume.' After that conversation, I decided to buy more vehicles. That increased my volume, made the business grow." [#14]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I started small and just kind of grew with every order and every year. And now, you know, we've gotten pretty good and are pretty big and have gotten kind of a pretty good foothold in the industry. But, you know, it's been a lot of years developing the relationships and in a real strong understanding of what we're doing, but it takes certainly some determination to see that and learning every day." [#15]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Our largest that we became was about 10 years ago, and we had about 120 employees scattered out between five to six states and doing public works and revenues were right around \$40,000,000 a year. Subsequent, we've scaled back the business, closed out operations outside of anything outside of California. We've closed those offices and primarily focus now on the greater northern California region." [#20]

**6. Marketing.** Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing and word-of-mouth referrals [#1, #6, #9, #12, #16, #17]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I have a website and a lot of it is word of mouth. If I had to start all over, I would definitely market better." [#1]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "We're mostly word of mouth in the industry and then our industry kind of just knows us." [#6]
- A representative from a WBE- and DBE-certified goods and services company stated, "We had one of the only retread shops in [our city] and the owner was also well known and well liked and so it was like word-of-mouth. We still do not like to advertise [these] day[s], it's all word-of-mouth. ... We've never advertised like in you know back in the day in newspapers or commercials or even radio commercials, it's all done by word-of-mouth." [#9]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "Word-of-mouth primarily. We don't have a marketing fund. We don't take out ads in trade publications or anything, it's just word-of-mouth. If somebody likes what we're doing they'll recommend us to someone else." [#12]
- The woman owner of a goods and services firm stated, "I use Google ads. I was using a shopper[']s guide, something that goes out to 55,000 households houses here, and so I had a

third of a page on there. It's pretty expensive to advertise, and I don't get a lot, as much business from it. Barely pays for itself. The advertising, so I stopped advertising there, and I'm just primarily using Google ads because I just think I get more, more business through Google Ads." [#16]

- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "We really haven't in the government sector like been marketing ourselves; and as far as how we've been marketing ourselves, we market ourselves on lots of social media platforms, and then we also have been doing Google Ads as of last year, which has really increased our business quite significantly, both in the commercial side as well as the event cleaning side." [#17]

## C. Ownership and Certification

Business owners and managers discussed their experiences with the California Unified Certification Program (CUCP) and the California Public Utilities Commission (CPUC), and other certification programs. This section captures their comments on the following topics:

1. CUCP, CPUC, and other certification statuses;
2. Advantages of certification;
3. Disadvantages of certification; and
4. Experiences with the certification process.

**1. CUCP, CPUC, and other certification statuses.** Business owners discussed their certification status with the California Unified Certification Program, the California Public Utilities Commission, and other certifying agencies and shared their opinions about why they did or did not seek certification. For example:

**Fifteen firms interviewed confirmed they were certified as DBE, MBE, or WBE** [#1, #2, #3, #5, #6, #7, #8, #9, #10, #11, #12, #13, #17, #18, #20]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I am a DBE small business and I'm an SB. ... I've always [been] in the construction field. It's just something that I wanted to do. Someone had mentioned you should get your small business. I mean, there's a lot more certifications I should probably get." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I'm UDBE and WBE and micro small business. ... I got the certification the first year I bought the company. So that would be 2010. I think I did it all during the that first summer. ... they used to have like a micro thing they add on when you were under a certain size, meaning you were because if you face small business and then you look under different categories, you can be small business and make millions of dollars and still be a small business in certain industries. But we were considered micro because we were like less than a dozen people or whatever." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "We're a disabled veteran-owned [company] and minority[-owned]. ...

we're also certified with the federal government as a small business. ... We're certified with the clearing house. We're certified by the city of Fresno as a DBE. We're certified with the federal government, veteran-owned small business, you know everything. Yeah, we hold a lot of certifications." [#3]

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "DBE, [we're a] Hispanic SB and WBE." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "WBE and DBE ... we have the 8A as well. ... and local business enterprise for San Diego." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "certified CBE, DBE, MBE, WBE ... and LGBTBE." [#7]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "I'm DBE. I'm also a disabled veteran so we are DVBE. ... And SB with Metro. ... [We also have] minority certifications, the only one that we do not have is WBE." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "So, we have our WOSB. And we have our WBE. We have our DBE, and then we also are an SB through California. ... We have the WBE through Suppliers Clearinghouse and we also have a WBE through the Women's Business Enterprise National Council, the WBENC and then of course our DBE is through the state, through the federal [government] and Caltrans, the one that facilitates that." [#9]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "[We have] a veteran's certification, DVBE ... we have a different certification from Washington, DC, it's just called SDVOSB, Service-Disabled Veterans Owned Small Business, it's [also] considered minority owned." [#10]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Yes, minority-owned." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We're DBE, MBE, and Small Business as well. They're with the State of California." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "WBE and an SB." [#13]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "We have a lot of certifications. Let's see; DBE, SB, WOSB, I think that one is still pending, the WOSB. [We have] the local business certificate, and [the] Small Business Enterprise. I have roughly 10 certifications right now, so I don't quite remember all of them off the top of the head." [#17]
- The co-owner of a SB- and VBE-certified goods and services company stated, "We have a small business we're required every, I think it's 3 years, to renew it. You have to submit I think tax returns and things like that." [#18]

- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "We are a local DBE here ... locally, we are a local business enterprise, and Micro-SBE. State level, we are small business and disadvantaged business enterprise. At the Federal DOT level, we are a DBE, disadvantaged business enterprise. At the federal level, we have in the past, we became certified as an 8(a) contractor, subsequently, we graduated from that program well over 10 years go and we are still a DBE on the federal side, and we currently hold a HUBZone or Historically Underutilized Business Ownership certification." [#20]

**One firm interviewed was not certified but was in the process of applying** [#16]. For example:

- The woman owner of a goods and services firm stated, "Not at this time, but I have downloaded and printed out and filled out the entire packet. There's a lot of information that they need from me. So far, all I've got together is my banking information, but there's, there's a handful of other things that I need, and I should have that finished within a week and submitted. I don't know how long it's gonna take for them to go over the documents and approve me, or what more they're gonna need from me. But I'm hoping to get it so that maybe I can be more competitive in, you know, the contracts. I need that to bid for contracts." [#16]

**Three business owners and managers explained why their firms had not pursued certification.**

Many uncertified firms were unaware of the certification or its benefits [#11, #14, #19]. For example:

- The Hispanic American owner of an MBE-certified goods and services firm stated, "I didn't know about that." [#11]
- The owner of a transit company stated, "I don't think so, no. I don't have the certification that we are a small business; it's just I have a business license [indicating] that we're medical transportation." [#14]
- The Black American owner of a transit company stated, "How do you go about being certified?" [#19]

**2. Advantages of certification.** Interviewees discussed the perceived advantages of DBE/MBE/WBE certification. Business owners and managers described the increased business opportunities brought by certification [#1, #2, #3, #7, #9, #12, #13, #15, #17, #20]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I mean your advantage is because you get to quote on minority projects because that's what these primes and contractors are being told. You need to have minority participation. So yeah, there, there is an advantage." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I have a number too that I put on my invoices to Caltrans. Just remind them they had to pay me timely or else they had to pay me interest ... The previous owner was probably going to retire, and I wanted to make my move, so I purchased a company and talking with other you

know, you hear stuff in the Grapevine. So, I was like, oh, man, if you're a woman owned business, so many doors are gonna open. So, I'm like, OK, so I got all my ducks in a row, did all my certification. ... the reason I got certified is I was hoping it would increase our work. ... it's really still relationships, it's not a certification that makes a difference. So, you have to build those relationships with the company. Public jobs such as the Caltrans contract PG&E, think it made a huge difference because PG&E has very high diversification goals as opposed to the state. So, I think it made a huge difference with PG&E and open doors and gave opportunities." [#2]

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "We're also certified with the federal government as a small business. So that allows us to sell military products [and] allows us to get into the into the federal [sector]. And supply depots and... It's just a lot. It opens a lot of doors for us." [#3]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "We're putting in bids for getting the certifications all the way across the board. All those certifications I named, at the end of the day, bottom line, matters. Certifications just good look good." [#7]
- A representative from a WBE- and DBE-certified goods and services company stated, "[Certifications are] a huge benefit, a huge benefit." [#9]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "Well it gets us in the door, and in some cases where price isn't the only factor in determining or awarding a bid, we can be awarded a bid if price isn't the only consideration. You know the fact that we are DBE or an MBE or a Small Business does play a part with some government agencies, not all. ... The transportation industry is largely funded by federal government and the federal government demands that these contractors use DBEs like us. So, in the transportation industry we've seen some success. However, if we receive just government bids that just say, 'Lowest price wins,' and it could be on any, in any department, that's where we don't participate." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "Everybody talks about, 'Oh, woman-owned businesses get this and that.' I have yet to find or see any real advantages to the woman-owned business. I have not seen a contract that says, 'I'm looking for woman-owned businesses.' You know what I mean? I've not seen any special anything for a woman-owned business. So, I feel like yeah, everyone thinks that. They're like, 'Oh, you're a woman-owned business. You should be getting this, that, and the other thing.' I'm like, 'Really?' 'Cause I don't see any of that anywhere.'" [#13]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "If we didn't have our certification, our business would go down significantly." [#15]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "I've tried to navigate this path previous to going through this lady and her company to procure contracts, and yes, you know, yes, it's, it's definitely valuable and useful." [#17]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "On the federal side we're typically competing as a



HUBZone, which by de-facto, is a DBE. Do you need to have, if you're not currently certified as DBE, but you are certified as a HUBZone, you technically can't check both boxes - but you technically should check both boxes. You can't be a HUBZone and stay in this business. So, it doesn't preclude you from getting an award if you do not have the DBE certification. That being said, there were several years, oh, about seven years ago, where we were reaching our maximum dollars. We were averaging \$20mm. So, we had to voluntarily withdraw from the DBE program. This is about seven years ago, maybe eight years ago, and so we were caught, that didn't preclude me from winning contracts, but what it did was, I could no longer, when I was awarded a project under certain contract terms, I could no longer use my own participation to fulfill the obligations of the DBE owned contract. So, I in turn had to have a subcontracting plan and reach out and obtain DBEs for my projects. So, that was probably the biggest issue that I had, you know, not having my DBE certification. Then about three years, four years ago, our average sales dropped enough to be able to recertify and it has certainly helped meeting our statutory goals for our federally funded contracts and locally funded M.T.A. contracts. ... just like there are women set-asides, service-disabled Vets set-asides, 8A set asides, small business set-asides, which will be a HUBZone set-aside." [#20]

**3. Disadvantages of certification.** Interviewees discussed the downsides to certification [#1, #2]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "The disadvantages come later down the road, of course. If you have issues." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I think [people contacted me] to meet the quota. I don't think it was truly an 'oh, I think you could do a good job'. And I wanna be known as a good surveyor, not as a woman surveyor." [#2]

**4. Experiences with the certification process.** Businesses owners shared their experiences with the certification processes [#1, #2, #3]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "The application's very long and tedious. ... The process was good. I didn't have a problem with the process. ... My SBE process was a lot easier. It wasn't as detailed." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I put it more in the middle because it did require us doing a lot of digging on paperwork and stuff that we didn't have handy or wasn't relevant that I had to go search back and find stuff, but it wasn't anything overly challenging. It was more, you know, gotta go find tax records and then gotta figure out how some things are held. So, my husband's in a totally different industry. So, I'm pulling up my tax returns and then I'm trying to show I bought all the stock, but we're in a community property state. So, then we're like, well, technically, does he own half of the stock?" [#2]



- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "You're starting from scratch. That's a little hard. ... Well, the DBE, the MBE, none of them are hard. The most difficult I've ever done is the is the certification for the federal government." [#3]

**Recommendations for improving and comments about the certification process.** Interviewees recommended improvements to the certification process and shared comments about the certification process [#1, #2, #3, #9, #13, #17, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "When you're going through your applications... I think you need to let everybody know ahead of time. ... [that] we will have this ready for you. We will have mentors. We will have meetings ... This can all be readily available for you if you get your certification. ... If a DBE was to ask me or if somebody came to me today and said, 'Hey I'm thinking about becoming a DBE and I wanna get certified with Caltrans, you know? What do you think?' [they] probably wouldn't want to know what I think. But there is a light at the end of the tunnel, and I believe that, and I believe things can be changed." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I won't say it was hard. It is unsettling how much personal information you have to give and that it's sitting in somebody's drawer and with all the identity. ... It is very unsettling to know that like bank account numbers and all my personal information, Social Security [numbers for] me and my husband, is sitting in somebody's drawer somewhere or I've loaded it up onto a server that could get hacked... The process itself of filling out forms wasn't difficult. ... it's kind of funny because you hear both sides, so I'd hear from 1 group how there's all these companies that are women-owned or minority-owned, but it's the spouse and they're not really doing anything and it's just on paper and then I'll hear from another group where I know the woman doing the work and she's like, yeah, they were questioning me... I mean, she's licensed running the business and they were saying no, it's your husband because he's out in the field or something. So, I was really nervous when they came to interview that they weren't going to see that I actually owned or run the company, especially since I had just quote unquote purchased the company even though I've been here for 18 years. When they were coming out to, you know, check the facilities and everything else. I was like, how am I gonna prove them that I'm the only doing the business since I just officially bought the stock less than a year ago? How do I make it so that? They can see that I am the one in responsible charge and I didn't have any problem [because], well, obviously because I could answer any question, I knew what was going on with the business and there was nobody sitting over in the corner feeding me answers, but it's amazing what you hear from both sides and I don't think either of them are probably true. ... There's a threshold, once your net worth is above something that you no longer qualify. My husband and I invest very conservatively and I'm afraid I'm gonna top out of this before somebody who just like to spend all their money. And I don't always understand why that's a criterion ... And how my personal investing and lifestyle of what I choose to spend money and not spend money on really would impact the business. ... I am impressed because in the past I received the letter in the mail saying, 'hey, your certification is going to expire, you need to go do this'. And then I did get some emails this time, but I actually got a phone call from the guy in the city of Fresno checking in, making sure if I needed anything and I was

actually impressed that he was being proactive because in the past I felt like you kinda gotta follow up on stuff a lot yourself.” [#2]

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "All my invoices all say all the various certifications, but nobody ever questions... You know I have the government CAGE codes I have, you know, a certification of the federal government. I have all this, but I've never had anybody say, 'hey, I see your certified with Caltrans or on the federal side'. No one ever has asked me about certifications. ... The only other way you're going to do that is take [the] DBE certification [to the liaison] person for the state and say, 'look, here's what we're going to do. We're going to give you a 10% on every new account you bring in'. Then you're going to see some action. Until then, you'll never see it, so I really don't waste my time with those certifications.” [#3]
- A representative from a WBE- and DBE-certified goods and services company stated, "It's a lot of work. I mean it's very time consuming and a lot of work to keep up all those certifications, but it's in the end it's worth it. It's kind of too bad that a lot of people don't take more advantage. Like for instance we went to a workshop and there was an individual there from the State of California and he told us that there were one to two million small businesses just in the State of California, because you know they say California is like the tenth largest economy in the world, right? We're our own little country basically. But he said out of those let's two million small businesses there was only like 30,000 small businesses registered. You know but I think that's because a lot of people don't know where to start. And even, even when we started or actually when I started, I should say trying to get her registered, like I got online, and you research it and you just... There's so many of those I don't know if you want to say 'fraudulent' companies, but all these people that are, 'Oh we can do it for you,' you know that want to charge you so much money and you can really do it on your own. But the direction there to get to that is very difficult. But once you find the place to go to then it's smooth sailing after that, because then the help and the assistance is just outpouring. You know they'll connect you; they'll meet you up with people, they'll you know partner you with somebody. ... [She] even went to a class that it was, it was through the Small Business, and it was a, it was like a president's you know thing for growing companies and stuff ... there's always stuff like that coming up that's just really, really helpful. ... But getting, getting, getting started is a challenge for people. And so, I always like to try to - like I keep all my links and anybody I know I'm like, 'Here, go here first' and then you know. ... any recommendations to Caltrans, OSD, or the CUCP for improving their certification process it would just to be making the path clearer.” [#9]
- The owner of a WBE- and SB-certified professional services company stated, "If they're listing opportunities like that [for certified businesses], well, where? 'Cause I don't see it.” [#13]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "Do I feel like the certification has helped obtain more business? ... No, I just don't know and so why is that? So, ok, in my head, I equate the certification as, as like, now you belong to a chamber... so, now it's, it's up to me which makes sense and I get it. Now it's up to me to really focus in on what I can get from that certification. ... The private sector for me was like oh, you know, I go in, I, I have a walkthrough. I talk to a few of the

people who would be making the decision, they create a proposal, contract, they sign, we get this going, you know, like my team goes in, does the scope of work, like that! It's a very direct path. The DBE is like, and I'm equating it to like the chamber. Now I have to go to all of the Chamber meetings, right - introduce myself, let people know that I'm there, then figure out what is what, what, what portals I need to go, because they're putting the jobs out there, you know, going through the walkthrough, then navigating all the questions that I have from doing that walkthrough, you know, through a form of sorts, where other people are in competition, which is great, you know, the process is just a lot less direct and a lot more labor intensive to obtain those contracts. ... You could even be given like this portal of, you know, there's 100 jobs and then maybe 5 are janitorial, and then you're looking through those 5 and of those 5 right - now I have to read through a huge packet of all this stuff to make sure that I'm, you know what I mean, it's just more labor intensive, and as a small business owner, pre C.O.O., and pre direct marketing, you know, and then like I get the contract, after all my efforts, all my reading, all of my going through everything I need to go through, all the meetings I've attended... I haven't figured out how to balance the time requirements to have it pay off. ... From my limited research, I've learned that going through a paid certification like that is more advantageous to acquiring corporate contracts than just solely individually on my own registering with them with my DBE that's been my experience." [#17]

- A representative of a Hispanic American-owned goods and services company stated, "I would appreciate if I could have some sort of a liaison to help me with my DVBE status. I've been disabled since 2014, and that's when I started my business and I'm still in the process of registering." [#AV156]

## **D. Experiences in the Private and Public Sectors**

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work. Section D presents their comments on the following topics:

1. Trends toward or away from private sector work;
2. Mixture of public and private sector work;
3. Experiences getting work in the public and private sectors; and
4. Differences between public and private sector work.

**1. Trends toward or away from private sector work.** Business owners or managers described the trends they have seen toward and away from private sector work [#2, #12]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I had a bad experience with Caltrans, and I chose to redirect my company and I'm not pursuing that type of work anymore. Seven years ago, when I was in my Caltrans contract, we were heavy with state of California heavy with city of Clovis, a couple other cities around town. We were heavy in the public arena and not so much in the private. Got fed up with the public and I chose to go private where I have more control over who I'm working with and how I handle my negotiation and my contracting." [#2]

- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We've got competitors, larger competitors than us that are able to reduce their prices because their costs are lower. So, if a contract bid or if a bid is out there from a government agency and they go with the lowest price all the time, then you know we're going to lose. So, it quite frankly prevents us from even taking the time to do government bids because it's not worth it to us, we know we're going to lose and there's too much time involved preparing the bid. So, we just don't participate in many of them. ... I mean the other thing is if we lowered our price to be competitive then we would not - if we were awarded the bid it wouldn't provide any profit for us, so why bother? You know it, we don't even want to win these things, because the price is so low that we would either not make very much money or even lose money, so what's the point? You know it's just a waste of my time and if we did win it would be a waste of the company's time to process these orders. So, we let the little guys have them, sit at home and don't have infrastructure or overhead to pay for these things and hope that - or not hope, but that government hopes that they're going to get their stuff." [#12]

**2. Mixture of public and private sector work.** Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

**For six firms, the largest proportion of their work was in the private sector** [#2, #3, #11, #12, #13, #14]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "95% of my work is private. ... Previously it was complete opposite." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Private would be probably about 80%. 20% would be public sector." [#3]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "I think private is maybe like 80%. ... It is just wherever we can help out, we have been bidding [public work], but I think it is one of those things we haven't won any bids. We hope we [will] still keep at it, but we haven't won any." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "Most of it is private sector, but I have no idea of the percentages." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "90 percent of my stuff is private." [#13]
- The owner of a transit company stated, "We don't work with government." [#14]

**For seven firms, the largest proportion of their work was in the public sector** [#1, #5, #8, #9, #10, #15, #20]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I think the majority of all of my work is public." [#1]

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "We really don't [do] private work." [#5]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "We only deal in public sector." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "Most of our contracts are through the public sector." [#9]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "[We do] military contracts." [#10]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "We primarily do public works projects." [#15]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "I would say that 98% is public sector. It's very rare that we do a private sector job. It has to be for a very specific client, or for a specific need if we do have to seek out private work or commercial work." [#20]

**3. Experiences getting work in the public and private sectors.** Business owners and managers commented on what it's like to seek work with public and private sector clients in California.

**Two business owners expressed that it is easier to get work in the private sector.** Many noted the benefits of personal relationships, the difference in process, and the ease of finding work as reasons they see getting work in the private sector as easier [#2, #3]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "There's more you have to do up front before you get awarded a contract [for the public sector]. If a private person calls, I can spend an hour. Sometimes I can look and just 20 minutes on the phone answer and give them 'hey, you're probably looking at this' and they'll go 'Never mind.' Or they'll say, 'oh, great, send me a contract' and then I'll spend a couple hours putting stuff together." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Private sector's much easier because you can move so much faster, and it just is finding that person that makes a decision." [#3]

**Fourteen business owners elaborated on the challenges associated with pursuing public sector work** [#3, #5, #7, #13, #19, #AV]. Their comments included:

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "It's very difficult to get into the into the government [sector]. And when I say government, it can be a city, county, state. It's just difficult to get into those [areas]. And Caltrans ... their help has been very... it hasn't been negligible. It's been 0. ... The problem in our society today is if you pay a state employee \$1,500, and he busts his back or doesn't do a thing, he still makes the same money. What's the incentive for him to really help you? ... And I find that true with SBA, the state of California, the city of Fresno, I find that through all those agencies. It goes back to the old school. If I want to do business with PG&E, [you]

better find out who the contact is, and you better ferret out that contact before you waste time. Because you have a lot of people there that have the position of procurement. People, they could give a darn if they talk to you or not. Yeah, that goes for... I mean I've put up with that the city of San Francisco, the city of Los Angeles, the city of San Jose, you have to ferret out that individual who is honestly trying to help you. They are almost nonexistent, but you do have many, many, many, many people with the title of 'help you as a small business'." [#3]

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "These projects are not really transparent at the level of a small business, so you spent a lot of time trying to find out who to talk to. ... Learning how to work within the public works sector was challenging. Like I said, they don't really train you to do that. They will tell you to look at the contracts and the specs and they give you the information that you need on what work needs to be performed. But Caltrans specifications are so large it's, you know, in the beginning it was really hard for a novice contractor to go in and read the 1,000 pages to figure out, you know, that you didn't miss anything. ... That was the I think the lack of transparency in the beginning and again that was 1980 when we started the company. So, it's a long ago." [#5]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "Another barrier would be waiting for that job to start, which still more money is being put into it because there's a lot of paperwork, including reading contracts and siphoning out all of the administrative needs to field needs and whatnot, which you know, like I said, it's an overhead cost prior to even getting paid, which can be up to 45 days later." [#7]
- The owner of a WBE- and SB-certified professional services company stated, "We've been trying to get government contracts for all these years, and it's been super difficult to get in there because the way that they look at these contracts is they end up going with people they've done business with over and over again. And then they say things like, you have to have this experience and that experience with government contracts. But how are you supposed to get the experience if they're not gonna give you the deal because you've not had experience? It's like - it doesn't make sense. And they keep going back to the same people and issuing the same people these contracts. So, then the rest of us can't get in there and get them. And we spend the time, effort - time and money and all this stuff on getting licensed and paying people to curate great contracts to submit. Those take forever to put together. And they take a lotta time. And we put 'em out there, and then we don't get chosen. And then it's like, oh, my god, they chose the same people again. It's maddening, really I've purchased platforms that have these bids that come up. And we will go, and we'll bid on it, on something. And nine times outta ten, they already had someone in mind before we even bid on it anyway, by the time it hit this platform. I didn't realize that until years after, and all this money I was spending, that that was taking place. They put the bids on there, but they're really not looking - they already know who they want to hire at this point. That's a moot point in the process because the government requires them to put it on these platforms." [#13]
- The Black American owner of a transit company stated, "There's another company here ... who is also a rescue safety company, and they have a number of ambulances that they have



now, and the county won't allow them to transport because there's already an existing provider that meets the RFP bids. ... Over the last couple of years, because of COVID, our EMS system has been severely impacted, and the ambulance company actually had to apply to ask for a strike team to come in and help them run calls because they have so many calls coming in. ... [Another company] was here in town with ambulances, but because the county won't certify them to be a transport service, they sat there for last 2 and half years, unable to transport anybody to help out and be involved in this big COVID mess that we had here because the way this RFP bid system that they've created, wouldn't allow them to do it, but they call in companies from outside the county. They come in service the area when they already have existing provider, which doesn't make sense to me, if I got my business up, I would have been in the same boat. I would have had ambulances sitting on my lawn and wouldn't have been an enabling part of this COVID response, because of the county, the way they developed our RFP Bid wouldn't allow for it which, again, doesn't make any sense to me whatsoever. ... Honestly, in my opinion, it's, it's all political. The owner of the company actually was the mayor here." [#19]

- A representative of a Hispanic American-owned transit services company stated, "Not all agencies [are] back to work yet and [it's] harder to find work." [#AV46]
- A representative of a majority-owned goods and services company stated, "We should not have to collect sales tax from state agencies." [#AV103]
- A representative of a majority-owned goods and services company stated, "[It is] difficult to know the process to get our footprint in the public sector. [It is] hard to reach out and establish ourselves, given the process." [#AV129]
- A representative of a Hispanic American woman-owned goods and services company stated, "Government regulations [are a barrier]." [#AV139]
- A representative of a woman-owned professional services company stated, "California [has an] enormous amount paperwork for small business." [#AV161]
- A representative of an Asian Pacific American-owned goods and services company stated, "Reaching the right person to call you back [at a] government agency, cannot get through, always a wall. You never get a call back! Cannot get through." [#AV202]
- A representative of a majority-owned goods and services company stated, "[I am] 100 percent service-disabled. [My] difficulties: paperwork [required] to get government services or contracts." [#AV219]
- A representative of a Hispanic American-owned construction company stated, "California makes it very difficult to make bids. It has a lot of requirements." [#AV228]
- A representative of a Native American-owned professional services company stated, "We have trouble in all areas of business in CA--everything from financial to supply chains issues, to lack of skilled laborers to excessive regulations and permits to work in CA as compared to other states. The CA government is in our way with excessive regulations and rules and yet they always have their hands out for donations and money." [#AV230]



**One business owner described public sector work as easier or saw more opportunities in this sector** [#1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I know federal projects have a lot more impact than private sectors you know, cities and counties, city and county jobs." [#1]

**One business owner noted that it is not easier to get work in one sector as compared to the other** [#3]. For example:

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Not really [it's about] the same." [#3]

**4. Differences between public and private sector work.** Business owners and managers commented on key differences between public and private sector work.

**Five business owners and managers highlighted key differences between public and private sector work** [#4, #10, #12, #13, #14]. Their comments included:

- The Black American owner of a DBE-certified professional services company stated, "Private sector, usually for us in our experience over 40 years, has a tighter rein." [#4]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "[We are a] prime in the government sector and a sub in the private sector." [#10]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "The private sector isn't so focused on price, they want a fair price." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "I would say even the private sector is getting a little wonky. And I don't really know if I don't have a good handle on the public one. ... The only real differences are approval processes within the scope of work that you have. That's really the only difference." [#13]
- The owner of a transit company stated, "I think the private pays more, and the type of patients is different, too, like for the public they pay less, and they accept any patient. But the private insurance, they just accept different types of patients, and different cities. They don't provide service in this area. So, it's just like, as I told you, different patients, different pay rates. But for us, we don't mind accepting any of them. ... It's just about the rates and the volume. It's same patients, same level of service, nothing different for us, but it's just different rates, different rates from broker to broker, different area they cover. It's nothing that different, just the rates are various." [#14]

## E. Doing Business as a Prime Contractor or Subcontractor

Part E summarizes business owners' and managers' comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors' preferences for working with certain subcontractors;
3. Subcontractors' experiences with and methods for obtaining work from prime contractors; and
4. Subcontractors' preferences to work with certain prime contractors.

**1. Mix of prime contract and subcontract work.** Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

**Four firms reported that they primarily work as subcontractors but on occasion have served as prime contractors.** Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise [#5, #11, #13, #14]. For example:

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "I think I would rather be GC than that subcontractor. You know, hindsight's 2020, right?" [#5]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "I think we've only been sub, we used to do a lot of stuff for Metro and then I think we were subbed with them. We weren't the main contract; we would get work here and there. But there were other facilities that [we] were consistently getting work." [#11]
- The owner of a WBE- and SB-certified professional services company stated, "Right now, we are just a sub." [#13]

**Three firms reported that they usually or always work as prime contractors or prime consultants** [#2, #6, #10]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Obviously we're only talking probably public because we don't do the private [sector]. I would say most of the time I've been the prime because I typically don't get a work as get much work as a subconsultant." [#2]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "We've subbed every once in a while. There will be a job where I find that I'm like, 'hey, do you wanna do this as a tier one?' ... We're usually bidding jobs as prime. We just haven't primed to Caltrans job yet. We haven't tried to." [#6]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "I am the prime contractor and I subcontract different companies. [We are] prime in the government sector and a sub in the private

sector ... Otherwise I cannot do it on my own. I cannot be an engineer working with an x-ray that I don't have much experience, no." [#10]

**Two firms explained that they do not carry out project-based work as subcontractors or prime contractors** [#1, #3]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I solicit through quotes as a material supplier." [#1]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "We aren't either [a prime or a sub]." [#3]

**2. Prime contractors' preferences for working with certain subcontractors.** Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

**Prime contractors described how they select and decide to hire subcontractors** [#2, #10, #11, #13]. Prime contractors shared the methods used to find subcontractors and the factors considered when selecting a subcontractor. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I look at what the project requires, so if it's working in a certain area, I try to pick somebody that knows that area. Depending on the size would depend on how many subs I use. I do weight past experience with that firm and highly on their qualifications and their ethics. ... Those are really important to me. ... It's knowing the qualification that's needed on the project to pick the best team players. So, there's some areas that, you know, I need a certain type of experience in or if somebody's been there, so usually go local when it's boundary. So, the location usually dictates that. ... [Other ways to find subs are] personal knowledge. ... There are networking opportunities to reach out to people and build those relationships " [#2]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "Well two things, if for example they want repairs for a True Refrigerator then you go to that True manufacturer, they repair them. If it can be subcontracted to a small refrigeration guy, then you choose a company to do that." [#10]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Like let's say you for example, let's say you own five trucks, and you have them going everywhere. Let's say one of your trucks breaks down in Oregon. A lot of times, they just pass on information, please call my driver he broken Oregon, see what you could do. Then what we would do is we will start calling people on that side of town. And then let's say it's my first time, like I said my first time to need someone in Oregon, I'll start calling so again to meet people just over the phone. See who I can start using, and then if I get a good feeling about that certain person and then I'll keep staying in contacting. Next time something happens, I'll use this person. That's the same thing as I have in other states, in Arizona, in Texas, New Mexico. Get to know a certain company, anything that I ever need in that section, or that part of town, then I'll use that particular company again. A lot of times, it's just talking over the phone, and not everybody has the time. But some people are still busy, and they'll give

you that time ... when you ask them a question. And some people just want to be quick, like they just come on, and they're just I'm busy, that kind of thing." [#11]

- The owner of a WBE- and SB-certified professional services company stated, "I haven't done it because I haven't won the business, but I would do it." [#13]

**Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors** [#2, #10]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Usually if you're going after a public contract, they wanna know who your subs are and have a chance to make sure they like all those firms as well that you're presenting as a team. A lot of times in the private sector, you would get a contract and then go, oh, we're really busy or I can't do all this, or this is something I need some help with. And then you reach out to your subs. Not always like during the project, but usually you don't have to run that by the owner of the project. They're just hiring you to get it done, if that makes sense." [#2]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "[We're a] prime in the government sector and a sub in the private sector." [#10]

**Two firms that the study team interviewed discussed their work with certified subcontractors and explained why they hire certified subs** [#2, #10]. Their comments included:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "On some contracts there were [DBE] goals. ... Another thing is being one myself. I understand and appreciate the opportunities especially if it's a smaller company, we often though we might not have some of the experience that some of the larger firms do. I think we communicate well. ... And have the same intentions on working together." [#2]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "No, [we don't hire DBEs because] they're competitors." [#10]

**3. Subcontractors' experiences with and methods for obtaining work from prime contractors.** Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

**Four subcontractors mentioned the helpful role Caltrans' programs play in finding work** [#1, #4, #7, #20]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Builders exchange. You know there's outlets you could go to find out who's bidding [on] Caltrans." [#1]
- The Black American owner of a DBE-certified professional services company stated, "We use that with many of the public agencies we're listed on there and they have they outreach system, and we often use that." [#4]

- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "You guys have a list of DBEs. These contractors probably go through it, send us an RFP, RFQ or invitation to bid." [#7]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "So, my initial exposure to Caltrans was through large prime contractors, and them needing to develop a relationship with a contractor - DBE to be able to help them facilitate meeting the goal. They would bid the work. We would be their teaming partner, DBE, and then they would ultimately go back, and we would carve out a scope of work that we were comfortable doing and could perform at a cost value for them as the prime, hopefully, you know, matching the bid amount that they put down for that specific activity. So, that was my original introduction into doing Caltrans type of work. ... I would say that the invitation to bid was predicated on having a current DBE status, as we were typically competing against other DBEs. So, these contract opportunities were not just us against the big Goliath in the room. They typically were tiered approaches that Caltrans took to say, we're going to compete them with other like-minded businesses that are in the same size capacity. So, that it is a fair competition." [#20]

**Three subcontractors reported that prime contractors often contact them directly because of their specialization, their certification status, or because of they are known in the industry** [#1, #6, #7]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I get my quotes to quote a subcontractor, so when the primes call and say hey, are you bidding this project, I may or may [or] may not be, but I'm bidding as a material supplier so that's different." [#1]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "We're mostly word of mouth in the industry and then our industry kind of just knows us. ... We do get a lot of DBE outreach." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "You guys have a list of DBEs [that] these contractors probably go through [and], send us an RFP, RFQ or invitation to bid." [#7]

**Two interviewees said that they get much of their work through prior relationships with or past work performed for primes.** They emphasized the important role building positive professional relationships plays in securing work [#12, #20]. For example:

- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We rely solely on the primes having a business development group that seeks after bids so I can partner with them, run alongside with them, and even feed them bids. We send them email 'are you going to bid on this, if so put me on.' We hope that they put us in and that they win." [#12]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "I think my first year we primarily did sub-contracting. We were subcontractors to some prime contractors that we had developed relationships with during my time as a project manager, working for other firms. They, you

know, agreed to create opportunities for me to spread my wings, either as a supplemental project manager or to do construction management." [#20]

**Five business owners reported that they actively research upcoming projects and market to prime contractors.** Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services [#1, #3, #7, #8, #11]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "You go on, you see what's bidding. You call your customers, or you know and say, hey, any jobs bidding this week, can I look into them?" [#1]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "I have to google the companies I want to go after. Learn all I can about them, and then ferret out the individual that I feel that can use my product. For instance, the head of maintenance, the head of restoration, and then he will probably in turn send me to one of his people in which all developers report to and once he tries my product then we have them as a customer." [#3]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "I do send out my capability statement to new general contractors. Prior to the bid, just so they get to know." [#7]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "The biggest challenge is getting to know the primes. Getting to know the prime general contractors that are going to be doing design, build projects and getting to know the large CM and the active CM firm so that we could become subs to them." [#8]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Just calling them up, seeing if there's anything anybody would actually need us [for]. I could go meet him in person, and getting just a senior facility, see how they've been working, what it is that they do. First of all, especially know if they're willing to work with us. Some companies are like you know what, I charge this and this, take it or leave it. Sometimes I'm like yeah, I'll work with you, you feed me, you keep me busy, and we make sure that we're both happy. It's not always, it's all kinds of some people are like no, this is not it. And then that's it so if you have no wiggle room in a room you don't have an incentive, there's no incentive to say work with a particular company if they're not willing to have. Because like I said, this industry is small but it's busy. There's plenty for everyone and then some people just, it's better to share than it is to be greedy." [#11]

**4. Subcontractors' preferences to work with certain prime contractors.** Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

**Subcontractors discussed the effect working in the public or private sector has on their decision or ability to work with certain primes** [#0, #13]. For example:

- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "[We're a] prime in the government sector and a sub in the private sector." [#10]
- The owner of a WBE- and SB-certified professional services company stated, "We work as a subcontractor on this other one we have right now, through [the City of] San Diego. But we haven't gotten a main contract yet [as a prime in the public sector]." [#13]

**Business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly** [#5, #7, #14]. Examples of their comments included:

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "We're choosing who we like to work with, and they have to have the same. Work ethics that we do in their honor, you know, pay their bills and you know we want that really good working relationship. You know we don't want you to give us anything, but we don't want you to hold anything back from us or try to not." [#5]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "Another barrier is also, which we're kind of coming over because we've been putting in so many bids with different general contractors. Now they're getting to see our name. We've completed a couple of more contracts. So just general contractors feeling safe and secure with listing us and subbing some workout to us because they're unfamiliar with us. They're still companies out there that have their go-to rebar companies and we're not quite one of them for a lot of the companies that have with a lot of the jobs that we would like to do work on. So that has been a barrier. There's one general contractor that is on my list not to do work with ... they were very rude to me and my guys in the field. And then I have another buddy has a company that told me that they didn't want to pay him for stuff that they told him to do. And you know almost bankrupt him. ... I like to do a screening process and get to know my general contractors prior to doing any work with them because I don't want [to] find out that they are a hole in the field after the contract is signed and I have to deal with them." [#7]
- The owner of a transit company stated, "There is a group on Facebook- to be honest, it has a lot of brokers and a lot of vendors of a company like me- they're sharing their stories with each broker, saying, 'This broker, he didn't pay on time. This broker, they didn't pay me.' They shared their experience, and that's how I always go and see which broker has really good feedback. So, I can contact them, try to get contracts with them. So, it's always like this. You hear the stories from different people, hear the feedback." [#14]



## F. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

1. General experiences working with public agencies in California;
2. Barriers and challenges to working with public agencies in California; and
3. Caltrans' bidding and contracting processes.

**1. General experiences working with public agencies in California.** Interviewees spoke about their experiences with public agencies in California.

**Four business owners had experience working with or attempting to get work with public agencies in California in general** [#2, #11, #14, #AV]. Their comments included:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I've worked with high-speed rail, that experience, being quite candid, seemed like there was a lot of money for very little stuff getting done. I want to say that was almost the opposite experience from Caltrans, where it seemed like we were busting our [expletive] and not making a lot of money. ... We've done a ton of projects with [our city] and also several other cities around here. Those have been a great experience. Between the staff and the communication, they're like, 'here's what we need' and we get into the project, and something would come up and not always, but if it did, we just take it up and it'd be like, 'oh yeah, we don't need that after all. Don't worry about it and we adjust the contract down' or they'd be, 'oh yeah, let's go ahead and add this'. ... Being smaller, the way the projects were was much more flexible and I felt they were very efficient and handled well for. I think that was one of the first projects I got. Once I got certified that one was like a two-year project and that really they paid very promptly, I wanna say." [#2]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Like for us and particularly like Metro has been, the work that we have done with them has gone great. I don't think there's been any anything negative to say other than I mean just not getting the work. I guess I don't get enough work for them yet to experience that yet but so far everything has been good. The work that we have received, it has been good for us. We haven't had too many negatives on that end." [#11]
- The owner of a transit company stated, "MTS is what they call it, San Diego Transit System, they are responsible for used vehicle transporting in San Diego, so you have to get permits from them for each vehicle. ... They are everywhere in San Diego, so thank God we passed this, we get all our paperwork with them. But the communication is really hard with them. It's really hard to reach anyone from them, especially after I call that they closed their office, and they shut down the inspection part, so sometimes, I just go stop by, and I want to talk with someone, but no one's available. No one answers the calls. They take a really long time to answer e-mails." [#14]
- A representative of a majority-owned transit services company stated, "Out here in the Northern part of California there aren't any alternatives. Lake County transit is very difficult

to get ahold of and difficult to deal with from what I've heard. Out here there is no Uber or Lyft." [#AV43]

**Eight business owners discussed the best experiences, policies, and practices seen when working with or attempting to get work with public agencies in California** [#2, #4, #5, #6, #7, #8, #16, #18]. Their comments included:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "With the counties, cities and Caltrans, they post it right on the site, so you know that those are the opportunities that are available. ... I do recall when we were doing a project when PG&E was getting ready to put a large contract out to bid, they actually held an in-person meeting, invited all the primes ... they anticipated people that usually go after the work and subs would work on other jobs. ... where they discussed the whole project and then afterwards, we had a chance to network and talk and see who was actually there and interested in the work. I thought that was helpful because I got to meet people face to face that otherwise would be totally cold calling. ... We've done a ton of projects with [a small City] and also several other cities around here, and those have been a great experience. Between the staff and the communication, they're like, 'here's what we need, and we get into the project and [if] something would come up, we just take it up and it'd be like, 'Oh yeah, we don't need that after all. Don't worry about it and we adjust the contract down' or they'd be like, 'Oh yeah, let's go ahead and add this'. Being smaller and the way the projects were much more flexible I felt they were very efficient and handled well for. ... With PG&E, that one was like a two-year project and that really, they paid very promptly, I wanna say within 15 days and it really made a difference, especially being small and starting out. ... As far as ease, the city was easiest to work with because less people, less paperwork. They're just down the street. So that made a big difference. The type of work that we did with them was more similar to what we had been doing. So, there wasn't a big learning curve." [#2]
- The Black American owner of a DBE-certified professional services company stated, "The status meetings are really good for both parties." [#4]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "What's wonderful about Caltrans is Caltrans will not allow retention ... Working Caltrans solely, it's been very, very easy. ... I love the fact that, like Metro has a really good policy on the websites, the portals, you know where you can report in that on those portals it specifically gives you who the contract administrator is for that project. That's how I found OCTA [Orange County Transit Authority] and I was able to drill down to, to get to the right people that I needed to do. But it was still a lot of work. So those, those types of things are really good tools. Metro has a really good policy on supporting you with a grievance. That's where they shine. ... They really have a team that can identify anything, [and they] include you in any of the disputes with the general contractor. They will meet with you, and you have like a conference call, and they mediate it immediately. So, I like that. ... Caltrans ... they enforce it because they pay their bills like right on [time] and you can see it. And one of the things that Metro doesn't do is they don't tell you when they pay their contractors. ... And the same thing with San Bernardino Transportation Authority. They gave me this little spreadsheet. It was like. But what? How much? What items? You know, Caltrans does an

excellent job on that. You think of the item numbers? They got the date they [were paid out]." [#5]

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Caltrans does have a good retention policy because they don't hold retention anymore. But you have to be mobilized and finish 10% or something like that. ... that's for the mobilization payment, I think. But then they don't hold retention at all on state. But other agencies still do, and it takes years to get that extra 5% on a big project. ... I know I know a lot of projects we've been on had payment verification portals. I don't know if all Caltrans, I don't think Caltrans projects have that. Our [MetroLink] project has it. The MCTC (Madera County Transportation Commission) project had it. ... like a required payment verification portal. I've seen it on some jobs, but I haven't seen it on all. There is someone or some mechanism following up to make sure the DBE are getting paid small business on time, paid often or per California code or contract whatever. I like that they don't hold retention anymore. ... Caltrans goals. They have it down pretty good because that's where we get the most of our DBE work." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "Caltrans has one of the best portals, and I think a lot of other owners can copy and use [it]. It's very good. ... Metro does a monthly audit to ask if we have been paid. They let us know the general contractor has been paid. What day, how much, and then they ask, have we been paid? ... Metro does set aside where they only allow companies that make a certain dollar value to bid on those projects. That would make it better for me and my counter small businesses to compete against each other and not [large companies]. The prompt pay, of course, is very good. ... because at the at the end of the day the policy [is] to make sure that small businesses get paid in a decent amount of time, it's of course can always be lessened, you know, instead of 45 days, it could be about four to five days." [#7]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Metro does [a] small business set asides. Caltrans doesn't do that. ... Metro, they wanna make sure we get paid within so many days. ... The credit goes to the agency for leaning on the primes. In Metro we got the look ahead started and we also got on the look ahead, the name and the phone number and the e-mail of that Metro staff member that was managing that project. So that we could count it and get information. So, all of that would be very helpful if Caltrans did that. ... Thank you to Caltrans for initiating the 3% DVBE requirement on all of their projects ... I only wish that Caltrans would have enough influence to influence the federal government to do the same thing." [#8]
- The woman owner of a goods and services firm stated, "You have to get permits with the airports like other stickers on your car permits to where, they're like, you've been vetted through the State of California ... they ask for a few documents, and then you get the permit pretty easy and then they put this little chip on your car that charges you every time you drop somebody off and there's certain places where you have to park with the TCP. ... Sacramento, I didn't have any issues, with San Francisco is just super busy. It's just all about getting in touch with the right person." [#16]
- The co-owner of a SB- and VBE-certified goods and services company stated, "I was very fortunate then that I found the lady that was in, I'm going to say accounts payable, and she had a wonderful attitude, she said, 'I look at it this way, if you supply something to Highway

Patrol, then they need to pay the bill right away', and I was talking about invoices that were for more than a million dollars. I mean, these are big sales, and so I just was, I was very, very fortunate that that lady worked with me, you know, we had I think that in maybe not, 2009 or 2010, we had done about 15 million dollars' worth of sales with Highway Patrol." [#18]

**Seven business owners discussed the worst experiences, policies, and practices seen when working with or attempting to get work with public agencies in California** [#1, #2, #5, #6, #8, #18, #19]. Their comments included:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "There's only one district I've had problems with and it's District 5." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "The area that I've had the biggest issue with Caltrans on my past contracts... I was chosen most qualified. But when we got into negotiating on the price, they shook my hand and said yes and then wouldn't let me speak to the accounting department that they had and then said we couldn't reach an agreement and went to the second person. And I have not requested yet the documentation, but I feel fairly confident that they ended up paying the next person more than they would have me with what we had agreed on only they didn't want to work with me. ... The cities and the counties are pretty easy [to learn about work] and Caltrans as well because they post stuff directly on their website as to when jobs become available. I honestly don't know because it's been a while since I've dealt with the utilities. If the utilities do the same thing or not. ... I would have more difficulty with some of the utility companies trying to figure out who's the person to even reach out to as opposed to. ... I haven't been impressed with the contracting portion with Caltrans." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "There would be two of them that we've had difficulties with. One of them is OCTA and San Bernardino Transportation Authority. ... Those two are a part of a conglomerate of design build. Some of the design build projects are very complicated to get involved in or to actually find out who you need to talk to. If you do have a problem. ... the OCTA [project], we had quite a bit of retention. We've been on the job since 2019 and in our contract [it] says that there's gonna be retention withheld and we would like to get [them] to release that that retention and it was only through my digging through that I found the design build contract that specifically said that they want you to submit your retention billing once the subcontractor [has] a substantial amount of the work done ... You know the partnerships which is 3 major groups and when it's that big, a small contractor gets lost and we're literally ... right now I'm at 100,000 on a project. It's [a transit] security project and ... we're 100% done with our project now, it's all change orders work, and we keep doing it. So, I would like my \$90,000 but then what happens is they're saying well it's in an escrow account. We can't get it out of an escrow account. ... That's really unfair and if most of the general and subcontractors would understand that, you know, the money that they've been held been withheld for 3, 4 years. It's money gone. That was your profit. But it's sitting in an escrow account, so the general contractor can get money and they're making interest. But none of that floats down. So, I've thought a lot about this over the years and I'm just thinking that should be a general escrow account where everybody shares in the price. If you're going to hold it, then everyone should get interest on it, not just one person, and it

shouldn't be convoluted, you know, contradictory language. There shouldn't be a design build contract and then a contract between the general contractor and the owner, and then a subcontract there really should be some uniformity in that. That's that. Those are those projects are nightmares." [#5]

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Our worst experience thus far has been with Orange County Transit Authority, and they have all these things in their specs about paying's early and often, but they just don't have the capability to actually process payment quickly. We were on a couple of jobs at them where you take up to a year to get paid from work before ... [Other bad experiences are] jobs with no mandatory goal; you send in a proposal, and nobody even talks to you pretty much." [#6]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Talking about Metro, because that's primarily Metro, it's a stickler on prequalification forms. LA Metro initially required prequalification forms which required a notarized document during the proposal stage. Which was really ridiculous. We spoke with them. I personally did, and they eventually ceased from requiring that [until] you've been selected, [and have been] noticed up to award no problem. But if you're if you're involved with 567 proposals and each one requires a notarized document for a small business, [it's totally], inconvenient. It's expensive. \$13.00 a pop. So just most recently, Metro has reinstalled that again, prequalification for each individual project. So, my recommendation on that would be not requiring pre-qualification, but [if] you do from the big companies that's fine, but the small firms, if they're selected, if our team is selected, then we need to provide that before contract can be issued, [that's] no problem. ... I mean when you're going to be getting a three to five maybe 10% max of a huge project and you start saddled with all of this paperwork which in many cases if a person went through them, you could realize that a lot of them really did not apply and are redundant." [#8]
- The co-owner of a SB- and VBE-certified goods and services company stated, "Many years ago, I got into a situation where the county of Riverside, it was, it was called a broker to sale, and the county of Riverside was supposed to submit the sales tax and they didn't, and so then the Board of Equalization sent me a letter and said that, you know, I had so many days to pay, or they were gonna come and lock my doors, and, and I'm not joking - this is very frightening, and so I contacted the County of Riverside and said, 'yeah, you know, we forgot to do it. We'll get it done right away', and even their contact with the Board of Equalization was difficult, because the Board of Equalization said to them, 'well, you know it takes us time to process this stuff, and I was within just a few hours of having the doors of our business locked, and so I, I just don't feel that it's right. ... So, I would say that is the biggest fear when I go into, let's say, there was a bid or something like that for materials, you know. I don't, I'm not concerned about labor and so forth. I wish that all state agencies would pay within the 30 days because that's what I'm required for all of my vendors." [#18]
- The Black American owner of a transit company stated, "For example in 2020 when I filed to become certified as a BLS company. Our county regulations state that they have 30 days to provide an answer - yay or nay. It took them 6 months before I heard from them. I sent an email every Friday. Never got a response. It wasn't until my partner went down to the EMS office and pound the door and said, 'Hey, what the hell is going on? The person she met with

said, 'oh, we found a couple of things wrong with your application, we'll send you an email and you guys just address that'. So, we did. We addressed the issues, gave them a solution to it, resubmitted and 6 months later still hadn't heard from them. I finally sent an email and said, 'look, we're gonna start operations In January. It's been a year - we haven't heard from you guys - what's going with our application'. Suddenly, I got this two-page laundry list of everything they could think of that was wrong with the company and said we're denying your application - that was it. Haven't heard, gotten any responses I've met since, and so they violated their own policy. ... There are two other companies here that were doing the same type of work already that I wish to get into and speaking with their owners, when they applied, they were assigned an agent from the county EMS department to help them through the application process, and they're up and running in less than 5 months. So, there's obviously an issue between myself and the EMS department. I'm not sure what that issue is." [#19]

**Five business owners described their experiences getting paid by public agencies in California** [#6, #14, #15, #17, #18]. For example:

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Our worst experience thus far has been with Orange County Transit Authority. They have all these things in their specs about paying's early and often, but they just don't have the capability to actually process payment quickly. We were on a couple of jobs at them where you take up to a year to get paid from work before." [#6]
- The owner of a transit company stated, "The broker that I work with in the public [sector] is really giving me a hard time with the payments. They really take a long, long time to pay and that [affects] me in a negative way, because they make me late for my expenses, my drivers, my insurance. For a private contract, [I get that as a] that deposit, I get the money like this, it's easier." [#14]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "Some owners pay more quickly than other owners. Our terms of sale are net 30, for example. But a lot of times our contractors pay us when they get paid so it's, you know, it's a cash flow decision as well, so that can be really tough if we're not getting paid, and so that does influence the decision [of who to work with], I guess." [#15]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "My experience with Metro, when doing that small contract with them, they had me on a prompt payment kind of schedule, or what have you, and while it seemed like that would be great, it still was a 60 to 90 day process of getting paid and that's because you were a subcontractor, right. They kinda had oversight of their big contract [which] had to pay the smaller people for whatever within a timely manner, but ... it was a lengthy process of getting payment for work, and I think that is a complete barrier for small business, it could be like a complete turn off, it's like we need our money. We need to pay people and pay the bills and you know, at the time, I didn't have cash flow to float like that, and so it was very tight, which actually in turn kind of deterred me from saying, you know what, I'm gonna go after more. So yeah, if there was some kind of, I guess, grace for, or a bank just [for] the small businesses under a certain amount of revenue per year that something was set up so that you can draw from [and] the corporations would have to pay



into that bank. Once they were ready to pay, or whatever, that to me would make more sense than making the smaller businesses wait for their money." [#17]

- The co-owner of a SB- and VBE-certified goods and services company stated, "It's just the state agencies, for example, when I get a purchase order from Cal Fire, they'll ask me for quotation. I send out a quotation, and on the quotation associated with it are the terms. I say that 30 - the purchase comes back, and it's always net 45. They will not pay before 45 days, so that base, and I can't say that that's true about Caltrans okay, but I can say that for sure about Cal Fire." [#18]

**2. Barriers and challenges to working with public agencies in California.** Interviewees spoke about the challenges they face when working with public agencies in California.

**One business owners highlighted the lack of communication with decision makers as the primary challenge, especially for small, disadvantaged firms** [#1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Biggest barrier and the biggest challenge right now, even continuing my firm, is answers. ... Having an outlet, having somebody out there to guide you to tell you right from wrong and tell you no, you shouldn't be doing this. Or yes, you do need to do this... Just an outlet, that's the biggest barrier right now is for someone like me, a small business who's been doing this for a while. We need an outlet. We need a common outlet. And no, I'm not talking [about] 'just go on a website and get your answers'. That doesn't work." [#1]

**3. Caltrans' bidding and contracting processes.** Interviewees shared a number of comments about Caltrans' contracting and bidding processes.

**Six business owners described their experiences learning about or attempting to get work with Caltrans specifically** [#1, #3, #9, #13, #20, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Caltrans is easy ... to learn about what they're quoting and what's out there. ... Attempts to work and their whole bidding process, I think is easy. ... But then I've never bid as a prime, so maybe that's more challenging for them. You know, I'm usually just listed. ... I've had several purchase orders direct through Caltrans and it's a great process. I've never had a bad process." [#1]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "I have traveled from the Mexican border of California to California's border with Oregon and contacted. I think every Caltrans maintenance shop all that territory and I don't think I sold them a can." [#3]
- A representative from a WBE- and DBE-certified goods and services company stated, "Just trying to get in with them as far as like you said it was there a bid somewhere, because we don't see bids for those. It's in our experience that they just choose who they go to and being that we're one of the only woman-owned business and DBE I think registered in the



area I assumed they had to use us, but that's not the case we're finding. Those aren't small, even registered as small business, they're a big tire company so." [#9]

- The owner of a WBE- and SB-certified professional services company stated, "It was very hard to find the actual RFPs on their site and to figure out how and who to speak to and things like that." [#13]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "The only issue that we had a few years ago was that there was an emergency coordinator for Caltrans that had been in that position for many years, and like anything else, you know, reputation and your ability to perform all become accentuated by your past performance. So, you become a known commodity to the contracting group, to the emergency group, so you'll win the opportunity, and when you're done with that opportunity you know, shortly thereafter, you know, you receive another invitation to be in the pool, so to say, but once that emergency coordinator left, it was like starting from scratch again. All the dozens of projects we had done were no longer relevant to anybody in the emergency group. They did not know who you were, and so we had to struggle to even know who the emergency coordinator was to make sure that we had the opportunity to bid. So, for about a year and half, we received no opportunities from Caltrans, and then slowly, through other means, we were able to re-connect. We established some connections within the organization and slowly, but surely, we re-emerged and, 'we were wondering what happened to you.' We didn't go anywhere, you guys just forgot about us, and so we were back, as they say, in the rotation. So, we were fortunate about that, but it [was] only as good as that gentleman, until he retire[d] and he decide[d] to move on to something else. Then we have got to figure out how to re-engage with the organization. So, that is the biggest issue, if records aren't kept and people don't know who you are, you're constantly hitting the reset button in your business development strategy with Caltrans. ... There's no RFP. In all fairness, Caltrans actually does a pretty good job of bringing the new contractors in. There's a certain threshold of emergency response. So, if you're new to the emergency arena, you know, the biggest opportunity you're going to get is something under \$250,000. There are certain dollar thresholds that they have. So, at \$250 and under, is for like, 'he's never done work for Caltrans and we're sure as hell not going to give him a \$1million dollar job'. So, we're going to taste the flavor, Kenny. Does he have capacity? Smart enough? Does he have workers, is he easy to get along with? Does he build properly. This is your opportunity to shine so you'll have that opportunity two or three times. District 4 does a really good job in allowing you to show your capacity in this respect and they'll judge, and they'll say, 'hey, you see, are you ready to move up to the next level?'. And then the next level is \$800,000, and so, anything under \$800,000 for emergency, then there's another pool of contractors that they have, you know, if you successfully do \$800,000, then the next pool is \$1million and half. Again, for \$1million and half then 5, after the \$5million, then its unlimited. So, at one point we were at the \$5million, and we're doing emergency work for \$4 and a half, \$3 and half million dollars, worth of work which is really good, because we were just one step below the unlimited, but these unlimited guys were like ... big lottery sources, a lot of horsepower, which we are not, but we were really suited for anything up to \$5million, we could do. So, that's how Caltrans allows you to scale your business. You show what you got." [#20]

- A representative of a Black American-owned transit services company stated, "[It's] difficult getting [a] loan or funded from [the] bank or government. I had to get [a] loan [from] the family. Inflation [is] so high and gas price [is] so high. Competitive- very hard to find workers." [#AV8]

**Eleven business owners described their experiences working with Caltrans specifically** [#1, #2, #3, #4, #5, #6, #9, #15, #20, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I mean this job for [the city], there were supposedly 6 Caltrans people supposedly [on] this job and I was not able to have their e-mail, their name or a phone number to communicate with them? ... So, everything was done on paper. ... I would say that's a huge barrier." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I did have a Caltrans contract that was almost \$1,000,000. It was a huge obstacle that Caltrans is union, and they can work four 10s and California State law says that's prevailing wage because it's where the funds come from, and prevailing wage says you cannot work four 10s without paying overtime. ... It was a huge obstacle, and I went through over half my contract eating all that. ... And when I was finally brought to their attention, and I was thinking I couldn't go on it, it took quite a bit before they acknowledged that I should have recoup[ed] costs. So, then it was a matter of how much time do I want to spend trying to retrace that and ruin my relationship with them for the contract as opposed to just calling it water under the bridge and learning experience and moving forward... The prevailing wage laws, because they don't apply to Caltrans employees, I don't think they're familiar with them and I don't think they take those into account when they're doing stuff... We changed our whole work schedule start on Monday, so we could do travel at a different rate on Sunday. It that was a big thing. ... I think Caltrans needs to recognize that not everybody is like Caltrans. I look at the state law and what I have to do, and we are not a union shop. So, if you're looking for small and women-owned and minority businesses a lot of times we are the smaller ones, and frequently we aren't a union shop and there's a difference there. If you are a union shop, then you can play by Caltrans rules. But Caltrans isn't aware that not everybody has to follow the same employee rules that they do. So, I think Caltrans being educated would be a big thing. I mean, when I first brought it up, 'hey, you're supposed to be reimbursing me for all costs' and we actually have an overtime rate in our spreadsheet, I was told no. I had to really fight to get it. I shouldn't have to do that. ... I do [think being a non-union employer is a barrier] with Caltrans, 100%. I think they need to be more aware of it, because once they knew the law they said, 'Ok, yeah, we'll reimburse you or pay you for that wage'. But we had already jumped through and done a lot of stuff that. I have a small company of less than a dozen people. I shouldn't be teaching the state of California, the rules and the laws. Their whole approach was if you're wrong, we're going to tell you. But if we're wrong or you miss something, you're just out of luck. ... You're going to go through and correct errors one way, but not the other. That's not being fair and equitable and really going on the whole premise of quality-based selection, and it's supposed to cover our costs. So, they didn't pay enough attention in the start [and] that was disheartening. ... During the bidding process, as well as some of the and invoicing paperwork, it seemed like the higher up you went, the more I would say there was some treatment issues. Part of this

is [the] perception that I didn't know anything or [that] I should have known stuff and they weren't gonna take the time to explain it or justify it. And that's part of the problem with the contract that we were chosen [as] the most qualified, but then didn't really get any answers as to what the issues were. It wasn't talked through. It wasn't explained. It wasn't like, this is what we were, how we think the numbers should play out or anything like that. It was very disrespectful. During the negotiation part, we came in the 1st. I already had one contract and we're going after the same contract the next year as the incumbent, and we came in most qualified. After we went through the whole interview, [it] came time to negotiate the prices because we were the most qualified firm for it, we sat down and the gentleman doing the negotiating, started off 'we're here for this contract and this amount.' And I said I'm sorry, that's not the amount of the contract. If it was, I wouldn't have had to spend \$15,000 on an audit. And then he accused me of where did I get my information? ... Who at Caltrans gave me that because that's not what the project was or what the contract was. And he was the one totally in fault and it was very accusatory. And he asked us to step out of the room while they resolved it. ... So, we have to go stand out in the hall for probably 30 minutes. Why? They tried to figure out what... And it was a mistake, we're all human right, but it came off very accusatory to start with. And it said a very bad tone for the rest. ... I do feel [it] was more women related and it should be, 'here's the job. Here's what we're gonna pay you. If you're interested, go ahead and send us a proposal'. They really should say, 'we just pay this percent profit.' There's no need to negotiate that. Because that [the other way] leads to a good old boys' club ... His job was to just get as cheap as he could get us. And instead of hey, we're all professionals here and we wanna pay you what's equitable. ... And I think it was one bad apple, right? One person in particular that just had a power trip or wanted to try to put people in their place and make them feel small so they could feel big. And you wouldn't have that if it was spelled out ahead of time. We're gonna offer 7% profit and this escalation and then everybody would know ahead of time. And if it didn't work for you, you wouldn't spend the time on it. ... [My first contract with] Caltrans was a good experience in that it was a totally new opportunity. I had a subconsultant backing me up and they were there to answer my questions. It gave my employees opportunities to grow and do work they hadn't done before, which was great. They got paid prevailing wage, which they hadn't on the other types of work before, even though we had some prevailing wage jobs. This was such a big contract that they got prevailing wage a lot more of the week than they had previously. So financially it was a huge benefit for them. For me it was a good experience. I learned a lot. The negatives were that huge amount of money flowing through my company for not making anything for it. So pretty much just money and money out and floating it so it didn't benefit me financially in any way. [It went] so well that we wanted to go after the next contract as it came up and we thought, oh, we could do this and so again we went in with the very similar team. We were picked as most qualified. But the negotiation part. ... Our rates were so low because we didn't have the past overhead stuff in our overhead rate because we weren't doing the things that they required with all the invoicing, and we hadn't been tracking the prevailing wage stuff and all the categories and necessary to break it out. So, none of that was shown. So, my rates were really low, which made it very hard to recoup the cost. And then knowing going in the second time. ... the negotiation just was. ... A terrible experience in so much so that I've got no interest right now of working for the state again." [#2]

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "I gave up on Caltrans years ago... it's too much for my blood pressure. Every time I hear the word. ... Back in 2010, I took my product to the Caltrans laboratory in Sacramento. Had it approved as a green product and approved for use throughout Caltrans. Then I took that letter, and I contacted three of their directors, [in] Los Angeles. ... And they all loved it, [saying,] 'Great. Good idea. We need to get away from problem products like WD40. With all the all the volatile organic compounds and carcinogens and petroleum and flammability. So yes, we want to get behind this product.' So, then I went from the Oregon border [to] the Mexican border. And I needed to sell one can, [and] they said, 'we don't care. We have our P-cards, and we can buy from wherever we want. However we want'. So, it came from the director and the director never pushed it down, which I didn't expect him to. And we never saw him a dime. So that's been my experience with Caltrans. That's why I'm very cautious in mentioning that name because it does raise my blood pressure." [#3]
- The Black American owner of a DBE-certified professional services company stated, "There are always challenges on assignments, particularly changes in scope. ... Caltrans [can] cancel contracts in the middle and that makes for a big problem." [#4]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Caltrans is really easy, especially their B to B ... Like I said, this last two years have been extremely [easy]. ... I've seen a huge change in in the growth for the better. I was definitely and I like, I mean, I'm part of a task group which is kind of nice in that they are, look, they're listening to subcontractors and general contractors. I often don't know what the end result of those conversations are, which I kind of like to know what this disparity here because I don't want to sound like I'm complaining or you know, but after 43 years, I would like, you know, when I retire to have some of these things resolved ... the task group that's been put in place and it's they're really seeking to get the answers and they're really listening to what the issues are. They're drilling down to the meat and potatoes of the issues." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "We get a lot of outreach, even on jobs that I don't know exists, so that that helps." [#6]
- A representative from a WBE- and DBE-certified goods and services company stated, "We've been doing work for Caltrans in Bishop ... they've been really, really great. They were using another tire company that we were providing tires to and then they finally they found out that we were a woman-owned business, that we were a certified DBE, and it was better for them and so they just cut the other people out and just started going directly with us." [#9]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "The percentage of [our] work ... in the Caltrans bucket. ... this is just a guess, I don't have any data that says it, but I would say 80%. ... There're some owners that are less than ideal to work with. So if our choice is, say to work with, you know, a contractor that's going to be working on a Caltrans job versus, say, L.A. Metro job, and we had to choose, we would probably work with the Caltrans project, you know, rather than maybe L.A. Metro, and it's just we know that we know the requirements that Caltrans projects are familiar with them, and we don't have to relearn something." [#15]

- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "We've done very well with Caltrans two or three years back. ... It's a little slower right now with Caltrans." [#20]
- A representative of a Black American-owned transit services company stated, "[Caltrans is] very open to help community from point a to point b. They all have great customer service." [#AV16]
- A representative of a Hispanic American-owned transit services company stated, "The DOT is horrible and difficult to deal with. They are outdated in all clerical areas, and just not easy to deal with at all." [#AV66]

**Six business owners described their experiences getting paid by Caltrans specifically** [#2, #5, #6, #7, #15, #20]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Caltrans did pay on a very regular steady rate. It wasn't a big issue. ... It would have been nice if it [all public payments] was closer to 30 days. Again, I think it was 45, but it's been several years since we had the contract. So, they did pay when they said they would under the contract. So, I don't have any problems with that. I could see where it could be a barrier if you had a bunch of loans and you're floating stuff for a longer period of time, but that wasn't my case." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "This last year they've invested in personnel that's helping with the prompt payment issues. You can check and see when the contractor has been paid. It gives you that information where you can let the contractor know that you know that payments been received and ... there's soft ways of making sure you can get paid, [but] that doesn't necessarily mean it's gonna happen because Caltrans has not been able to really enforce the prompt payment. I've had some issues like back in 2017 where contractors specifically told me was just, they don't pay per prompt payment, they pay when they want to because they have 2400 small contractors ... So, I took that draft, and I took it like this was the word of Caltrans. And I contacted Caltrans and said this company was paid 3 months ago. Here's the proof. I still haven't gotten paid. And in this draft, it says that I should contact the resident engineer. ... I found the resident engineer. I sent it to him and, you know, basically the resident engineer said nothing. He never responded. He never communicated with me. So, I spent a lot of time going down the rabbit hole. OK, who's enforcing this? You know, you it's such a big deal and it's everywhere, you know, 'strongly enforced'. ... the biggest challenge is being the unwilling bank. The three-month bank. You'll have a \$200,000 bill and you know, you start the work in April, and you get paid in September. It was really unsustainable. We kind of moved away from some Caltrans work. ... But systemically it's an issue, you know, across the when you're dealing with federal state dollars and stuff like that. I understand that it's equally difficult in the private works too." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Caltrans is better than others [about payment]." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "I have one other person that specifically does certified payroll, which is

called for on every single Caltrans project. That's a compliance thing that has to be there." [#7]

- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "They have their process, like if you get your invoices into the contractor and then they get them turned in by, say the 20th, then Caltrans will pay by the following tenth or something like that. But then by the time they process payment and things like that, it's you know, it's a period of time. ... There's some stuff that like we get billed, like say a steel pile, we get billed as soon as the pile leaves the mill in Arkansas, and then we ship it to our cutter in Oregon, but Caltrans won't pay for it until it's like physically on the ground in California; that period of time that it takes to make all that happen is a lot longer than the 30 days in which we're required to pay for the material once it leaves the mill, so we had to carry that those costs a lot longer than we would if they were a little more flexible on that. You know, the fact that it has to be in California before they'll pay for the material on hand. It seems like it is in the last couple of years that seems new." [#15]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "We've never had cash flow issues at Caltrans. ... There's always that [situation] where someone went on vacation, something got stuck, got lost on somebody's desk. Pretty typical, you know, you start with the chain of command. You establish a chain of command; you follow the chain of command and rattle the cage to get things moving again with Caltrans. Again, District 4, very common, in fact, they want their small businesses to be paid. So, for the most part, the Caltrans group does an exceptional job of getting people paid as a prime. Now things get a little convoluted when you're a sub to a prime. That's a little different animal. I can't speak to that. All I know is I try to pay people within three days of when I get paid. It's not industry standard of how it is." [#20]

**Eight business owners shared recommendations as to how Caltrans or other public agencies could improve their contract notification or bid process** [#1, #2, #4, #6, #7, #8, #13, #15]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Maybe more training for them about the CUF [Commercially Useful Function]. ... More training for the local agencies. ... Who do DPS get informed on? Right? There's a barrier on rules and regulations. ... If something's changed, uh, how do we know it? ... Instead of learning it after the fact during your audit process. And I'm not talking about the rules and regulations of the CUF. That's 15 million pages long and everybody interprets it different. I'm talking about. ... A new barrier and a new procedure of understanding the CUF document. And if the rules and regulations have changed, how do we know this? And how do we protect ourselves? How do DBEs and small businesses protect themselves? The suggestions would be [to be] more specific on the CUF document, more clarity on what's expected of all of us. I don't even know if they're aware of it." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I think Caltrans does have specific requirements that unless you're working for Caltrans, you don't deal with, so maybe some kind of training. Rather than just saying you agree under your contract that you're going to follow all the manual stuff that they have for



surveying, which is printed manual, you can read it and everything else, but everybody interprets and has general practices, and I know that we've had employees work on two different crews and that things are handled totally different on those two crews, even though they're using the same manual on how they do stuff. So maybe some kind of orientation or and I don't know what they do because I wasn't the one going directly to Caltrans, it was my employees that were working over there. I don't think you should win a contract and then not be able to fulfill the contract, but I think if there's specific to Caltrans, they should have some kind of training that says here's how we do things here. ... It would kind of be nice if they had more information as to the past contracts. I'm sure with Freedom of Information you can get everything. ... I remember and understand and do stuff better if someone explains to me the why. So don't just tell me this is a 5-digit number. Put it here. Tell me what the first number means. The district tells me that the second number means a certain type of project. Help me understand it. So, it makes sense. So, it's easier to do quality control check. ... I think that makes a difference too with your subs too, so they understand, or you know your consultant, so they understand why they're filling those out and there was conflicting information like, 'Oh yeah, we don't need that anymore'. And you're putting in, you know, 16 digits and letters and then they're like, 'oh yeah, that's the only thing they look at'. It's like there's gotta be a better way to do this. If some people just got together and talked about it." [#2]

- The Black American owner of a DBE-certified professional services company stated, "The last thing I would say is that we've gotten some spam from under the Caltrans name for years, and we've reported this, but it's people that have probably hacked into Caltrans website and are sending emails to us saying we need to respond, and we are sure it's a hack. And we've later sometimes track some of them and surely that's what it is. It's simply a hack attempt. So, Caltrans need to remedy that because I know when it first happened many, many years ago, we were in a bid situation, and we assumed it was legit and we tried to open it and fortunately our antivirus software protected it. ... I think the biggest thing is to let contractors know in advance that the decision is going to be elongated and therefore some preparation can be made. Avoiding it would be ideal though. ... One thing is I think oral [interviews] should be done in most procurement for management consulting projects, it's not necessarily for construction, but definitely in management, administrative kinds of project. A meeting between the agency and the team bidding. Because insights are provided there that are keen." [#4]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "I know a lot of projects we've been on had payment verification portals. I don't know if all Caltrans, I don't think Caltrans projects have that. Our [MetroLink] project has it. The MCTC project had it. ... like a required payment verification portal. I've seen it on some jobs, but I haven't seen it on all... You have someone or some mechanism following up to make sure the DBE are getting paid small business on time, paid often or per California code or contract whatever. If there's a slight dispute on something, then it holds our payments for really long, which is extremely detrimental to the business. So, if there was a faster way to get through that process. If it was a dispute with the contractor or the owner, instead of it sit there till I don't know when. If there was, if there were maybe milestones within the job. If there's any dispute in works with DBE's or payments held with DBE that they say 'hey at this milestone, we get those all covered and paid' or something like that.



Like these agencies put in their specifications that they're going to meet all these DBE, requirements to get the federal funding so they can do their projects. So, they have it in there, but they don't actually follow up and make sure they meet, they don't really care about paying DBEs for their work quickly. It's just there's another number out there, so there is actually some follow up. On the bigger projects have somebody that is going around, 'hey, why are you paid? Why not? Let's figure it out. Yeah. Did you do the work? Is it approved? OK, why aren't you paid? How long has it been sitting there?' We just have to go out there and fight. Because we don't have corporate backing and cash flows everything. So, it just takes a lot of extra time to go fight for that money that you've done the work for six months or a year ago. It's happened on lots of jobs." [#6]

- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "Get paid in like 2 days after the month is over or get paid weekly. Or even [changing the] mobilization like more than five or 10% that can be paid either prior to the guys being put out there or you know a week after; programs like this would assist with small businesses cash flow... One thing that you guys can do is no retention. ... I would say maybe a report card from Caltrans inquiring how the work was with certain contractors. [So, Caltrans is] aware of the culture of the contractors that are being awarded the projects. ... If it's [something like a] general contractor treats me like crap or puts me out of business, and then you wonder why you're not making your DBE numbers." [#7]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Talking about Metro, because that's primarily Metro, it's a stickler on prequalification forms. LA Metro initially required prequalification forms which required a notarized document during the proposal stage. Which was really ridiculous. We spoke with them. I personally did, and they eventually ceased from requiring it. Now it's once you've selected, [and have been] noticed up to award, [that's] no problem. But if you're if you're involved with 567 proposals and each one requires a notarized document for a small business, [it's totally], inconvenient. Plus, it's expensive. \$13.00 a pop. So just most recently, Metro has reinstalled that again, prequalification for each individual project. So, my recommendation on that would be not requiring pre-qualification, but [if] you do from the big companies that's fine, but the small firms, if they're selected, if our team is selected, then we need to provide that before contract can be issued? No problem. ... [Also] a look ahead providing a look ahead list of upcoming projects. ... the other thing that they can do to really help is to publish or make available the list of prime contenders. ... That allows a small business to identify potential marketing targets" [#8]
- The owner of a WBE- and SB-certified professional services company stated, "Put limits on how many times they can renew the same contract to the same vendor. And then that way, they're being a little bit more fair and they're letting other people have a chance, number one. And number two, they might be missing stuff and they don't even know it because they've been hiring the same person over and over. And you only know what you know, right? You don't know what you don't know. 'Cause you've had the same person; you have no idea what you're missing. And there might be things that they're missing, but they wouldn't have any idea because they've been just renewing other people." [#13]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I don't know that they have like a monthly distribution, so I don't know, if it's possible to have a

twice a month distribution or if that would just cause too much paperwork or whatever, but I think that, you know, that could be so more, like, more frequent distribution of money and then also getting rid of that new thing where they, you have to have your product in state in order to get paid for it, for material on hand. And then I think, I don't know, I've heard that there's some sort of a prompt payment thing that is required for DBE's or if SBE's or something like that. I don't know if that's a thing where do you find that, like, is it in the contracts or the special provisions or where do you find that language that you can say, look, we're a DBE so prompt payment means, like I don't know what it means, ten days... Caltrans has it also that they're supposed to do a prompt payment deal? ... I wonder if that counts, even like for material on hand, like I mean, we've been waiting for quite some time for a payment on a pretty big project that, you know, I don't know if, but if, if that prompt payment thing was a thing that applied to our kind of work, our jobs [that] would be helpful for sure." [#15]

## G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of California's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. COVID-19 effect on the marketplace; and
3. Keys to business success.

**1. Current marketplace conditions.** Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors in light of the COVID-19 pandemic.

**Eighteen interviewees described the current marketplace and the effects of COVID-19 on the marketplace and their firms as negative, describing a decline in sales, slower payment, difficulty obtaining supplies, and general anxiety about future ventures** [#3, #11, #13, #17, #18, #AV]. For example:

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Well, people were just a little bit [more] cautious as how they spent; if they could do without something, they did without it or they wouldn't order the normal amount, they cut back." [#3]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "It was going really good pre-COVID, like it was for everyone else. We were really busy. And then we're going good for a good while, and sort of kind of expanding because we specified only in certain things in the beginning. As we progressed, we started doing more and more, adding more things on. From there, started getting to expand a lot more, we're able to get our own shop. Then from there we actually had taken on a few big accounts where we were the only dedicated service fleet. And then it was going good like that for a good while, but then after that's when COVID hit. Then once COVID hit us that's when we had to say, we just said a pretty much dramatic change. Well, we ended up having a lot of companies went on a different route, and some of our companies went bankrupt. We had another big company,

which they ended up going on a completely different route. They ended up actually having third party company, logistics division and then we had been with the Navy like 14 years at the time. That was like 90 something percent of our business at the time, because we have more than one shop... that took that hit. It was just pretty big because they were like 90% of our business. We had close to like about 30 people dedicated to them alone." [#11]

- The owner of a WBE- and SB-certified professional services company stated, "I would say [our growth has] decreased. And I attribute it to everything that's been going on, COVID, just everything that's happening right now. ... We are an advertising agency. And when nobody's out spending money, then it makes it harder for clients to wanna advertise. Everybody pulled back their marketing dollars." [#13]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "We lost 100% of our event cleaning business during that time because everyone was indoors. ... I would say we lost about 60% of our business, and then the other 40% that stayed on board was out of goodwill, and they were larger companies, and so they reduced the number of days, the cleaning, but they also, they kept us afloat. That was nice and generous of them to do that." [#17]
- The co-owner of a SB- and VBE-certified goods and services company stated, "We only have two employees now, because [of] COVID. We had to get smaller, but we're still alive. ... The last couple of years have been kind of brutal." [#18]
- A representative of a Subcontinent Asian American-owned goods and services company stated, "COVID affected [us]; less people and traffic in the store." [#AV104]
- A representative of a majority-owned transit services company stated, "pre-COVID, it was very competitive, now less competitive, at this time lot of difficulty in growth, finding staff and finding the equipment we need. Difficult to expand, [but] I imagine in the future that will change." [#AV111]
- A representative of a woman-owned goods and services company stated, "It's very hard to run a business here, its next to impossible, can't find employees, sales are down 30-40 % price increases coming in every direction." [#AV113]
- A representative of an Asian Pacific American-owned goods and services company stated, "[It's] getting more difficult with current economic standards." [#AV125]
- A representative of a Subcontinent Asian American-owned goods and services company stated, "Business has been difficult after the COVID pandemic with getting sales." [#AV132]
- A representative of a majority-owned goods and services company stated, "When the economy is not good, business is not good either." [#AV137]
- A representative of a majority-owned goods and services company stated, "Since pandemic: trouble keeping employees. [We] had to shut down 3 stores." [#AV181]
- A representative of an Asian Pacific American woman-owned goods and services company stated, "The economy is a problem--people don't want to spend money like before. Offices are downsizing; it's hard to find employees, and the fees to do business have risen a great deal." [#AV195]

- A representative of a majority-owned goods and services company stated, "CA is over-regulated and for a business like ours, we are a non-union shop, but the unions control most of the public sector businesses. A lot of businesses are leaving CA, so it makes doing business harder. There are less businesses so there are less opportunities." [#AV196]
- A representative of a majority-owned goods and services company stated, "The economy [has led to] low incomes. [The] COVID pandemic was challenging." [#AV206]
- A representative of a majority-owned goods and services company stated, "The pandemic has affected a lot of businesses that we deal with, and they were closed. Travel was down and so was tourism. It still continues to be a problem. Business travel needs to pick up, tourism and hospitality needs to recover so my business can recover." [#AV246]
- A representative of a Hispanic American woman-owned goods and services company stated, "[Because of] the pandemic we lost a lot of customers." [#AV252]
- A representative of a majority-owned goods and services company stated, "The business climate is very hostile to small businesses." [#AV262]

**Two interviewees shared that recent market conditions and COVID-19 negatively affected their firm, but things have started to improve** [#AV]. For example:

- A representative of a Black American-owned professional services company stated, "Due to the pandemic it was slow, but things are starting to pick up. However, we are now dealing with inflation but at least opportunities are growing." [#AV170]
- A representative of a Hispanic American-owned transit services company stated, "[It has] been difficult [with] people not traveling last couple of years. Now more transportation [opportunities] with people traveling more." [#AV180]

**Twelve interviewees stated that the marketplace is becoming increasingly competitive** [#10, #11, #12, #AV]. For example:

- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "It depends. Last year I had the volume of sales and then this year a little less. It depends on the needs again and it's very competitive, so you really have to be out there and outbid better service-disabled veterans. It is competition. ... The percentage of profit you go is about 15 percent, but in competition they go all the way to 2 percent, 3 percent that's how low their profit margin is." [#10]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "You have a whole new bunch of shops, I think like overall, I think in the industry last year, there was like 110,000 new trucking companies. And the same time you have like another, let's say 50,000 shops open up. Then you have you have all that new competition, and they lowball to get the client." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We're facing large corporations like Amazon and other large corporations that can realize lower cost and efficiencies that we can't compete in." [#12]

- A representative of a majority-owned transit services company stated, "The problem is that they flooded the field with other vans, and drivers [that are] not experienced, they park wrong, don't go where they are supposed to go, interfere with other companies, leave their trucks in wrong place, handicap zones, crosswalks... I have been in business for 30 years, I had 3 vans, now I have me and other person, and [it's] hard to retain work because of the industry being flooded." [#AV3]
- A representative of a majority-owned transit services company stated, "[There is] competition with many companies." [#AV109]
- A representative of a majority-owned transit services company stated, "Pre-COVID it was very competitive." [#AV111]
- A representative of an Asian Pacific American-owned goods and services company stated, "The security industry is very competitive now, so it is more challenging to obtain work." [#AV128]
- A representative of a majority-owned professional services company stated, "It is highly competitive in our industry. We would like to see more opportunities from government for small businesses to bid on. So many contracts are in the \$20 million plus range which is too large for small businesses to compete on." [#AV165]
- A representative of a Hispanic American-owned goods and services company stated, "Costs and pricing has skyrocketed--rent has also increased. As a small company, I can't buy the big containers like the larger companies can, so it is more difficult for me to stay in business. The market is very competitive now." [#AV200]
- A representative of a Black American woman-owned transit services company stated, "There is lots of competition with 3rd party contracts, but their rates are very low, and we want to get good trips with higher paying rates." [#AV264]

**Eleven interviewees noted the marketplace is improving** [#1, #2, #11, #AV]. Some businesses also discussed positive effects of COVID-19 on their businesses and industries. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "It has definitely increased. ... that's just a matter of the amount of work." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "In general, I think our whole area right here has been very busy the last few years. Which is another reason I downsized, is it got too busy, and we got backlogged and work was not being performed to the quality that it should have been. We weren't able to stay on top of our projects, which is another reason I downsized." [#2]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "It was going really good pre-COVID, like it was for everyone else. We were really busy. And then we're going good for a good while, and sort of kind of expanding or the more because we specified only in certain things in the beginning. As we progressed, we started doing more and more, adding more things on. From there, [we] started getting [to expand] a lot more, we're able to get our own shop. Then from there we actually had taken on a few big

accounts where we were the only dedicated service fleet. And then it was going good like that for a good while" [#11]

- A representative of a Black American-owned transit services company stated, "It is a good place for a marketplace." [#AV9]
- A representative of an Asian Pacific American woman-owned transit services company stated, "So far so good, the market is booming right now it's showing signs of profit and expansions." [#AV22]
- A representative of a majority-owned transit services company stated, "No difficulties everything going good. Freight prices very low." [#AV37]
- A representative of a majority-owned goods and services company stated, "We have not had much difficulty because everyone needs their car repaired. The California marketplace is very difficult for new business owners due to all the regulations to open and the taxes and fees." [#AV110]
- A representative of a majority-owned goods and services company stated, "There is ton of work, not having a shortage of any work." [#AV118]
- A representative of an Asian Pacific American-owned goods and services company stated, "I do zero advertising, we haven't had any issues. We doubled in size since COVID. I would have to say that anyone can start it, there's plenty of work out there." [#AV187]
- A representative of a majority-owned goods and services company stated, "Plenty of work." [#AV189]
- A representative of a majority-owned goods and services company stated, "Plenty of work to be done... It has been consistent. It's great, more than enough." [#AV191]

**2. COVID-19 effect on the marketplace.** Interviewees shared the perceived effects of COVID-19 on their businesses, their industries, and the marketplace as a whole. Business owners and managers speculated whether they believed those changes would be permanent.

**Seven interviewees discussed the effects of COVID on their business** [#2, #7, #9, #14, #15, #17, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I had employees who had to leave because of COVID. So, I had an office person that was working out quite well and she had to leave because she had to stay home, take care of her kids because of the home schooling." [#2]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "I had a bit of growth during COVID. But since COVID has gone away, it's kind of decreased. That was only because we were working on the projects that were essential." [#7]
- A representative from a WBE- and DBE-certified goods and services company stated, "It was difficult regarding staff and keeping our staff healthy and keeping up with the government's requirements. So, and keeping ahead of it too, because it was ever changing. You know this week it's 'no we don't have to wear masks and then next week it's do this and



'Oh by the way you have to pay your employees you know to be off.' Then it was like, 'No, that's expired, now you don't,' but oh but now guess what we have to again. ... We were able to acquire the payroll protection underneath the small business and also the emergency industrial disaster loans, so that helped substantially, because we had a major decrease in gross revenue." [#9]

- The owner of a transit company stated, "I start operating in February 2020 and COVID started in March 2020, so it was really hard during COVID. Patients were really sensitive. Some patients refused to wear masks. Some patients refused to sit in the back. ... I was trying my best to accommodate the patient requests, so I tried doing the COVID-19 protocol, so each car would have a plastic cover between the patient and the driver. Each car would have two boxes of PPE, the gloves, face masks, face shields, alcohol, and hand sanitizer. I tried my best to cover their needs." [#14]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "It's supply and basic economics 101. I mean, supply and demand hit us on stuff. So, even though you know, you had a contract for a certain price, it just cost more to get it because the cost of doing business seems to be higher and higher. We had a similar volume, but the profitability was different... Everything became more difficult with the pandemic." [#15]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "We obtained an EIDL loan and then we had the PPP, so we were able to maintain, not all of our staff, but a significant part of our staff." [#17]
- A representative of a Hispanic American-owned transit services company stated, "During COVID you could tell certain companies had favoritism and many were struggling and experiencing difficulties. There were too many restrictions, too much favoritism within the companies. Lots of controversy." [#AV70]

**Nine interviewees mentioned the effects of COVID on their industry and speculated whether those changes would be permanent** [#1, #9, #13, #14, #15, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "It's definitely affected the workforce, you know, people don't work as much as they used to. I think a lot of our manufacturers and suppliers don't have the staff they used to have, so it affects how quickly get our answers. ... Response time is a lot slower than it used to be. ... I would hope that it's temporary, but I don't think it's gonna be temporary. ... I see it getting worse. ... I think there's a lot of panic. I think there's a lot of general contractors and customers that don't know answers. We don't have answers to a lot of our questions. So that is starting to impact my business." [#1]
- A representative from a WBE- and DBE-certified goods and services company stated, "We do have significant demand from the public sector. The private sector it's like it seems like it's been business as usual for the most part. There's been a few I mean like changes publicly as far as a lot of your bigger corporations who have more employees have had to change their daily operations or requirements because of the COVID. But I would say almost all of those have kind of reverted back to the way it was before COVID." [#9]
- The owner of a WBE- and SB-certified professional services company stated, "Not necessarily [permanent changes to the industry]. I just think people are looking at every



penny that they're spending. I don't think people are spending the same amount of money that they were before. I think budgets have shrunk. And so maybe we have to get more business because the budgets are smaller, so we have to get more of the smaller business because the bigger budgets aren't there." [#13]

- The owner of a transit company stated, "After Covid-19, it's become online or by phone, and it didn't change until now. We looked at these patients ... and we lost them, because their appointments become virtual right now, and I don't think that can change. It's gonna be virtual for a long time. ... I have a friend, he has a company, he shut down and he sold his vehicle because he couldn't make any benefit, because the broker that he was working with, they don't pay that much, and they refused to increase their rates, and then the same time, he was responsible to pay the drivers the minimum wage. He was responsible to pay the gas prices... In the end, after two or three months, he noticed that he's not making any benefit. He's losing. He tried to get another contract and he didn't, and he tried to work with his broker to get an increase in the rates, and they refused, so then he had to shut down his company, and sell his vehicle. It was really sad, because at this time, we should have more of these types of companies, these types of medical people, during COVID, we need help more and more because they are the ones who help. So, we lost a lot of companies that could help our patients." [#14]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "We got a lot busier during the pandemic, but we also faced a lot bigger problems as far as like being able to get product out of factories because a lot of them had to change work conditions and so that limited production, you know, their people could only be this close together. So now they can only have this many people in the factory so they could get, you know, only 50% of the product out. And then we added the fact that since nobody was driving on the roads, the owners fast tracked a lot of the projects. So, they wanted to get them done sooner and take advantage of no traffic. So, they not only wanted the product, but they wanted it faster and so we were trying to get product faster out of factories that were able to produce less material in a timely fashion. So that's a pretty big challenge, so we were kind of working around the clock coming up with different, you know, vendors and fabricators and things like that and learned the kind of, you know, to satisfy the needs of the project, so we got very busy." [#15]
- A representative of a Black American-owned transit services company stated, "The only difficulty we had with COVID-19 is due to nobody taking transportation." [#AV6]
- A representative of an Asian Pacific American woman-owned transit services company stated, "Because [of the] pandemic, independent/Uber and lift [owners are] making our businesses slow down a lot." [#AV27]

**3. Keys to business success.** Business owners and managers also discussed what it takes to be competitive in the California marketplace, in their respective industries, and in general [#2, #9, #13, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I don't necessarily feel competitive with the other companies in town. My goal is always to provide a great quality service, be ethical. ... I don't feel all firms do that and they chase the

dollar and that's not the structure of our company. ... I tend to focus on quality. Answering the clients' questions, so to me it's not a price competitive market, it's just state educated. And to me I think educating the public, so they understand what we do is a huge part, but not in that competitive way." [#2]

- A representative from a WBE- and DBE-certified goods and services company stated, "Customer service is hands down number one. Because the price of the tires, you sit here [and] you know we're all buying them pretty much the same price from the same distributors, right? So, at the end of the day, it's customer service, because the majority of the people that we obtain as customers that have had other you know tire companies will say, 'They're not doing this,' 'They're not doing that,' you know. The owner here is very, very particular about the way she does things, about safety as number one. You know get some other tire companies that will mismatch the tires on say a truck that has like two tires that run together, she won't do that here. ... Now it may cost the customer more money, but she will then tell you, 'I'm not, I'm not going to guarantee I'll be the cheapest, but I'm going to guarantee you I'm going to provide you the best service,' and that in a sense being safe and being thorough is part of you know having good service." [#9]
- The owner of a WBE- and SB-certified professional services company stated, "Well, having experience, having versatility within your offering, having the research, having the staff. I think trying to keep as much in-house that you can do in-house rather than farming out is good for the agency and for the client because you can make changes on the fly, you can be more involved with the client directly. And when I say have experience, I don't mean have experience in government contract. I mean in the category." [#13]
- A representative of a majority-owned goods and services company stated, "It is difficult finding cashiers, but if your prices are right and your service is right, you can succeed." [#AV155]

## H. Potential barriers to business success

Business owners and managers discussed a variety of barriers to business development. Section H presents their comments:

1. Obtaining financing;
2. Bonding;
3. Insurance requirements and obtaining insurance;
4. Factors public agencies consider to award contracts;
5. Personnel and labor;
6. Working with unions and being a union or non-union employer;
7. Obtaining inventory, equipment, or other materials and supplies;
8. Prequalification requirements;
9. Experience and expertise;
10. Licenses and permits;
11. Getting a foot in the door;
12. Unnecessarily restrictive contract specifications;
13. Bid processes and criteria;
14. Bid shopping or bid manipulation;
15. Treatment by primes or customers;
16. Approval of the work by the prime contractor or customer;
17. Delayed payment, lack of payment, or other payment issues;
18. Size of contracts or the size of the company;
19. Bookkeeping, estimating, and other technical skills;
20. Networking and learning about potential project partners;
21. Inflation; and
22. Other comments about marketplace barriers and discrimination.

**1. Obtaining financing.** Twenty-five interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses [#2, #3, #5, #7, #10, #11, #14, #15, #18, #19, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Because we're service based, we don't have a big expenditure. I guess if I was going after big contract, and I didn't already have the equipment that we did as an existing company. ... That could be a big hindrance. I've always self-funded." [#2]

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "The challengers were many, but most of all I was introducing a product which no one has ever seen before. That was [one] major challenge, [and] not have any operating capital to fund what I wanted to do was another challenge. ... [To overcome the lack of funding took] about 17 hours a day and a credit card. ... For a small business, [when] it's starting out [and] has no credit record at all, it's going to be very, very difficult for them. And as far as getting SBA loans, when you don't need the money, then everyone's trying to offer you money." [#3]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "We were the product of an SBA loan early in the early years and they can do that. ... Everyone gets really excited to get an SBA loan, but they don't understand that they're gonna collateralize everything, including your first child. Then it could handcuff you so that if you needed to do additional like a line of credit, if you're already all your assets or your equipment is ... sucked up by, you know, by an SBA law, you know, then the just things like that, that that's a real key. You know that a deterrent and understand what you're getting into." [#5]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "I would like to scale. I'd like to, you know, be able to estimate where I'm estimating about two jobs a week. Now, I would like to estimate or bid on five projects a week, but you know that like I said, that costs money. Finding capital to assist in in scaling has been a barrier ... What my job is to get out and get to meet the general contractor and, you know, put more money into marketing ... which is more money up front, so overall money is a barrier, lack thereof, or just the fear of running out of it because, you know, I still have other operations going on. It comes with the territory in regard to managing a company. ... Knowing what to put money into, when to put money into who to know, and how to talk to folks." [#7]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "The major manufacturers sometimes they carry that [cost] and you have like 30 days to pay them and normally the government will, the VA for example, pay within a month. ... Especially if you have one contract ongoing that you bid then that, that money is secured to that project and then there's another bidding, another project you want to bid on that, then you've already spent 90 percent of that capital, then you only have 10 percent, then where are you going to get the money? You're going to go for FDA [loans] but I've never done that, because you're paying for a percentage. There's a lot of paperwork to do it if that happens. But I've never done that, some people are using FDA bank to make a loan ... One example is like making t-shirts, I have done that before and embroidered t-shirts for the government. The small businesses that, that I deal with for example in San Diego, 'Hey, we want, we're going to buy this product. I'm going to pay for my people. I want this amount of money.' They'll be asking for \$40,000.00 upfront, which I don't have. It's that money is already attached with other projects, so you let that go. So those are the kinds of barriers that I have. Obtaining, obtaining financing like I said I never, I never tried that from the bank. I tried to do it with the other people, give them percentage, but they don't want, especially if they're not business minded." [#10]

- The Hispanic American owner of an MBE-certified goods and services firm stated, "At the very beginning it was [a barrier]. A lot of times they ask you if you have a shop and a lot of times, they don't want those type of jobs done on their facility. It's too messy. At times, they would ask me do you have a shop, we would tell him no. And we would ask them [if we could] just get it done here. And they didn't like it, but some people will comply, and they would us give us a little space and double check that we didn't make a mess. But all it did was make us try harder to produce enough to get our shop. And then we finally did, about two years in, or two years then and then we had our first shop. [We] were mobile for a while before [we] figured out before we had enough capital to rent our own space." [#11]
- The owner of a transit company stated, "This was a main issue, the medical equipment, the vehicle, the medical vehicle is even really hard to fund, they're really expensive. I remember I buy a car from a different state, and I have to ship it over here just to keep a rating. That's been an issue for us. ... It's definitely financial, if the rates are good it's gonna help you increase the vehicle, buy more equipment, hire more people. I think the main point is the rate, because if I discover all the expenses, like the gas, the payment, the driver, that's gonna make me increase, buying more, adding more vehicles, and helping more patients." [#14]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "Initially, I bought stuff on my credit card and then just paid off the credit card as soon as I got paid for the material [that] had sold and so, over the years, I got a line a credit, you can get a line of credit when you don't need one. And so, I have had a line of credit, but, you know, I really haven't used it that much because I sort of grew my company slowly. And, I just lived well below my means, and so I kept, I didn't spend all my profit, I you know, I just kept my profit in the company after paying taxes and all that, of course. And so, also sometimes, some of our vendors will extend our credit a little bit. They'll be like, ok our terms are net 30, but ... we'll let you slide. And, you know, so sometimes our vendors give us a little extension on our credit as well." [#15]
- The co-owner of a SB- and VBE-certified goods and services company stated, "When I said to go the bank, you know, I have a line of credit and that type of thing, but I still get charged the interest for using that. ... Basically, in those days, I'm gonna have to guess it's still true, if you're a company and you're setting up to do business in the State of California, the State of California requires you to put a substantial deposit down which they keep all the time. They don't pay you any interest on it and so they said, no, we don't want to get involved at all, so we would like for you to do the sales." [#18]
- The Black American owner of a transit company stated, "I'm figuring that it's gonna cost about a \$1 million, maybe a little bit less to get started. To give you an example, back in 2012, I was hired to help a person start a business in Pennsylvania. And so, sitting down with their EMS department, the gentleman across the table from me basically said, 'Look here's the bottom line, in this area, on average, it's going to cost you \$385,000 to run one BLS ambulance per year in this area and, so you guys have to make, generate that much income just to break even and anything beyond that. Then you know that, of course, would go into your pocket, you know, and that costs \$385,000 would be for the vehicle itself, vehicle maintenance, multiple insurance policies that you'd have to have, a minimum of 4 people, you know, two in each shift plus, you know, two extras for some people to have days off, because you can't just run everybody constantly, fuel maintenance, medical supplies,

and some other things that will cost to run one ambulance per year in Pennsylvania.' California is way more expensive. I'm figuring that two BLS units probably looking somewhere upwards about \$400, \$500,000 just for a basic ambulance; paramedic unit about \$750,000, if that, \$800,000 just in operational cost per year ... I was trying to hunt down grants, I mean for years and years. You always hear that there's special grants for minority-owned business, emergency business, and stuff like that. I spent a year and half looking for these grants, and never found a single one. I thought about investors. I'm leery of that because of things I've seen in my past. I've seen businesses get investment capital and then the investors decide to get greedy and if the business isn't making money fast enough, they either sell off by taking over the business, run it into the ground, sell off the pieces, re-coop their money A few of the investors I have spoken with, you know, my goal was okay. I'll take money from you then I might be able to pay you off. Their intention was to stay and remain in the company until the company went out of business, or disappeared, or sold for a profit, and I don't want that string being attached to me. I want to be able to pay them off, run the business that I envision it and do the things I'd like to be able to do without having to worry about answering to the corporate board or an investor getting permission to do that. What I envision, because they're in there for the money and they don't understand how the business works, and I've also seen where the same thing happens where an investor has no clue about business, start making demands of, we'll cut here, cut here, don't do this, don't do that, and then the business suffers, you know, and then ultimately the people who are interested to be taken care of by them also suffers. ... My luck with banks hasn't gone all that well. Years ago, I went through a horrible divorce and basically destroyed by credit rating, and so when I went to apply for a loan to buy just a wheelchair van, I was told that there was not a chance in hell I was going to get a loan, plus COVID happened and all the banks quit giving loans, and so that led me to close. I would much prefer to look at grants and SBA loans. SBA has not been much of a help either, but that's a whole different subject there." [#19]

- A representative of a Black American-owned transit services company stated, "Getting funding for business. Funding should be easier to obtain. Amount money needed and smaller business don't get capital to get set up. Business fall through the cracks. I think the industry is hurting a lot [of] people by undercutting the market. People getting jobs for less and not paying registration costs." [#AV1]
- A representative of a Black American woman-owned transit services company stated, "I need funding for more cars! I have a big wait list. There is a big demand especially now with parents going back to work. So, whatever the state can do to help facilitate transportation would be great. We would love to partner with adoption agencies also for transport for kid to courts, etc." [#AV4]
- A representative of a Black American-owned transit services company stated, "Difficult getting loan or funded from bank or government. I had to get loan [from] the family." [#AV8]
- A representative of a Black American-owned transit services company stated, "Can't expand. We need funds. I was trying to get a PPP loan, and I have better credit now." [#AV11]

- A representative of a woman-owned transit services company stated, "Only barrier was as a start up getting monetary assistance to start the business. I thought with being a woman-owned [business] I would get help but didn't get any." [#AV17]
- A representative of a Black American-owned transit services company stated, "For me personally, [we have had] some issues with getting loans to purchase the equipment needed for my company. The industry I'm in is to purchase vehicles and my county I'm currently living in is basically 'you're in or you're out'; very limited to what you can do, running into difficulties to get contracted on the EMS side." [#AV19]
- A representative of an Asian Pacific American woman-owned transit services company stated, "We want more grants." [#AV20]
- A representative of an Asian Pacific American woman-owned transit services company stated, "The loan capacity is where I am hitting a wall. Getting institutes to loan to small businesses." [#AV22]
- A representative of a Black American woman-owned transit services company stated, "Make easier for allow for people with not best credit to get good credit. To help get business loans because credit [is] not good. If credit [is] not good, creditors [are] not helping me get loans for the business." [#AV76]
- A representative of a Black American-owned professional services company stated, "It is also hard to get loans so I can purchase better equipment to get the bigger jobs." [#AV174]
- A representative of a Black American woman-owned professional services company stated, "Access to working capital." [#AV210]
- A representative of a majority-owned goods and services company stated, "Every 4 years we have a recession which slows our ability to grow. Access to capital is very limited for small business." [#AV224]
- A representative of a Hispanic American woman-owned goods and services company stated, "Financing: credit not available. Very competitive." [#AV253]

**2. Bonding.** Public agencies in California typically require firms working as prime contractors on construction projects to provide bid, payment, or performance bonds. Securing bonding was difficult for some businesses and two interviewees discussed their perspectives on bonding [#11, #20]. For example:

- The Hispanic American owner of an MBE-certified goods and services firm stated, "We were new to the industry, and we didn't know exactly what was going to be needed, so then there were certain insurances that we had to have. We have to [have] certain bonds especially with the food industry, even [with having] a higher insurance. Most companies want you to have a million-dollar umbrella and with them I think we're at 2 million for the food company. And I think that was a whole new [challenge]. A lot of times they would feed us a lot of work and then now that we have a clientele was directly with us, we had new things [we] needed that we didn't know before and we were still small time, so we didn't really know everything needed. Little by little [we] gain[ed] the bond, gained the insurances, getting the umbrella, just a step at a time and then learning as we went." [#11]



- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Initially, you know, it's very difficult to attain any kind of bonding capacity. The road map with owner's equity in business comes bonding capacity - with the ability to have a line of credit comes bonding capacity. So, one, we were taught early in the beginning of our career as a business owner that one does not come without the other. You cannot get bonding capacity unless you have owner's equity. If you don't have owner's equity, you won't get the line of credit and without the line of credit, you won't get any significant bonding capacity. They all work hand in hand. They all work in unison. So, in that respect, we grew it as we could. We pushed the envelope where we could, to get larger and larger bonding, bonds, but, you know, the struggle maybe was to get financial reporting into the company to the bank or the bonding company. Those are probably bigger struggles than getting the bond, actually. We developed a fairly good track record, financial track record, which is credit, cash, capital, and character. So, if you're lacking any of the those four 'Cs', it becomes extremely problematic getting your bonding without capital." [#20]

**3. Insurance requirements and obtaining insurance.** Sixteen business owners and managers discussed their perspectives on insurance [#2, #5, #7, #8, #9, 11, #14, #16, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "The insurance requirements were higher than what I had, and I did have to increase them. So, the obstacle, I would say [is that] the rates that I proposed in my contract were based on what I had before I upgraded to Caltrans' requirements, so they look at last year when we figure out our overhead rates and it didn't include all those expenses I had to incur. The way they do a lot of the accounting requirements for the contracts like I'm operating with a certain amount of insurance and now I have to upgrade it, but I can't recapture that cost. I didn't have a good experience financially, not that I was expecting to be lucrative, but anything I did made, I don't feel overall Caltrans was profitable for me in any way. I feel like I used everything to just stay above board and I don't even think I stayed above board. And by that, I mean like, I think other jobs were carrying my Caltrans contract because I wasn't able to bill out for the cost that I was incurring because of it. ... We need to include that small adjustment into the overhead rate." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "I would say you need to have a good insurance broker carry that you can communicate with and have them look at the requirements for some of these specifications and then let them will let you know what it's gonna take to insure those projects. A lot of people don't do that, you know, they wait to get the job ... You have to preempt and kind of figure out what it's going to take to do a job rather than 'I'm gonna bid this job. I'm certified. I'm gonna go bid this job' and then all you're going 'oh, I didn't understand that. I can't do that. I don't have the wherewithal or the financial capacity to do to take on like a \$10 million liability' ... [You have to] understand what your limits are and understand what they're asking for. So, if you sign a contract and you don't read the insurance specifications that say you're gonna provide them \$10 million umbrella, that \$10 million umbrella is gonna cost you \$20,000 and if your job is only \$1,000... you are in trouble." [#5]

- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "The issue with how much insurance [costs]." [#7]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Sometimes I've had to go back to the primes and say, do we really have to have a \$25 million aircraft insurance when I'm doing a small labor compliance service at an airport? So, all of a sudden, the primes are realizing that, and they've adjusted it. Of course, we've offered to get the coverage but make everything proportional to what your role is going to be." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "I would have to say the challenges is the daily operations as far as the insurance rates that we like to provide. You know it used to be easier to hire people because we would provide you know amazing insurance and we would pay for the employee and all their family, and we would retain our employees. We have over I believe I think the last time I tallied up 465 years of experience that works here right now, but before that used to be a lot higher, because we were able to retain the cost to what was it five, six years ago when all the insurance changes were made. Now that cost is just gone through the roof. Vehicle insurance has just gone through the roof. Fuel costs right now are just killing us, killing us." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "We were new to the industry, and we didn't know exactly what was going to be needed, so then there were certain insurances that we had to have, certain bonds especially with the food industry we have to have even a higher insurance. Most companies want you to have a million-dollar umbrella and with them I think we're at \$2 million for the food company. ... I would say, I mean at least when it comes to our type of industry, is having that warehouse insurance, just to help you color. It's consistent now, but there's so much and that has been one of our biggest challenges to this. So much equipment that has been taken or stolen, and if we didn't have those insurances, it would be way more out of pocket with having a repurchase. ... I mean it's extremely important, especially when having not only the customer's equipment at your facility, because you still have the same challenge or if anybody wants to break in and steal something. They could always come after your clients' vehicles, to making sure that you have all those the main insurance, umbrella insurance." [#11]
- The owner of a transit company stated, "To be honest, the insurance, it's really expensive, I'm paying a lot of money for the commercial insurance ... they request you to have to coverage of \$1 million, so it's really expensive, [and] there is no waiting time, no process time for this." [#14]
- The woman owner of a goods and services firm stated, "What makes running this business so expensive because you have to have close to a \$1 million property or small commercial business insurance. Everything's commercial, drug consortium, I have to hire somebody to randomly drug and alcohol test me as well as anyone that I hire. I'm gonna have to do a 25-year background check on the driver that I hire and drug consortium for their Workman's Comp. And nobody's, not very many companies are offering the type of insurance that is needed. I had to use the only company." [#16]

- A representative of a Black American-owned transit services company stated, "We qualify to get trucks [but first] we need to get the bid, then get equipment, then commercial auto insurance. [And we have] issues with affording the commercial auto insurance." [#AV15]
- A representative of a Hispanic American-owned transit services company stated, "The cost of auto insurance. It's too high and the workers comp is too expensive. Expanding and looking into other states to do business." [#AV54]
- A representative of a majority-owned transit services company stated, "I tried to bring my business to California, but the requirements make it very expensive--such as I must supply workers compensation (which the employees don't like either), it is more expensive to hire drivers in California, taxes are much higher." [#AV63]
- A representative of a majority-owned goods and services company stated, "Hard to survive in CA, why? Because [of] taxes, workman's comp, cost of living. Difficult with the costs. Employees, prices, overall cost of living." [#AV126]
- A representative of a majority-owned transit services company stated, "California is horrible. They make it very cost prohibitive to insure a commercial vehicle for passenger transport, and navigating what specific licensing you need, i.e., PSG numbers versus TCP numbers. There are no primers or examples specifically for getting a PS. The gas and fuel tax is killing us. We're not sure if we can continue next year." [#AV136]
- A representative of an Asian Pacific American-owned goods and services company stated, "Hiring qualified people and insurance costs to high and fuel to high and cost leasing and renting to high." [#AV149]
- A representative of a majority-owned goods and services company stated, "Healthcare is my biggest expense issue; because I lost the salary to it so, consequently, we no longer offer healthcare to our employ." [#AV224]

**4. Factors public agencies consider to award contracts.** Ten business owners and managers discussed their perspectives on the factors public agencies consider when awarding contracts and discuss barriers these factors may present for their firms [#1, #8, #10, #11, #12, #13, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I think that there are barriers when it's depends on who's making the decisions. I mean everyone interprets it differently, and I'm going back to communication and clarity [would be the answer]." [#1]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Some agencies will pick the lowest bidder, and that goes contrary to what we stand for. We're not putting up a building. We're not contractors. Not there's a significant difference, yes, but when they're just going straight for the number. That defeats the purpose of putting together a proposal and qualifications and resumes and all that." [#8]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "The percentage of profit you go is about 15 percent, but in competition they go all the way to 2 percent, 3 percent; that's how low their profit

margin is. ... But you're offering the same thing, capabilities, you're offering the same product, same brand. Why the government buys a different product you're offering ... It's a big challenge, yeah, for me as a small business." [#10]

- The Hispanic American owner of an MBE-certified goods and services firm stated, "I just try to be as reasonable as possible, and if there's not a particular wage that they ask for, you have the risk of overcharging till you lose the bid. You never know what the other person is charging. One thing that has benefited us is that we have companies that they'll still give us the work, even though we're a little bit more expensive, because how fast we can get the work back to them ... And some companies are like there's somewhere cheaper, but it's never the same price. Like let's say they might bid \$5,000 cheaper, back in the day, they find so much extra that in a day they've been \$1,000 or \$2,000 more than us." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We've got competitors, larger competitors than us, that are able to reduce their prices because their costs are lower. So, if a contract bid or if a bid is out there from a government agency and they go with the lowest price all the time, then you know we're going to lose. It quite frankly prevents us from even taking the time to do government bids because it's not worth it to us, we know we're going to lose and there's too much time involved preparing the bid. So, we just, we just don't participate in many of them. ... The transportation industry is largely funded by federal government and the federal government demands that these contractors use DBEs like us. So, in the transportation industry we've seen some success. However, if we receive government bids that just say, 'Lowest price wins,' and it could be on any, in any department, that's where we don't participate. ... Government agencies that have put out bids need to understand that it's more than just price. I can quote a price of one penny, but if I never ship the product who cares? Service is my point. So, our business model is based on service, not just price, but service. Many government agencies don't care about service, they just want price. And so, that's where we run into problems if they don't consider service. We have the sense that government agencies are so focused on price, that they're picking somebody or they're awarding a contract to somebody who has no idea how to get the product to them. They're, they're just they want it, but they don't know what to do from there. So, we're guessing a lot of these government agencies are frustrated because they pick somebody based on price and that particular company doesn't have the infrastructure or even complete the order or ship it. So there has to be some, something else involved in awarding these contracts, rather than just price." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "When I say, 'have experience,' I don't mean have experience in government contract. I mean in the category. And that's where I think this isn't fair, is that most of these contracts, they say [that] they want experience within the government sector. And it's like, 'Well, we're trying to get in there, but you guys keep hiring the same people. How 'bout look at experience within the category? You're missing out on people that are super qualified that could - might even be able to bring you a fresh relationship and quality of service if you would give somebody else a chance that actually knows the category.' ... We won't go after an account that we don't think that we would qualify for. We wanna make sure we meet the qualifications in terms of the scope of work, right? ... So, if it has something in there within the scope of work where we're like, 'Yeah, we can't do that,' we're not gonna bid on the

project. But if we're bidding on the project, that means that we know we have the capabilities to handle the job, and that's why we're going after it. But then they end up choosing people that they've already done business with just because it's easy for them. I've purchased platforms that have these bids that come up. And we will go, and we'll bid on it, on something. And nine times outta ten, they already had someone in mind before we even bid on it anyway, by the time it hit this platform. I didn't realize that until years after, and all this money I was spending, that that was taking place. They put the bids on there, but they're really not looking - they already know who they want to hire at this point. That's a moot point in the process because the government requires them to put it on these platforms. ... a lotta times, you can read the contract and you can know right away, "They already have someone in mind. They've narrowed this down so - they've made it so concise, so you're just like, 'Okay, who's gonna meet all that? It's gotta be someone on the inside.'" [#13]

- A representative of a Black American-owned transit services company stated, "Getting funding for business. Funding should be easier to obtain. ... I think the industry is hurting a lot of people by undercutting the market. People [are] getting jobs for less and not paying registration costs." [#AV1]
- A representative of a majority-owned transit services company stated, "A lot of bids goes to minority- or women-owned business as opposed to other companies that are not minority- or woman-owned." [#AV2]
- A representative of an Asian Pacific American woman-owned transit services company stated, "Our responses to our bid, [getting] the right connection to get project, [the] effort required to get it, the IT software [needed]." [#AV20]
- A representative of an Asian Pacific American-owned goods and services company stated, "It seems to be a lot more difficult for small business to win contracts--The whole procurement process that the state usually uses is time-consuming, and it seems to be that the state prefers companies that have already worked with them. The labor market is getting very expensive, yet the maximum budget that's published in the procurement specifications does not seem to be increasing. This makes it difficult to be profitable for small companies to find resources to bid on state contracts." [#AV212]

**5. Personnel and labor.** Seventy business owners and managers discussed their experiences regarding personnel and labor and its relationship business development [#1, #2, #4, #7, #9, #11, #12, #13, #14, #16, #17, #18, #19, #20, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I'm sure there is a problem of it I honestly have no suggestions other than people just need to get back to work. I don't have any suggestions or recommendations." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "One of the biggest obstacles we face is finding qualified people who are willing to work and do a good job and are ethical. And that's probably... I mean, employees are the biggest part of running the service-based business. It's hard just to [hire] somebody without some

experience and training, because that's a hoop that changes too, between change from since I started in the last decade, from paper to electronic submittal." [#2]

- The Black American owner of a DBE-certified professional services company stated, "There's always staffing issues as well. ... We've had challenges, we've done advertisings, we've done solicitations, we've done mouth and referrals." [#4]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "On the supervisor field supervision [level]? Yes, because not everybody has it. You know what I mean? Not everybody can run a project according to Caltrans standards." [#7]
- A representative from a WBE- and DBE-certified goods and services company stated, "Finding people has been extremely difficult, extremely difficult. I mean it's like nobody wants to work. ... It's hit everybody in different senses and we just, some of us want to stay hunkered down, some of us are scared, some of us want to do a different life, it's really, it's pretty intense. ... Training them is not difficult, no, we're fine with the training. We do all our own stuff here so it's not a problem.
- We're more than happy to train people. We just need the body to train. ... The only challenges I see that were barriers is advertising for employees. We ran like a, we ran an ad for a week in our local newspaper, did not get one phone call. Then when we do it on Facebook you have to pay like so much money and it's - I still don't feel like we're getting the amount of exposure." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "It's only a challenge depending on the type of person that we're dealing with, and just to be straightforward, if you have any older person, they're going to have different things; they're going to have [certain] priorities. Especially if they have a family, you know family is always going to be a priority, so you'll see a little bit more harder work coming from them. But the younger guy, younger girls they don't have that same drive, because they don't have the same type of responsibility. We pay, we help out, they get raises and they take certain courses, if they get certain licenses, class A, class B we pay extra for that. But you don't always have that. Right now, with the way things are today, labor rate has skyrocketed. I remember, we used to pay the dealers used to be like let's say \$180, \$190 let's say, and now you have I think [it's] \$250 the hour, \$280/hour. Those hourly rates right now are up there. In the industry when we had started, we were starting at \$55, when we were being fed some other company and this was back in 2000-2002. It was a bigger company; they were constantly feeding us work so they can make some money from what we were doing. I think we're charging like \$55, \$65 depending on what the job was. And a little by little we started raising that because of inflation here and there. If it was companies that worked with us directly, and there was no middleman then yeah, we would have a higher rate. But nowadays, I think it's like 1.25, 1.35 is the average [rate] now." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "That's a problem. Since COVID the workforce has changed dramatically. A lot of people don't want to work. First of all, the government shouldn't have cut a bunch of checks to people to stay home and that's trashed the work ethic for a lot of these people and that goes back to something much deeper. ... If they don't want to work,



they're not going to work. I mean it's, it's a, it's really a moral issue. So, we've taught people that free money is the way to go and to rely on the government and not on themselves. So that's a very deep issue. I could take two hours on that alone." [#12]

- The owner of a WBE- and SB-certified professional services company stated, "What they've kinda set up in terms of employees and what qualifies for hourly rate versus salary versus being able to use a contractor, what spec qualification, the - you've got - they're not giving you a lotta flexibility in terms of payroll, to be flexible. So, the price of employees... I do a lot of expanding and contracting. Because when you have the business, then you're going to add staff... there's no flexibility in moving someone from being able to be an employee to a contractor during a certain period of time because they don't follow certain criteria. So, I would say that's been my biggest hurdle, is that flexibility. I mean, we figured it out, but that's definitely a challenge. The state requires [that] a salary person has to make ... I think it's \$57,000 a year they have to make in order to be on salary. Otherwise, below that, they have to be on hourly. And then you have contractors and then what constitutes a contractor. And so, when a small business is trying to make it all work, that can sometimes be a challenge because you don't have as much flexibility within those areas to make it work sometimes. ... The thing is you could get funding to make sure that you have everybody covered and you can keep your staff. So, there's that, as well. I'm just saying that's kind of a challenge sometimes, for small businesses." [#13]
- The owner of a transit company stated, "During Covid, we lost a lot of money, lots of employment. People refused to get - they don't want to get a job because government was giving money - it was really hard to find drivers to work. People don't want to; they don't want to work in the medical stuff. They don't want to be in contact with the patients. It was really hard to find a driver, as well. So, now in 2022, we're doing better than '21, 2020. It was the increase in minimum wage for the driver, so the rate, the hour rate, the gas, Covid-19, that's what really affected us. It was hard during Covid, as I told you, lots of people refused to work in a medical facility, whatever you want to call it. They don't want to be in contact with patients. They don't want to help patients and touch them, because we transport old patients, they need help, door to door service, help them with their walker, their wheelchair. It was really hard, because also people refused, also people scared for their family or kids. So at that time, I was the one who was driving, working, touching, management, I was doing a lot, and the same time, because there was really hard time to find people, and if you found people, you have to pay them more so they can accept the risk, plus the add money that the government gives for people, they refuse to work. ... It was really affecting that time, but now it's better." [#14]
- The woman owner of a goods and services firm stated, "I'm hoping that, say for instance, I do get a contract with Caltrans. Then I can afford to get the worker's comp insurance and hire another employee and then that way I can continue to take care of all of the needs that the contract would require, and then also be able to keep the handful of repeat customers that I'm just now starting to get to take to the airport, you know, when they need to go." [#16]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "I don't know any business that is not going through this right now we're a service-based business, you know, we, we, you know, we pay a little bit above



minimum wage which is, in California, not enough to live on. ... So, transportation is an issue, you know, if people are looking at, you know, minimum wage and, or, you know, things that are above minimum wage, but not like a full time salary and full time pay, that is a barrier for people in the community that [we] tend to attract with advertising for job opportunities, so then, you know, with having such, like having a small business as, as mine, you know, I need to focus and concentrate my sales in a particular area so that I can make sure that people get to the places that they get to the jobs. ... I really, I've tried to ask attorneys and stuff about, like what are the laws for using or, or trying to hire, you know, like you know, like people who have migrated here right? And, and how do I, how do I support that community in, in my business, you know ... and then like move them along in, in their like efforts to be, you know, like have more stability in this, in this state and get what they need for their families and, and that's, that's a barrier right ... like they don't have a social security number, I can't hire you. I have an S corporation, I'm not willing to, you know, I can't pay cash, those, that's tough, it's tough. ... So, you're saying if I were able to pay \$30 hour? ... I've not seen those contracts, I've not ever like come across those in the business. Cause at the same time you have to be also competitive, right - you can't, you can't not be competitive in your bidding ... I believe it would be still a barrier if we were to get larger contracts that could pay more money to the workers - I would say that it would be less of a barrier, but I believe the barrier would still exist." [#17]

- The co-owner of a SB- and VBE-certified goods and services company stated, "You know the other, this has nothing to do with Caltrans, difficulty is finding radio technicians. You can't find them ... I would say that probably there hasn't been a lot of interest of people going to school, you know the state suffers from this the same problem. ... I've recently talked with the supervisor there in the repair department. He says, 'I can't find technicians, people who know what they're doing.' As I said to him, I said, 'some of the stuff that comes in, it's got really simple things wrong with them.' 'I know,' he says, 'we can't find any technicians', and I hear that. So, they just aren't around, I guess I'm just a dying breed. I'm 79, I said I'm so lucky I can do something that I enjoy, you know what I mean. ... I think it's well paid. I would say, I'm just gonna guess that today young and upcoming potential technicians don't want to work with two-way radios. They don't understand that. They just want to work with I.T. stuff like computers and cell phones and that's not what we work with, and you know, the two-way radios are very real. Every Caltrans vehicle out on the road has the two-way radio in it. Every California Highway Patrol vehicle has 4 or 5 radios in them. So, it, this is, I mean, this isn't like just something that people don't use." [#18]
- The Black American owner of a transit company stated, "The other thing, is in my focus, really, is on the employees. One of the painful lessons I've seen over the years is, and I hate to say this about my own industry, because again, I have a deep passion for it, but there are a lot of people who own these types of businesses who are out to make as much money as they possibly can, and they can care less about the employees. Unfortunately, you know, EMTs are literally a dime a dozen, EMT schools up and down the state are turning out tens of thousands of EMTs for limited number of positions, and so replacing employees and keeping lower wage ones around is a lot easier than people realize, and so the turnover rate in our industry is fairly high because of that. I wanted to do something different. I wanna be able to create a company where people want to come in, want to stay for a long period of time, advance their careers into, you know, becoming paramedics, supervisors or moving

on to becoming nurses, PA doctors, whoever the case may be. But I value the people who work for me." [#19]

- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Our biggest issues have been, and currently right now, are an aging workforce, given that I started 20 years ago, the team that I started with have progressively retired over the last five years. I've probably lost seven people. Key personnel in leadership roles that have recently retired. We've done our best to funnel in younger talent, newer talent, but it's been difficult to get people up to speed. They're getting there, but it's a natural contraction that we must take because we simply don't have manpower. Not trades people wise, but management people, superintendents, lead individuals that can actually build things. We just currently don't have that capacity right now to add much more work to our backlog. ... We found that a lot of our talented young tradesmen are simply not interested in being something other than someone who comes to work, takes a lunch break, and goes home at 3:30. They're not interested in the extra money. They're more committed to their family and to their off time, which we respect. They're good employees, but they personally don't see the value to go up the food chain, so to say." [#20]
- A representative of a Black American-owned transit services company stated, "I would say that after the pandemic it slowed down, we are starting to pick up, but have a driver shortage." [#AV7]
- A representative of a Black American-owned transit services company stated, "[It's] competitive and very hard to find workers." [#AV8]
- A representative of a Black American-owned transit services company stated, "It is a good place for a marketplace. Tough on employees." [#AV9]
- A representative of a majority-owned transit services company stated, "Can't find employees." [#AV10]
- A representative of a majority-owned transit services company stated, "Lack of employees." [#AV24]
- A representative of a majority-owned transit services company stated, "Very difficult to hire and afford good people. Gas [is] driving costs up. On [a] low income [it is] hard to live." [#AV32]
- A representative of a Hispanic American-owned transit services company stated, "Hard to find drivers and [there are] no people." [#AV35]
- A representative of a Hispanic American-owned transit services company stated, "Hard to find drivers." [#AV38]
- A representative of a woman-owned transit services company stated, "It has been difficult in California with labor--people do apply but they don't show up. They don't want to work. It's rough because of the cost of businesses in the last year with gas prices, the overall economy, the new laws with 32-hour work week and overtime laws." [#AV40]

- A representative of a Hispanic American-owned transit services company stated, "Pandemic leaving us large; employees younger and not experienced and loss one employee. Not all agencies [are] back to work yet and harder to find work." [#AV46]
- A representative of a Hispanic American-owned transit services company stated, "Staffing issues is the biggest issue, it's been a big challenge in the last 2 years. We can't find dependable people. We are in a very difficult transport service. We do just like an ambulance service so it's difficult finding people. We do specialty work." [#AV53]
- A representative of a majority-owned transit services company stated, "Difficult to find employees because clients are disabled and require a lot of transport to medical facilities." [#AV59]
- A representative of a majority-owned transit services company stated, "We've had difficulties expanding because lack of employees, unable to find commercial drivers." [#AV61]
- A representative of a majority-owned transit services company stated, "I tried to bring my business to California, but the requirements make it very expensive--such as I must supply workers compensation (which the employees don't like either), it is more expensive to hire drivers in California, taxes are much higher. Fuel costs are also much higher in California. The demand for truckers and drivers, and the parts for the equipment--biggest needs. In California, both of these things are more expensive than in any other states." [#AV63]
- A representative of a Hispanic American woman-owned transit services company stated, "Stab law in CA make is difficult to hire and have to enough drivers that are certified and stabbed to handle to demands from the schools." [#AV65]
- A representative of a majority-owned transit services company stated, "Driver shortage." [#AV68]
- A representative of a majority-owned transit services company stated, "Trying to survive with high expenses, taxes, leasing office, fuel, maintainer, driver shortage." [#AV69]
- A representative of a majority-owned transit services company stated, "The biggest challenge we have is getting employees and the second challenge is the cost of gas." [#AV79]
- A representative of a majority-owned goods and services company stated, "[Lack of] available employees, lack of technical work, not a lot of communications tech[nician]s out there." [#AV101]
- A representative of a Black American-owned goods and services company stated, "Finding employees: people don't want to work." [#AV102]
- A representative of a majority-owned goods and services company stated, "Lack of enough employees." [#AV106]
- A representative of a majority-owned goods and services company stated, "Lack of qualified workers." [#AV107]

- A representative of a majority-owned transit services company stated, "Pre-Covid, it was very competitive, now less competitive, at this time lot of difficulty in growth, finding staff and finding the equipment we need." [#AV111]
- A representative of a woman-owned goods and services company stated, "It's very hard to run a business here, it's next to impossible, can't find employees, sales are down 30-40 % price increases coming in every direction." [#AV113]
- A representative of a majority-owned goods and services company stated, "Since COVID we have had a hard time finding labor." [#AV115]
- A representative of a majority-owned goods and services company stated, "Starting in business very tough, not enough business in this area and no one to hire." [#AV120]
- A representative of a majority-owned goods and services company stated, "Hard to survive in CA, why: taxes, workman's comp, cost of living. Difficult with the costs [of] employees, prices, overall cost of living." [#AV126]
- A representative of a woman-owned goods and services company stated, "Employees, getting people to work." [#AV140]
- A representative of a majority-owned goods and services company stated, "Finding good employees and getting paid by state on time." [#AV141]
- A representative of a Hispanic American-owned goods and services company stated, "Transportation is good but not enough drivers." [#AV146]
- A representative of a majority-owned goods and services company stated, "Finding labor is increasingly difficult." [#AV147]
- A representative of an Asian Pacific American-owned goods and services company stated, "Hiring qualified people and insurance costs [are] too high and fuel to high and cost leasing and renting too high." [#AV149]
- A representative of a majority-owned goods and services company stated, "More staffing." [#AV150]
- A representative of a majority-owned goods and services company stated, "Find employees, huge shortage, no employees to hire in the industry." [#AV152]
- A representative of a Hispanic American woman-owned goods and services company stated, "Expanding: hard to find good employees." [#AV154]
- A representative of a majority-owned goods and services company stated, "It is difficult finding cashiers, but if your prices are right and your service is right, you can succeed." [#AV155]
- A representative of a majority-owned goods and services company stated, "We went through a pandemic, and it was very difficult to get employees." [#AV158]
- A representative of a Hispanic American-owned transit services company stated, "It would be nice to have foreign labor force." [#AV160]
- A representative of a majority-owned goods and services company stated, "In California it is pricey here in terms of cost of labor and materials." [#AV172]

- A representative of a majority-owned goods and services company stated, "High demand [for] skilled labor—tough to find... can't find drivers, driver shortage." [#AV179]
- A representative of a majority-owned goods and services company stated, "Since pandemic: trouble keeping employees. Had to shut down 3 stores." [#AV181]
- A representative of a majority-owned goods and services company stated, "Inflation and lack of housing that [a] reasonable price and stable employees." [#AV189]
- A representative of a majority-owned professional services company stated, "Cost [of] labor [is] high, high/rent/leases, we pulled out....no longer in CA because employee compensation was higher than [in] other state." [#AV194]
- A representative of an Asian Pacific American-owned goods and services company stated, "Getting capital, marketing skills, talent equitation, hard to find good talent." [#AV202]
- A representative of a majority-owned goods and services company stated, "California is difficult to get workers, because of people are leaving the state." [#AV205]
- A representative of an Asian Pacific American-owned goods and services company stated, "The labor market is getting very expensive, yet the maximum budget that's published in the procurement specifications does not seem to be increasing. This makes it difficult to be profitable for small companies to find resources to bid on state contract." [#AV212]
- A representative of a woman-owned goods and services company stated, "It's hard to find anyone right now due to current economic state." [#AV214]
- A representative of a majority-owned goods and services company stated, "Inflation/labor force." [#AV221]
- A representative of a Native American-owned professional services company stated, "We have trouble in all areas of business in CA--everything from financial to supply chains issues, to lack of skilled laborers to excessive regulations and permits to work in CA as compared to other states." [#AV230]
- A representative of a woman-owned goods and services company stated, "Find[ing] qualified help, customers willing to pay to do the work, taxes /and permits are outrageous and getting worse." [#AV234]
- A representative of a woman-owned goods and services company stated, "Staff issues, supplies take longer." [#AV239]
- A representative of a majority-owned goods and services company stated, "Our biggest challenge is hiring independent contractors because AB5 has destroyed our ability to work with small businesses. California is not a business-friendly climate." [#AV244]
- A representative of an Asian Pacific American-owned professional services company stated, "We don't have any difficulties in our area, but having difficulty expanding, people-wise. Getting people to work for us, we cannot extend in our area, we have to subcontract for people." [#AV257]
- A representative of a woman-owned goods and services company stated, "Impossible to find labor and maintaining compliance with state regulations is always challenging for us." [#AV260]

- A representative of a majority-owned goods and services company stated, "CA: cost, workers, land, property, business." [#AV270]
- A representative of a majority-owned goods and services company stated, "Hard to get good people to work, and hard to find technical people in this field." [#AV271]

**6. Working with unions and being a union or non-union employer.** Ten business owners and managers described their experiences with unions, or with being a union or non-union employer [#2, #5, #6, #7, #8, #10, #11, #20, #AV]. Their comments are as follows:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "100% that's part of the negative experience ... partially [it's related to the] union because that reflects the prevailing wage rates here in California. But that was a huge obstacle. We did have the pay prevailing wage, but because Caltrans was union, they didn't have to follow all the same rules that we did, and we had a lot of difficulty with overtime not getting compensated for stuff. ... I had to fight harder than I should have with Caltrans before they wouldn't actually reimburse me my overtime expense when it was a T&M contract. There's no reason that I should be eating the overtime out of my overhead and any profit... It was a huge obstacle that Caltrans is union, and they can work four 10s and California State law says that's prevailing wage because it's where the funds come from, and prevailing wage says you cannot work four 10s without paying overtime. ... When I was finally brought to their attention, and I was thinking I couldn't go on, it took quite a bit before they acknowledged that I should have been [repaid]. ... Then it was a matter of how much time do I want to spend trying to retrace that and ruin my relationship with them for the contract as opposed to just calling it water under the bridge and learning experience and moving forward so. The prevailing wage laws, because they don't apply to Caltrans employees, I don't think they're familiar with them and I don't think they take those into account when they're doing stuff. ... I think Caltrans needs to recognize that not everybody is like Caltrans. If you're looking for small and women-owned and minority businesses a lot of times we are the smaller ones and frequently we aren't a union shop. There's a difference there that if you are a union shop then you can play by Caltrans rules. But Caltrans isn't aware that not everybody has to follow the same employee rules that they do. So, I think Caltrans being educated would be a big thing. ... I have a small company of less than a dozen people. I shouldn't be teaching the state of California, the rules and the laws. Their whole approach was if you're wrong, we're going to tell you. But if we're wrong or you miss something, you're just out of luck. ... I think Caltrans works a lot with union shops and they don't have things set-up for non-union shops and when you try to take my information and put it in there, they're like 'oh no, that doesn't go in this box'. And I'm like 'yes, it does because this box is for XYZ, right?' I think that it we don't get fair treatment and it's an obstacle or barrier because we're not union because we don't plug and chug into their spreadsheet that has been developed using only the big large union shops and then we don't have the same numbers and then our stuff has to fall into other categories which they won't allow justification for charging. ... [This is] the biggest obstacle and the reason that I'm stepping away from a lot of the prevailing wage or from a lot of the public work, is the prevailing wage requirements." [#2]



- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "We're a union company, so I've spent a lot of time over the last 43 years being part of an association. It takes time to get your foot into the door, but it's necessary to build those type of relationships so that you can manage the expectations. Most of these jobs [with] Caltrans I don't think you have to be union, but you do have to pay prevailing wage, so you need to understand that if you're on one of those jobs a labor person's gonna meet you at the door. ... Understanding what working with the union is, what requirements you need and what goes into those requirements." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "When we were starting up being union was actually easier. Because the union handled that portion of it, their benefits and everything." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "We are signatory to iron workers. ... If they're not union there should always be workshops, seminars, and trainings. Because the there's no college that you can go to for this stuff [except the] school of hard knocks. Providing those [trainings] on a regular basis, ensuring that when a when a job is awarded that any non-union or union contractor ... have someone reach out to us and give us a class on how to manage, you know, certified payroll and dealing with unions and PLA's and all that good stuff." [#7]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Unions not applicable to our services, although we do administrate project labor agreements. So, I do interact with unions for my clients." [#8]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "You know the prevailing wage that you see that the government issues, I have to look at it to make sure that I complied. ... Because when you go bidding you have to consider those also. For example, just for example, I bid for \$2.5 million for that project and somebody would come forward with \$900,000.00 only. So where did that go? Where did I make a mistake? Where did... Why, why, what did I miscalculate? ... The prevailing wage says that a maintenance man for example is minimum here in the area is \$25.00 and I have to go with that prevailing wage and the other guy said, 'oh he's going to bid for \$15.00, the minimum', then I'm at the loss of \$10.00 per hour. ... So how could I win?" [#10]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "We're not a union shop. I do work at union shops. For us in particular, it's just getting to know exactly how they want things done. I know every union shop is going to have a certain set of rules, [like] they don't want auto mechanics working inside their shop... At times it's just picking up the equipment, so what we had to do is we had to accommodate that pickup and delivery. Then for us it was that was just one more challenge added, and we just figured out a way how to get it done. And then certain shops were okay for us to work on at their facility so that wasn't a problem. In other shops, they didn't want to see us not even on their property, so we had those type of challenges. ... Many guys that we go to some of these union shops, they're really cool. They're very down to earth, but and then you have those ones where they're so hardcore union and they don't want to see no one else there. And they can be very behind on work. Like they're constantly complaining and saying that they're going to call the union rep because they're using an outside source. But then when



you get there, it used to be, they're doing a one-day job in three days. I think that's a challenge for most union shops, is can you get the most out of your people?" [#11]

- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Given that we have collective bargaining agreements with all our trades unions, that portion of training, technical things, it falls on to the union. So, the initial training is given by the unions, and from there, we try to acclimate them to working in the field with regards to budgets and deadlines, and make sure that they understand their nuances of how we perform and how we like to do things ... and so that, that's when the top shelf superintendent foremen people come into play, they're there to give onsite training, and if they're training more than they are actually building things, it becomes a hinderance, and so we can't bring in too many people at once. We have to add them sparingly and appropriately when we have opportunities for them to excel, but that comes with carpenters, laborers, operating engineers, cement masons. So, all these different unions have different levels of understanding of how to build things, and so we do our best." [#20]
- A representative of a Hispanic American woman-owned transit services company stated, "The union blocks us because we are non-union. In order to get jobs with Caltrans you have to be union." [#AV55]
- A representative of a majority-owned goods and services company stated, "CA is over-regulated and for a business like ours, we are a non-union shop, but the unions control most of the public sector businesses." [#AV196]

**7. Obtaining inventory, equipment, or other materials and supplies.** Thirty-two business owners and managers expressed thoughts with obtaining inventory or other materials and supplies [#1, #2, #5, #6, #9, #10, #11, #14, #15, #16, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "To have more inventory, you have to have you have to make more money ... You don't wanna sit and have a bunch of inventory unless it's gonna move ... A small business can't hold all kinds of inventory. I know there's a lot of DBE or small businesses that don't even have inventory. I would love to have a bigger inventory, but then there's so much cost involved. Why would I? I mean I can't afford to buy all kinds of inventory and let it sit and hope someday I get a big enough job or a job that can take all of it out." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Because we're service based, we don't have a big expenditure. I guess if I was going after big contract, and I didn't already have the equipment that we did as an existing company [it could be a barrier]." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Currently we're having supply chain issues, but for the most part, whatever industry you're in or whatever contracting license you have, I think that just comes with knowing what kind of equipment you need, you know so. And if you don't know equipment, then you're in bigger trouble than that." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Same as the rest of the world of the last couple years." [#6]

- A representative from a WBE- and DBE-certified goods and services company stated, "Well it's due to COVID... You know the customers are demanding tires and we are just really unable to get them, because the production has substantially changed. You know a lot of our Michelin tires come out of Europe so that's, that's the biggest challenge we're facing now is the ability to get tires to sell to our customers. ... Now we're running into the ability to obtain like the tires of course, to get the products we need, the parts we need for certain things, and then the cost of those have risen substantially in the last six to eight months. Having a tire that I sold a month ago I just went to enter it yesterday, it's gone up \$60.00. ... I think a lot of it's inflation and just on everything it's just crazy. Then the tires I think a lot of it has to do with we were warned that there would be a rubber shortage, because of the rubber production, so I think that's kind of had a lot to do with. Then you figure the issue with the shipping has been a major, major, major problem." [#9]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "Sometimes capital, but there's a way that you can get around it, because the major, major manufacturers sometimes they carry that and you have like 30 days to pay them and normally the government will, the VA for example, will pay within a month. ... That can impact your ability to pay, it affects, it affects your liquidity. ... Especially if you have one contract ongoing that you bid then that, that money is secured to that project and then there's another bidding, another project you want to bid on that, then you've already spent 90 percent of that capital, then you only have 10 percent, then where are you going to get the money? You're going to go for FDA [loans] but I've never done that, because you're paying for a percentage. There's a lot of paperwork to do it if that happens. But I've never done that, some people are using FDA bank to make a loan, but I've never done that too, so I cannot really point that out to discuss the matter, but it can be done. ... One example is like making t-shirts, I have done that before and embroidered t-shirts for the government. The small businesses that, that I deal with for example in San Diego, 'Hey, we want, we're going to buy this product. I'm going to pay for my people. I want this amount of money.' They'll be asking for \$40,000.00 upfront, which I don't have. It's that money is already attached with other projects, so you let that go. So those are the kinds of barriers that I have." [#10]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "I think just for us, is that we were able to create a good relationship with all of our vendors. I mean, right now sometimes it can get extremely hard to find parts. Even though we've had a good relationship in the industry, some parts are just hard to find, if we had a couple of international trucks that there were certain parts needed from and it was on critical backorder, so it was a three to five month waiting period. For any company having a truck down, it's going to affect them because — if they're still paying for it, they still got that on top but it's not producing nothing for them. But you have a driver waiting for the unit, and especially if you have a lot of same trucks, you have a lot of same issue. I think that company in particular had three units with the same situation. They had to rotate drivers, some drivers work one week sometimes worked another week, and makes it hard to hold on to the employee in case they find something else. ... I think that's been our biggest challenge is sometimes some of these parts are just hard to find right now." [#11]
- The owner of a transit company stated, "They should have a financial support that supports them to buy vehicles, because I lost one of the contracts because they were requesting to

buy [an] ambulance for them, not an emergency ambulance. That is really expensive, and they requested to buy multiple ones, and I couldn't provide it on time, so I lost it. Of course, yeah, it's really affecting - they don't understand the price is getting crazy, especially the gas, and I e-mailed the medical number... asking if I can bill them this [cost] if I do the service for the station, and if I can bill them what the rate is, they don't answer, they don't reply. So, yeah, billing issue, the equipment is really limited and hard to fund, especially the gurney, it's really hard to fund a gurney, a good quality gurney. ... It's definitely financial, if the rates are good it's gonna help you increase the vehicle, buy more equipment, hire more people. I think the main point is the rate, because if I discover all the expenses, like the gas, the payment, the driver, that's gonna make me increase, buying more, adding more vehicles, and helping more patients. ... Each gurney cost almost \$8,000.00 or \$9,000.00. I had to send it over to California, so also expensive. So, the equipment part was hard, too, but now I'm good. I have everything I need for now. ... I wish there was a place they can provide all this [emergency] equipment here in California, so you can just go and get a quote, get a price, and you can get it, because there is none here, more so the equipment, I get it from Virginia, I get it from Arizona. There's nothing being [sold in] San Diego. So, I wish there was a place to have a medical supply, providing all this type of equipment for different transportation purposes. There is for a nursing home, a bed, equipment for nursing homes, but there are not for medical transportation supply." [#14]

- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "They have their process, like if you get your invoices into the contractor and then they get them turned in by, say the 20th, then Caltrans will pay by the following tenth or something like that. But then by the time they process payment and things like that, it's you know, it's a period of time. But provided there's, I mean, there's some stuff that like we get billed, like say a steel pile, we get billed as soon as the pile leaves the mill in Arkansas, and then we ship it to our cutter in Oregon, but Caltrans won't pay for it until it's like physically on the ground in California, so the - that period of time that it takes to make all that happen is a lot longer than the 30 days in which we're required to pay for the material once it leaves the mill, so we had to carry that those costs a lot longer than we would if they were a little more flexible on that. You know, the fact that it has to be in California before they'll pay for the material on hand. ... I don't know, if it's because they can't physically send their inspectors to the job site to verify that or to the, you know, where it's located to verify that it is in fact good to go material or, or what? I don't know why they started doing that, but that's something new that they've started doing and I don't know if it's like what with Zoom and things like that, you could have someone with a video it where materials located to show that, yes here it is and it's good, but they don't, so... We got a lot busier during the pandemic, but we also faced a lot bigger problems as far as like being able to get product out of factories because a lot of them had to be on, you know, change work conditions and so that limited production, you know, their people could only be this close together. So now they can only have this many people in the factory so they could get, you know, only 50% of the product out. And then we added the fact that since nobody was driving on the roads, the owners fast tracked a lot of the projects. So, they wanted to get them done sooner and take advantage of no traffic. So, they not only wanted the product, but they wanted it faster and so we were trying to get product faster out of factories that were able to produce less material in a timely fashion. So that's a pretty big challenge, so we were kind of working

around the clock coming up with different, you know, vendors and fabricators and things like that and learned the kind of, you know, to satisfy the needs of the project, so we got very busy. ... [There are] supply chain issues like, you know, we order a couple of pallets of nails and they're like, ok, well, we're in allotment, so we'll give you 20 boxes. So, it's just, it's a matter of purchasing materials has become a lot more challenging because you've kind of, sort of you know, you just can't do it the way you've been doing, it would have to go to a lot more different, a lot of different vendors that we hadn't used before. Then you have, you know, the issue of like, well, can we count on them, is their quality good and ... [is it] going to meet the specs and that sort of thing. So, it's vetting new vendors and fabricators and then just kind of constantly getting more frequent shipments, but smaller, and you, things like that, it's like, oh, this is not going to be, we should be able to get this material in a month and then when you get to a month and it's like, now we're delayed another couple of weeks. So, it's just like tracking material and kind of all. It takes a lot more time and effort to just order something and expect it to come. You have to, like, keep pushing it along, like getting your kids ready for school in the morning. You can't just say you got to go and then go. You got to be nudging them, you know, like it's kind of like that." [#15]

- The woman owner of a goods and services firm stated, "I would qualify for a loan, but I am not going to do that until I absolutely need to, and that would be assuming if I got a contract so that I could get, purchase another vehicle, if I could purchase another vehicle and hire an employee, then I would take out, maybe, like a \$30,000 loan to help with the insurance and all the fees to do that, or, you know, another \$50 grand for a vehicle." [#16]
- A representative of a Black American-owned transit services company stated, "There is a fine line when you can't invest unless you have equipment. There is a barrier if I had equipment we can provide. We qualify to get 26-foot box truck then we need to get the bid, then get equipment, commercial auto insurance." [#AV15]
- A representative of a Black American-owned transit services company stated, "For me personally, some issues with getting loans to purchase the equipment needed for my company. The industry I'm in is to purchase vehicles and my county I'm currently living in is basically 'you're in or you're out' very limited to what you can do, running into difficulties to get contracted on the EMS side." [#AV19]
- A representative of a majority-owned transit services company stated, "Difficult - supply chain." [#AV21]
- A representative of a majority-owned transit services company stated, "The demand for truckers and drivers, and the parts for the equipment--biggest needs. In California, both of these things are more expensive than in any other states." [#AV63]
- A representative of a Hispanic American woman-owned transit services company stated, "The only thing that's stopping us from growing is the cost of fuel and there is no availability of trucks in stock." [#AV64]
- A representative of a Hispanic American woman-owned transit services company stated, "Parts are up, victim of supply chain, waiting on parts for over 2 months as the pandemic subsides. The cost of business has doubled, insurance has increased, driver wages." [#AV65]

- A representative of a majority-owned transit services company stated, "[There is] no freight, Long Beach is not organized (California) a lot of shipments coming and not getting released on time, therefore we [don't] work because we don't have access to freight." [#AV69]
- A representative of a majority-owned goods and services company stated, "We should not have to collect sales tax from state agencies. Supply chain issues can get product." [#AV103]
- A representative of a majority-owned transit services company stated, "Pre-COVID, it was very competitive, now less competitive, at this time lot of difficulty in growth, finding staff and finding the equipment we need." [#AV111]
- A representative of a Subcontinent Asian American-owned goods and services company stated, "I think in general, because of economic issues and COVID challenges of the last couple of years, that businesses will be facing supply chain talent problems and economic issues. Over the last couple of years, we haven't returned to a sense of normalcy yet." [#AV112]
- A representative of an Asian Pacific American-owned goods and services company stated, "Costs have gone up. There is inflation. Inventory is taking longer to arrive and is more expensive. Costs for shipping have gone up." [#AV128]
- A representative of a majority-owned goods and services company stated, "Some barriers are red tape for approval on new facilities, supply chains issues are slowing everything down, finding labor is increasing difficult." [#AV147]
- A representative from a goods and services company stated, "Supply change issues are integrated." [#AV151]
- A representative of a majority-owned goods and services company stated, "Trying to get product." [#AV159]
- A representative of a majority-owned goods and services company stated, "Our biggest difficulty with the marketplace is getting the components we need in a timely manner and at an affordable price. A component that used to be \$42 is now priced at \$500. It is tough right now in the marketplace. The pricing has gone sky high and being a small business, it's harder for us to compete against the big guys who have a lot more money than we do." [#AV166]
- A representative of a majority-owned goods and services company stated, "In California it is pricey here in terms of cost of labor and materials." [#AV172]
- A representative of a majority-owned goods and services company stated, "California experiencing high shippers refusing to pay high prices. Fuel prices to high. Carriers and brokers carrier not getting paid [the] right amount. Shipper can go out of state." [#AV173]
- A representative of a woman-owned goods and services company stated, "The marketplace is terrible now. We can't get materials that we need--for example parts like casters are made in Asia that are used for making chairs. We can get foam and other necessities for chairs in the USA but the whole order has to be delayed." [#AV211]
- A representative of a Native American-owned professional services company stated, "We have trouble in all areas of business in CA--everything from financial to supply chains

issues, to lack of skilled laborers to excessive regulations and permits to work in CA as compared to other states. The CA government is in our way with excessive regulations and rules and yet they always have their hands out for donations and money." [#AV230]

- A representative of a woman-owned goods and services company stated, "Supplies take longer." [#AV239]

**8. Prequalification requirements.** Public agencies sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on government contracts. Six business owners and managers discussed the benefits and challenges associated with pre-qualification [#1, #2, #4, #8, #11, #13]. Their comments included:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I didn't know there was a pre-qualification" [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I'm not saying that the qualifications were unjustified, but it was a barrier because I had to do a financial audit which cost me in the neighborhood of \$15,000 due to the size of the contract we were pursuing. The barrier again is that it was outside of my normal operating and something specific I had to do for Caltrans, which isn't in my overhead rate, and I had no way to recoup it. On the specific one, I just thought of is that it needs to be a requirement after you get the contract. Because I didn't get the contract and I didn't need to spend \$15,000 and I was chosen most qualified, so it would have been better to have that as a requirement before the contract was executed, but not in order to. ... That contract, I don't think you had to have it before you applied. But the window of time from when they picked most qualified until they tried to sign the contract was so small that I had to incur that cost before I even got to that point." [#2]
- The Black American owner of a DBE-certified professional services company stated, "There's always a special certification, some of which we qualify for, but elected not to pursue because of the administrative burden ... The redundancy and the amount of administrative support is highly burdensome and quite frankly, eliminates many contractors, small businesses from participating. so, the agency has to decide if they're gonna require that. ... Make it administratively reasonable for both parties, the agency and the contractor." [#4]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Talking about Metro, it's a stickler on prequalification forms. LA Metro initially required prequalification forms which required a notarized document during the proposal stage. Which was really ridiculous. We spoke with them. I personally did, and they eventually ceased from requiring [until] you've [been] selected, [and have been] noticed up to award no problem. But if you're if you're involved with 567 proposals and each one requires a notarized document for a small business, [it's totally], inconvenient. And it's expensive. \$13.00 a pop. So recently, Metro has reinstalled that again, prequalification for each individual project. So, my recommendation on that would be not requiring pre-qualification, but [if] you do from the big companies that's fine, but the small firms, if they're selected, if our team is selected, then we need to provide that before contract can be issued, [that's] no problem." [#8]



- The Hispanic American owner of an MBE-certified goods and services firm stated, "Without the shop? Yes [it was a barrier]. And a lot of times they want to look at your facility. They ask you okay, well, how big is your shop, can it accommodate us? Can it do? And that was in the beginning, that's what pushed us more to find a facility that would accommodate exactly what we wanted. And eventually, we ended getting there." [#11]
- The owner of a WBE- and SB-certified professional services company stated, "When they state in the prequalification that you have to have all this experience with government contract, yeah, that's a problem for anyone trying to break into it. It should be prequalification within the category, like, 'Show me your advertising agency's' ... I've been around for 15 years. What's my capabilities, you know? ... And then match them to the scope of work. That's what you should be asking; you're paying someone to do a job. ... Marketing is marketing. Can you do the marketing? That's what you should be asking. ... I mean, unless it's specialized of some sort... there are exceptions. But for the most part, it's like, do you need TV advertising, billboards? Do you need paper click? Do you need a website built? What do you need? And if you need those things, we can provide that. ... One other prequalification that ends up being a little bit strange, is when they have location qualifications. So, if they say, 'You must live in LA or you must - or your offices must be here and there.' Why? If we can make it to the meetings - you know what I mean? I just feel like they list things to make it difficult, ... See, I think sometimes they do that because they want to weed people out of - 'cause it doesn't matter where the office is. Advertising agencies do businesses for all over the country. ... And in California specifically, you can get anywhere. You can to LA. You can get to Irvine. You can get to San Francisco, San Jose. It's not an issue." [#13]

**9. Experience and expertise.** Interviewees noted that gaining the required experience and expertise to be competitive in responding to solicitations, reading specifications, and other skills required to be successful in the public sector can present a barrier for small, disadvantaged businesses. Many interviewees noted the need to develop relevant project experience prior bidding on projects. [#1, #2, #10, #11, #13, #14, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "It's who you know. It's who in the industry helps you." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I don't know if they have samples, so I know like when you get your RFP, it says no more than so many pages and you need to address XY and Z. But if they had some samples of what they're looking for or what to expect, sometimes that's really helpful, especially if you don't have a mentor. I wouldn't even know what to make it look like or what I need to touch on." [#2]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "If I need to look at it, sometimes I peek, because the government publicizes the awards. ... If I didn't get it, I would look on the company who got and who they are if they're service-disabled veterans. That's how I research; it's a learning process. You don't learn it from the first day and you have to find out what you did wrong, and where I made a mistake, and how come they got it, and I did not. Then you research



that. There's a system that you have to do, you know you have to find out, learn how to investigate. You have to be a spy or something like that in order to." [#10]

- The Hispanic American owner of an MBE-certified goods and services firm stated, "It was, especially for the quotes, because we just never know if we're being competitive enough. If we're over or under charging, that's always going to be a challenge. You're trying to win the clients so if you know that you charge so much. And then come to find out you should have charged more. At first, we're not trying to [see] if our prices are okay, so we messed up on this one. Let you know, you just learn from this mistake. The difficult part [is] just never knowing what ballpark you should be in, compared to the next person." [#11]
- The owner of a WBE- and SB-certified professional services company stated, "When I say have experience, I don't mean having experience in government contract. I mean in the category. And that's where I think this isn't fair. In most of these contracts, they say, they want experience within the government sector. And it's like, 'Well, we're trying to get in there', but you guys keep hiring the same people. How about look[ing] at the experience within the category? You're missing out on people that are super qualified that could probably even be able to bring you a fresh relationship and quality of service if you would give somebody else a chance that actually knows the category. ... Experience and expertise in my field is not a problem, obviously. We've been around for 16 years and getting experience in the public sector has been a huge problem." [#13]
- The owner of a transit company stated, "In the beginning, we didn't really have the experience that we have now. ... Working with patients, working with a broker, it's completely different than the first year. We didn't know what the process is, we didn't know a lot of rules, we didn't know about this. But after three years, it's really better." [#14]
- A representative of a Black American-owned professional services company stated, "I have a problem obtaining work and I think it's because my promotions are not as strong. It is also hard to get loans, so I can purchase better equipment to get the bigger jobs." [#AV174]
- A representative of a woman-owned goods and services company stated, "It has been challenging to bid on projects when we are a fairly new company. We are encouraged to be part of a contract by another vendor. The challenges that we face is more in the public rather than private sector." [#AV263]

**10. Licenses and permits.** Certain licenses, permits, and certifications are required for both public and private sector projects. Fourteen interviewees discussed whether licenses, permits and certifications presented barriers to doing business [#1, #11, #14, #16, #19, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "We don't know what we're supposed to be getting. ... And when you're bidding from town to town and city to city, it is a barrier." [#1]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "In the beginning, we didn't know how much we had to have, because you have like OSHA and HAZMAT and all that. In the beginning we would get those letters. Just to get to know them, we would just ask them to come, we would ask HAZMAT or OSHA to come and give us a give us a rundown. What am I missing? I could have risked getting fined, but I didn't know, then

they'd come as a surprise. And then I get fined for something I didn't know about, or I didn't realize. That's what we would do. Then we started from there also going online, downloading a bunch of information, videos to watch. And then not forcing, but having our staff sit down, go over some of the stuff. I know it's tedious, but a lot of stuff it is common sense, but not everybody uses it. And not everybody uses common sense all the time. what I would do, and I think it was with OSHA when the general from OSHA came, all we did was I gather all my guys and have him explain to us exactly what is it that we were missing, what needed to get done. And just so he could teach us, and over what happened to be nice is that he was willing to kind of go over stuff and the reasons why. And I think that helped us get to that point where we needed to be at." [#11]

- The owner of a transit company stated, "The process was really hard to complete all the paperwork, and it takes a really long time, like the medical member, the MCS inspection, [and the] MCS application. It costs a lot of money, and it takes a long, long time. So, this is what the main challenges that I faced, has just been all this money and permits from MCS, and medical numbers. They take a really long time until they approve you. ... They took almost eight months 'til they reported to me. And during COVID, they would always use this as an excuse - 'COVID, we are slow.' But we need this number so we can operate, so we can help during this hard time. We need this number so we can sign contracts and keep operating, because if I still have to pay for my insurance and pay for everything, and I don't have anything to support me, that will make me shut down. And they don't really care, and they don't really answer the e-mails or the calls. I waited eight months for them until they responded, and they reject me, and saying I have a couple paperwork is missing. I was like, 'Why you guys don't call or answer e-mail and say, 'You missed one, two, three, and finish it so we can get approved?'" They just keep me in a really long process, then we pay \$500.00 for the application without making me understand what the issue is. And then the issue is also - which is really, really make me mad to be honest, they call me one time, and they were like, they e-mail me, 'Why don't [we send] the inspector on his way to inspect the vehicle?' After six, seven months, and if you are not close by the vehicle, she gonna inspect it from outside. I was like, that doesn't make any sense. What about my car is not ready? What about my car is dirty? I need to be prepared for the inspection. You cannot just e-mail me saying the inspector is on his way. I did my best to be there, and clean the vehicle really quick, the vehicle's been parked for seven months. So, after that, she rejects me because the vehicle didn't have all the equipment. It was missing the wheelchair on it, and I didn't know that she was coming, that's why the wheelchair was not there, and they didn't care. It was really a stressful process, and they don't answer, they don't communicate, they don't care, and that's why our system, our medical system, is getting worse and worse. They don't care. They just refused and they don't watch the applications. They don't answer e-mails. They don't care was just like, 'There's someone who can - ' For example, he worked with a company, he takes four or five applications, you work on them, and he communicates with on, like, 'Hey, I'm missing this in your application. I need this, verify this with me.' But they don't do this. You don't even know who's looking through your application or who's working on it. Or how you can communicate with them, or how you can ask them for a status. There is no one like this. I wish if there was a communication, that's really helped to fix a lot of misunderstandings, to fix all of the issues that's gonna save time and money for both sides." [#14]

- The woman owner of a goods and services firm stated, "The first big challenge was I didn't know anything about running or owning a business, so I used a licensing agency to make sure that I get everything correctly with the state and, you know, and could disregard that junk mail that comes saying, 'oh, give us a \$150 - we're with the Federal blah, blah, blah....' Or whatever. There's a lot of spam mail that comes to your house when they know that you've started a business and have an EIN number. So, I hired a licensing company, and I did everything that they said, and they had 30 days to get back to me, about requirements that the state of California requires so I got ratted out by a competitor, not sure who, and I got a cease-and-desist email from the California Public Utilities Commissioner. So, I immediately like, within the hour, contacted him and I wasn't in any trouble, because he understood the fact that I went with an out of state licensing agency, and it hadn't been that long and somebody did call me in, a competitor, but he couldn't say who and so he, because it was COVID, and there it was really difficult. ... The DMV was a piece of cake to deal with, compared to the Public Utilities Commissioner. They were impossible to get them to process paperwork. I had no idea what I was doing - filling out forms, everything like that, so, that detective actually was so helpful. If I had a question about a form, boom, boom, boom! Just off the top of his head, he didn't need to look anything up. He knew that huge packet like the back of hand. So, I was able to successfully submit my application and get approved for my TCP number." [#16]
- The Black American owner of a transit company stated, "Emergency services has been a lifelong passion of mine. I wanted to start with the medical transport, because that would be the easiest and least regulated. Basically, you would have to fill out and apply with the state that you're gonna start such a business, go through some paperwork, purchase the vehicles, have them inspected by Highway Patrol, because they have to make sure they pass their Brake Certificates. Proper insurance is covered, and once I have the certification, I basically can start as soon as the paperwork is signed. The State doesn't really regulate that industry all that much and so it's very easy, in fact, one of the problems with the industry is that it's so under regulated and so easy to get started, there's a lot of fly by night companies that start up like, for example, in this area I'm aware of a couple of companies that have had multiple complaints, and what they just basically do is they close a business, wait a week or two and reopen it under a different name, and still the same people, same management making the same mistakes ... In Los Angeles County, the safety rescue business, I can start up overnight. They don't regulate them. The only time you'll hear from the county is if somebody files a complaint against you, and then they would come and talk and find out what's going on and investigate it." [#19]
- A representative of a Hispanic American-owned transit services company stated, "Expanding is hard because of the state regulations [and the] high permit cost in California, this is why we don't expand, everyday a new regulation that cost money." [#AV38]
- A representative of a majority-owned goods and services company stated, "Some barriers are red tape for approval on new facilities." [#AV147]
- A representative of a majority-owned goods and services company stated, "The taxes, licenses, permits and regulations small businesses have to pay is very prohibitive--in fact, they are choking them. It makes investors not want to invest in the company because of

this. Business is very good for the gas station business; however, the regulations and rules keep investors from investing because of all the expense involved." [#AV163]

- A representative of a majority-owned goods and services company stated, "Difficult to do business in CA, [because of] regulatory and permits." [#AV215]
- A representative of a majority-owned professional services company stated, "I paid all these fees for government work, nothing never became of it." [#AV220]
- A representative of a majority-owned goods and services company stated, "You can put down more customer service and support are needed for licensing to police this industry, because right now there is zero policing for this industry or its service." [#AV226]
- A representative of a woman-owned goods and services company stated, "Taxes and permits are outrageous and getting worse." [#AV234]
- A representative of a majority-owned goods and services company stated, "I think the largest obstacle is sometimes with city government, the bureaucracy of the city government. California really has to look at the permitting process, takes way to long." [#AV247]

**11. Getting a foot in the door.** Eight business owners and managers discussed their challenges breaking into the marketplace and obtaining their first contract [#2, #3, #4, #11, #13, #14, #20, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDDBE-certified professional services company stated, "It's kind of that double edged sword you want to get in, but you don't have everything. I don't think I would have taken on the [first] contract that I did if I didn't have the support of another firm and the team together to know we had it covered, before I went after that contract. It's hard to get your foot in the door. I guess the big take away from this is once you're running, you're fine, but it is hard to get your foot in the door, which is why I mentioned the Calmentor was helpful for me to do that. I couldn't have done the contracts without that program." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "The barrier is getting to get a contract from those entities." [#3]
- The Black American owner of a DBE-certified professional services company stated, "It's just a matter of getting the opportunities to perform." [#4]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "I think just allowing more opportunities and I mean, it pretty much just it is giving [us] the chance. I think that's the one thing that is missing, just giving [us] the chance to be able to show... a lot of times you're not allowed that chance. Just that one chance, I think that's the one thing that brings a lot of people down. All you're looking for is that one chance and it seems like you always miss the opportunity." [#11]
- The owner of a WBE- and SB-certified professional services company stated, "The main reason why I'm taking this call from you guys [is] because we've been trying to get government contracts for all these years, and it's been super difficult to get in there because the way that they look at these contracts is they end up going with people they've done

business with over and over again. And then they say things like, you have to have this experience and that experience with government contracts. But how are you supposed to get the experience if they're not going to give you the deal because you've not had experience? It's like it doesn't make sense." [#13]

- The owner of a transit company stated, "Yes, there was, especially because I started in 2019. It was really hard to find a contract with any transit company. As soon as I started, found a contract, and I signed it, I started operating in February 2020." [#14]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Clearly, there are barriers. It comes again from bias, but also their apprehension of the performance evaluations, you know, because they're coupled with their career. So, some agencies [and project managers] will look at it, as you know, if the project fails. Yes, contractor is responsible, but so are you as the project manager. So, there's an apprehension that this would tarnish their reputation as somebody building their career. So, they start to protect themselves by creating a dossier of letters that become very intimidating to a small business as they're unfamiliar with the process and don't know where all these letters are going, or why this guy is so hard on it. And I just don't know. There are systems in place within the management structure that is a self-fulfilling prophecy, in a sense that you know this guy, you know may do a good job, may not do a good job. But what makes him look bad? What could you do to make him look bad. He may not necessarily be saying that this small African American woman owned business is problematic for his career, but he certainly has his guard up and is less likely to allow a space for that contractor to learn how to do the job well and is a quicker trigger to termination and/or not looking to partner on the project. That same contractor could have a worse experience with a very large firm with the jobs getting done. He's not going to have an opinion of a larger prime. He may have worse problems with the larger prime, but he's not going to have the same disrespect as he would with a small business. There's an intimidation factor that plays a part in this. Small businesses simply don't, until you have exposure to working with an agency, you, yourself will have your antennas up and say, I don't want to do things wrong, and now you're getting these, you know, peer notices and now you've become overwhelmed. So, you know, I think certain districts do a better job than others, no doubt about it, but the way that project managers are taught to deal with diversity and inclusion as far as their contracts go, would probably go a long way in creating a better environment for our smaller DBE and WBE businesses, and them learning how to navigate the nuances with working with Caltrans." [#20]
- A representative of a majority-owned goods and services company stated, "Difficult to grow/expand to know the process to get our footprints in the public sector. [It is] hard to reach out and establish ourselves." [#AV129]

**12. Unnecessarily restrictive contract specifications.** The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Six interviewees commented on personal experiences related to bidding on public sector and private sector contracts [#2, #5, #6, #12, #13, #14]. Their comments included:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Once we have the work most of the obstacles I encountered were more in the billing and paperwork side than the actual performance of work. I also think the agencies sometimes write stuff with the certain consultant in mind. Which might pay to their benefits a little bit, but I think, especially like the big ones. ... Size really makes a difference for the public contracts." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "The biggest issue is signing a contract and the language basically saying that you are equally liable to the contract between the owner and the general contractor, and they don't provide you with the contract. If they do provide you, they'll say you know, 'I want you to sign here that you've read the contract between me and my general'. I'm going 'well, no, you need to send me that contract'. And within that contract, I've only been able to see one time and it was over 1000 pages. I really do believe there has to be a system or some kind of mandate in the specifications where you can just give a subcontractor this subcontract and it's like not just specific, [but] spell it out, what those are instead of saying you're gonna be bound to us. ... I did get it one time and it was over 1,000 pages. And we couldn't upload it into our system. The other thing that's hard when you when you do sign your contract is when they change the language, they'll say, OK, you're bound by this contract, but we're gonna change the prompt payment language so that it it's. We're going to tell you we're going to get paid. You're gonna get paid when we get paid. They'll also not tell you in the contract they won't like, put item numbers in your contract and we'll bid a job, for instance, and we'll bid items 11/12/13. They will put in your contract that you're gonna cut 20,000 feet of concrete, what item is that? Because if you go back on the website to see what item it is so you can follow to see if it's been paid. ... You have to make sure that you tell the subcontractors. These are things that you need to follow through before you sign the contract. Make sure there's an item number on there so that you can identify the work that they're listing you for, because if they don't, they can say I wasn't paid for that, or I didn't do that. And again, you don't understand this until you've actually lived [it]. ... They could be as simple as you're gonna be required to have insurance. That's OK. You're going to be required to reporting your DIR. That's OK. We're gonna pay you whenever we wanna pay you. No, that's not OK. You know, we want you per prompt payment. We wanna know and then we wanna know what items we are so we can follow it. So again, it's a bait and switch. It's very, very subtle." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "There's a lot of very poor specs and plans out there that are produced by various owners that are not very good." [#6]
- The owner of a WBE- and SB-certified professional services company stated, "What they've set up in terms of employees and what qualifies for hourly rate versus salary versus being able to use a contractor, what spec qualification - they're not giving you a lotta flexibility in



terms of payroll, to be flexible. So, the price of employees - so I do a lot of expanding and contracting. Because you have - when you have the business, then you're going to add staff. So, you end up going down this path of, like, there's no flexibility in moving someone from being able to be an employee to a contractor during a certain period of time because they don't follow certain criteria. So, I would say that's been my biggest hurdle, is that flexibility. I mean, we figured it out, but that's definitely a challenge." [#13]

- The owner of a transit company stated, "From [a] broker? Some of them, they request a lot of paperwork, and they request a lot of - for example, one of the brokers request to make interview with each driver. You have a contract with a company, you don't have a contract with each driver. They were requesting a lot of things - I don't think it's fair to make each driver, each dispatcher come to my office to inspection from my office." [#14]

**13. Bid processes and criteria.** Twelve interviewees shared comments about the bidding process for public agency work [#2, #3, #4, #7, #8, #11, #12, #13, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "We do request for proposals. So, our work is all quality based in our industry. They review based on your qualifications, pick the most qualified person and then they look at your overhead rates and they negotiate. Well from what I hear, they don't negotiate anymore. So, it sounds like maybe things are heading in the right direction. They negotiate your profit and your escalation, but otherwise it's all based on your overhead rates. I doubt the Caltrans one was harder, but I think it probably has to do with the volume or the size of the contract. So, when I'm working with the cities and the counties, it's a much smaller contracts, so there's not as many hoops or things needed in the submittal. ... Versus with Caltrans, you had to put together a nice proposal. There was nothing wrong with that, but it was far more detailed than some of the other stuff. ... The presentation was far more in depth than other presentations, and the whole contracting the negotiation part again was not something that I've had to deal with for any other agencies I've worked with." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "The bidding process really doesn't spell things out. They'll throw a bag of worms out there and it's up to you to dig through it to find out which one might apply to you. ... It's been very difficult. Because they say, what's your SIC code? Well, this is my SIC code. I go to the SIC code and I see the definition of that SIC code pertaining to me. It's so vague it might mean that I'm selling butter or that I'm selling Jeep tires. It's so vague. Because these people have never dealt with synthetics; they deal with a product like WD40, then everything's listed as a petroleum lubricant. We do not deal [with] petroleum lubricants. So, when we get into the SIC codes, they don't, they never address the synthetics, only petroleum. Now where you go? I've been to General Services. They research [and] end up scratching their head. I've worked with Department of Water Resources. They ended up scratching their head and if they're scratching their head and they're writing the rules, where do I go? [To solve this,] they have to assign a process a specific number to a synthetic lubricant, which they don't have and never had. And see like the state of California, they preach, 'Green, green. Green'. Yeah, we have a green product. We took it to your lab. Your lab tested it and approved it. [But they] didn't need the thing. We never sold a can. And they



preach, 'Ohh, you've gotta be environmental. And we will get behind you'. They don't walk [the walk], they just talk the talk." [#3]

- The Black American owner of a DBE-certified professional services company stated, "You have to bid these jobs and when you do, Caltrans goes for the lowest bidder. But you gotta keep in mind when a contractor like me elects to bid the job we bid it with one prime, but that may not work, so a barrier would be to have.... let the subcontractors [be] available for multiple primes. Therefore, the winner would therefore increase the number of contracts that the actual contract subcontractor could participate in." [#4]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "Getting work. ... It's like playing the lottery. ... Estimates cost money, so there's that always that component that I have to put up a bunch of money to hopefully get some money." [#7]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "The second challenge is the tremendous amount of paperwork that's required for proposals from small subs, it's almost same thing that's required of a big subway \$100 million contract. That same amount of paperwork [is] required from a small sub. When you're small, you've been a tremendous amount of time and resources, billing documents, most of which have no impact [because it's a] small portion of a project. I mean when you're going to be getting a 3 to 5, maybe 10% max of a huge project and you start saddled with all of this paperwork which in many cases if a person went through them, you could realize that a lot of them really did not apply and are redundant. Remember there's only 24 hours in a day when you're so proprietor, you're doing everything; you're chief cook and bottle washer." [#8]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Our industry is so small, but it has grown. You have a whole new bunch of shops, I think like overall, I think in the industry last year, there was like 110,000 new trucking companies. And the same time you have like another, let's say 50,000 shops open up. Then you have you have all that new competition, and let's think they lowball to get the client. And then you talk with these guys later on, and then now they're talking about, 'how do you do it? How do you make it so you could charge more?' And I say just 'the more that you lowball yourself of course, it's going to look good to the client but it's not going to be what's best for your overall operation.' ... It's just that simple as okay, I'll charge really cheap. And then it is, I mean of course, you can win clients all day, by the end of the day, what is your profit margin? Are you even making enough for the fuel that you use? There are other things that go with it. ... Bidding's still so challenging for us because we're so used to doing things that were like let's say, I just quote you on this job. And now on a complete bid to say, okay, I'll take over this whole fleet at this certain particular dollar amount. That's our challenge today, is knowing if we were to do something like that, and it is a different type of bid because then you're talking like a bulk amount for the year. That's the challenge now is where should we be at, when we do bid, we have to take into consideration not only with fuel, but also office staffing. Everything it takes to accomplish that, to accomplish the paperwork and procedures that are payables, receivables, all those steps do have to be taken into consideration. Which we didn't before, before we'd only think about the mechanical, the physical, but we wouldn't think about the everything and now on the office

side. That was another learning curve too, because we never would take that into consideration when we should have. I think it has, just because we haven't been bidding long enough, that we need to get better at it." [#11]

- The owner of a WBE- and SB-certified professional services company stated, "I've purchased platforms that have these bids that come up. And we will go, and we'll bid on it. And nine times outta ten, they already had someone in mind before we even bid on it anyway, by the time it hit this platform. And I didn't realize that until years after, and all this money I was spending, that that was taking place. They put the bids on there, but they're really not looking... they already know who they want to hire at this point. That's a moot point in the process because the government requires them to put it on these platforms. ... But I spent money buying the platforms, hiring a consultant to do the RFP [and] help us with the RFP writing and working with my team, doing the research on what I need to do to get into these government... we have spent so much time, effort, and energy on this. And we still have yet to get one. And I'm starting to believe that it's not possible. I just think it's not possible. It's so bizarre. The system is set up that supposedly, you're supposed to be able to have access to all of these RFPs through [systems]... I have Periscope and I have Vendor Bid and I have all of those platforms. I'm in there. I'm registered. I'm all these things. But it's a moot point because they load them in there, and by the time they load them in there, they've already got kind of an idea of what they want [and] who they wanna do business with. How do you get ahead of that? I don't know. Let's say there's a time limit. And then they ask for questions, and we give the questions. And then sometimes it's not enough time between the answers and the RFP due date. Then you're scrambling trying to fix the answers that have just come back. So that's just another thing that might sometimes be a problem. 'Cause it's like, 'Okay, they gave us the answers back. But oh, my gosh, one of the answers requires a major change. And it's due in five days,' you know? ... They need to be realistic. ... Perhaps if they post the answers and they're like, 'Okay, there was a lotta questions here,' they need to revise the due date." [#13]
- A representative of an Asian Pacific American woman-owned transit services company stated, "Marketing staff, our responses to our bid, right connection to get project, effort required to get it, for IT software." [#AV20]
- A representative of a woman-owned professional services company stated, "Hard starting a new business and running a new business. I think that public sector request for proposal [is] a lot of paper and hard [to] build relationships." [#AV52]
- A representative of a majority-owned goods and services company stated, "We are a small company, [it is] hard to land big/sector projects, not [a lot] of resources, too much documentation for every bid." [#AV142]
- A representative of a woman-owned goods and services company stated, "When we get bids, generally the bids go out to 100 or more people and they usually are not specific--for example, they may say they want a chair but for what purpose? Chairs can cost anywhere from \$30 to \$100 depending on what the customer wants." [#AV211]

**14. Bid shopping or bid manipulation.** Bid shopping refers to the practice of sharing a contractor's bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process or a bid to exclude fair and open competition and/or to unjustly profit. Six business owners and managers described their experiences with bid shopping and bid manipulation in the California marketplace [#3, #5, #6, #7, #11, #14]. For example:

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "I think [bid shopping] should be illegal." [#3]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Sometimes we'll be bidding to 10 general contractors as a subcontractor. And one problem that we've had with Caltrans last year on two different projects as they would be sent our bid out and then it got postponed or delayed. And then, our numbers are out there with our competitors and so when our estimators were looking at what the numbers were, they were like one cent off from ours. You know, I'm talking like the big guys like you know, so now we just won't. Contractors are telling us we need your numbers. ...We're not going to do that because our numbers are getting out there. So, it's a little disadvantaged there when they cancel, or they postpone [it]." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "There are certain people that you just know you can't trust, so." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "It's funny that I like to keep open communication with general contractors. 'Hey, how's our number looking?' and the most that they'll say is all you're looking good. And then like last minute, we're not looking good. I don't know how that happens." [#7]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "We've had times where actually they learn from what we're doing. And we come to find out that they were using our bids to get to the next guy to bid lower than we were bidding. We have had that. We've had that because it happened to be that I think we were talking with a particular person. And that's what happened that we [have] seen an invoice actually. They actually got an invoice from this other company. And we noticed to their company and what their invoice had come out to, which was I think it had beat us, I think, by like 500 bucks or something like that. It so happened to be that our estimate was next to their estimate. And then later on when we found out, we were finding out that they were using our information because I think one of their techs told our sales guy what was going on." [#11]
- The owner of a transit company stated, "They do [bid shop]. For example... the broker that I work with, when I'm signing a contract with [them], they send [me] the rates from multiple brokers, from multiple companies, and I refuse it. 'I'm sorry, I cannot work with this.' And they e-mail me back, 'This company accepts it,' I was like, 'They can accept it, I'm just not working to.' They compare you with another company. And then they sent me another offer, sent me other prices, and they request[ed] me to send them my quotes, my pricing that I needed, and they were telling me that this company is charged less, this company charged this - I was like, 'It's different quality, different type of vehicles, different type of services, so

you cannot compare.' They do this all the time. They compare you with another vendor."  
[#14]

**15. Treatment by primes or customers.** Seven business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work [#2, #5, #6, #10, #11, #14, #19]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "During the bidding process, as well as some of the and invoicing paperwork, it seemed like the higher up you went, the more I would say there was some treatment issues with. ... It is because I'm not union. ... My numbers do not plug into their spreadsheet the same as union shops, which is what the whole thing is. I think this is my perspective. I think Caltrans works a lot with union shops and they don't have things set-up for non-union shops and when you try to take my information and put it in there, they're like 'Oh! No, that doesn't go in this box'. And I'm like yes, it does because this box is for XYZ, right? ... I think that we don't get fair treatment and it's an obstacle or barrier because we're not union because we don't plug and chug into their spreadsheet that has been developed using only the big large union shops and then we don't have the same numbers, and then our stuff has to fall into other categories which they won't allow justification for charging. So, like I said, if I have to do a lot more in invoicing than I did previously, I need to bill for it or I need to just my overhead rate to compensate that I've got overhead that now so." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "The biggest problem with and a lot of general contractors know that these small contractors, aren't going to be able to do that or they're not going to think it's important because they're so eager to get the work. And so, they're sorry to say, but there are little pariahs out there. I've got my DBE. I don't care as long as you get the work done. If I don't pay them because they don't know what they're doing, that's their problem." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "If there's a slight dispute on something, then it holds our payments for really long, which is extremely detrimental to the business. So, if there was a faster way to get through that process." [#6]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "they said we did not comply to their timeframe. They would use the 10 percent of your project. ... Still have to complete the project because I signed the contract, so they had the power to do that. But I asked those people that control that, and they said, 'No, you did not accomplish the project on time.' Then it's very controversial of I fight it. But if you fight it how people talk. They just don't get that company again. You have a bad mark at the VA, the government, if you have a bad mark then that's it. So, that's why I lost money, it's okay, I don't contradict with their own likings, I don't complain, otherwise they will put you a bad mark, which they do. The government has their ways of doing that and they rate you on their checklist, 'Okay, who's this guy?' Okay, then they look on their secret file I guess and then they see your name, 'Hey! This is only like a wishy-washy guy, 50 percent, forget him.' So, those are the kind of things that you have to avoid." [#10]

- The Hispanic American owner of an MBE-certified goods and services firm stated, "Many guys that we go to [in] some of these union shops, they're really cool. They're very down to earth, but and then you have those ones where they're so hardcore union and they don't want to see no one else there. And they can be very behind on work." [#11]
- The owner of a transit company stated, "They treat you different, which is sometimes really stressful. I remember one time, we had emergency with one of the patients, and even if I called the direct line, they would only [take the] approval of her manager, and no one was available for me, and I had to wait four hours with a patient, and no one answered. ... It is [true], especially when you have patients in a type of vehicle, he's sick, he needs help, so I cannot just wait for a dispatcher to give approval for a manager, [and] he's not available. Someone [should] communicate with him when it's emergency." [#14]
- The Black American owner of a transit company stated, "Well, as a paramedic, I've experienced much of that over my career. For example, as a paramedic, I'm the highest level of authority on the scene, and so, I've run calls where I've had people completely ignore me, completely ignore my experience or whatever and make decisions and then I'm responsible for their decision making. For example, there's what's called Title 22 which is the state regulations for emergency medical services up and down, [and] in it, it states that the highest person authority from each agency will get together and form a unified command. Very rarely has that happened. Back in 2002, I think it was, I used to work with a guy who was kind of fairly large, and we had learned painfully that one of the fire stations had nicknamed us the [racial expletive] and the fat man. And that's how they referred to us behind our back constantly, and we found out by accident because everybody in the company knew that it was a running joke. I've had it where I've gone in to take transfer from either doctor's offices or hospitals, generally, the standard is the nurse or doctor would go to the paramedic and give a report, so you could have a legal transfer of care from the hospital to myself. Oftentimes, they'd walk up to my white partner - he'd tell them, my partner would say, 'Hey! look, I'm an EMT, he's the paramedic and you need to report to him'. They take one look at me, throw the paper up on the gurney, walk off, and I wouldn't get a report, and so now I'd have to hunt somebody to find out what's actually going on with my patient, so I can provide the care they needed. And so that type of thing happened constantly. I had an instance... we went to a doctor's office and the doctor wanted the patient transferred to the hospital because he had diagnosed this person with the flu. I looked at the patient and something was off, and so, okay, well, whatever, I took the report, got the patient out to the ambulance, started to hook her up to our equipment, when I get her on the cardiac monitor, her hear rate was at 38, which is extremely slow and could be somewhat life threatening or very detrimental to the patient, and so I did what I was supposed to do, started IV, gave her some medication. Doctor came out, grabbed, opened up the back of the ambulance and started yelling and screaming at me, and asked what the hell I was doing. So, I showed him the monitors and said, 'look, you misdiagnosed the patient, we're taking care of it, it's not a big deal.' He slammed the door, called the order into my boss, and said, I mean I listened to the tape, you know, 'Don't ever send that [racial expletive] back to my office ever again'. To my boss's credit, he actually stuck up for me and said, 'look, you will never ever speak to my employees that way again. You'll get whoever we send and deal with it.' So, I've dealt with racism my entire career at various different levels." [#19]

**16. Approval of the work by the prime contractor or customer.** Two business owners described their experiences getting approvals of the work by the prime contractor or the customer [#2, #4]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I could see where some people might [have issues] if they don't have that experience or don't have the mentors to show them what's different about that work. And that's kind of going back to the training thing that we mentioned. If Caltrans doesn't share how they do stuff, then it's hard for you to figure it out. We didn't experience any of that because we had some mentors." [#2]
- The Black American owner of a DBE-certified professional services company stated, "We've had delays in approvals. I mean, you know, particularly in the bid process now some of that most recently has been COVID pandemic related, but it's happened prior. the decision process somewhat gets converted and diluted and extended. Sometimes it's a, you know, reason we understand. Sometimes it doesn't seem to be [understandable]." [#4]

**17. Delayed payment, lack of payment, or other payment issues.** Seventeen business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms, especially those who performed work as subcontractors [#1, #2, #4, #5, #6, #7, #9, #10, #11, #14, #15, #17, #18, #AV, #WT1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Oh God, timely payments. I can go on and on about that ... It would be great if we could have some type of backing from the agencies that says, you know you can't hold your money for 90 days, 120 days just because you didn't get paid from your small business DBE. It's just it doesn't work like that. It's not supposed to work like that. ... But they all do it and they all don't care ... Timely payments, that's huge. ... Maybe the prime or the customer gets penalized, if you're not paying your DBE small business or who you know on time, maybe there should be a timeline... you know, it used to be you can't hold the check for more than 10 days ... Right now, they don't really care when they pay you." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "If they could pay in 30 days or less, that would actually be less of a barrier... My employees do the work and I have to wait [to be paid] because of the billing cycle, right? So, I've already paid their payroll all month... Before I invoice and then it's another 45 days, so it's by the time I get my money. I've already been out to the three months before I can recoup those costs so because it's payroll based on, it probably applies to other things, a more prompt payment would definitely help, like 30 days or less [would] be more helpful." [#2]
- The Black American owner of a DBE-certified professional services company stated, "You know it's 30 to 60 days, which is bad, but at least you know it up front and you try to prepare that should be cut back to 30 if possible. A lot of that's just not happening in the industry. So, it may not be possible, but that was certainly be a major factor in the cut down the payment time" [#4]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Just recently, it was a Caltrans project, [but] we weren't working on the job



[anymore]. So, I contacted the contractor and said, I know, we've done the bulk of our work. ... are we done with this work? Should we just close this job out? And they're like, oh no, no, no, no, wait. And so, I think because of how many years I've been in the business, I was able to go directly to the general contractor and say, look at, we still have a little bit of work, but you still haven't given us our change orders. And these changes were \$600,000... [With] our work is there's enough of our work that we should have our own items. But what they do [is] they'll put our item in like heavy construction, and it'll include socketing. Which is what we do. And then maybe another subcontractor's gonna go in there and pull out the concrete. And then another subcontractors gotta backfill it and another one has to pour the concrete back in it and then then the item is done and then they can pay for it. So here we are. We've done the work, the initial work and for the convenience of the contractor, they'll have us do 20,000 miles. And which is like maybe a \$300,000 bill that we do, and this goes back to April, but we can't get paid, and they won't submit our work until all their other subcontractors have done their work so. We might not get paid for 120 days. So, we've asked in in our in my meetings before I've asked that you that our work be separated. You know that each subcontract is doing their work, have their own item number, and not be bulked into one whole one so that it can delay them. ... So, what happens is they did submit it, but it was 90 days after we did it and you know and on these drops you gotta pay union dues. I mean, you're cashing, you're throwing out the cash on union project. It's a lot of money you're putting out there. Problem you know of contractors just not paying their bills when they were, you know, do like, why would you? ... I was getting the, you know, the conversation... 'Sweetheart, I've got 2400 subcontractors and you're going to get paid when we get paid'. And I'm saying. 'But you did get paid. You need to pay it'. But there was nobody on Caltrans and now there is. There's somebody there now that you can e-mail and write to. And before I had play, [and issue] stop notices on jobs on Caltrans jobs. But again, they would get the cash, but they the next month you'd see that they paid the subcode that they paid the general contractor. So, [I'd issue a] stop notice and I did it and I'd have verification that they did receive it. Nobody was holding the funds" [#5]

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Once we have jobs, our major barriers are payment, getting paid on time. ... Nobody wants to pay you. ... When we submit bids, we try to get mobilization up front before the generals get mobilization. ... Smaller contractors like us would have to wait till the larger contractor gets mobilization and sometimes that's a few months. Because they have to finish 10% of the job before they get it. So, it holds us up. But we try to we try to put it in our contract that we get mobilization, but it just it just depends on the GC. ... It's been an issue because some of the work that we do is usually first on the project. So, we're out there spending a lot of money building stuff and not getting paid yet. Because we're early in the project and the mobilization hasn't been triggered or they just not set up yet to start paying quickly. ... If there's a slight dispute on something, then it holds our payments for really long, which is extremely detrimental to the business. ... If there's any dispute in works with DBE's or payments held with DBE [they should say] 'hey at this milestone, we get those all covered and paid' or something like that. Like these agencies put in their specifications that they're going to meet all these DBE requirements to get the federal funding so they can do their projects. So, they have it in there, but they don't actually follow up and make sure they meet, they don't really care about paying DBEs for their work quickly. ... There is actually



some follow up on the bigger projects from somebody that is going around, 'hey, are you paid? Why not? Let's figure it out. Yeah. Did you do the work? Is it approved? OK, why aren't you paid? How long has it been sitting there?' Yeah, we just have to go out there and fight because we don't have corporate backing and cash flows and everything. So, it just takes a lot of extra time to go fight for that money that you've done the work for six months or a year ago. ... We were on a call this morning with OCTA [Orange County Transit Authority] trying to get paid for work we did three years ago." [#6]

- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "We're waiting on a general contractor to get paid and then we get paid seven days after that and where it gets even worse is if we're a second-tier sub. You know that's a whole 'nother seven days. So, you know you're, you're we're floating. We're at the bottom of the barrel, [and] we're carrying the load, we're financing the job. To be able to take away that element I believe would help a lot of small businesses." [#7]
- A representative from a WBE- and DBE-certified goods and services company stated, "Very much so. A lot of it it's other small businesses that buy tires from us [that] have been struggling with the whole COVID thing. Then there's been quite a few of them that have completely went under, so we got stuck with that. So, and then a lot of our bigger corporations have gone for whatever reason went to and some type of online payment system, and those are like anywhere from 90-days-plus on return. You know, before we would run a credit card every day for this big oil corporation and now it's like three months minimum before we even get paid. Now as long as you keep your invoices processed and keep running them through then once you get - you know once we got to that first three month you know payday and now it's, now it's regular. But you know if you have a big invoice that's \$10,000 or \$12,000 on the tires, you know Michelin sends us the tire bill before we get paid, you know what I mean? So, we're a couple of months, two or three months out sitting on tires. We've paid for these tires already but haven't gotten reimbursed from the customer that we put the tires on. Like I said a lot of our big companies have done that recently. Yeah, I'm not sure of their reasoning. If it was shortage of staff to streamline their processing? But just in the last eight to nine months three of our big customers have gone to that online payment system." [#9]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "The major manufacturers sometimes they carry that [the cost] and you have like 30 days to pay them and normally the government will, the VA for example, pay within a month." [#10]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Nowadays the majority of clients they used to visit maybe 30 days. Now they're paying like every 60 to 90. Some things get looked over or misplaced so let's say that 90, 90 days changed to let's say 100 and let's say 105 to 110, and 60 days, changed to like about 70-75 days. That's a good chunk of I want to keep reinvesting before seeing the money returned." [#11]
- The owner of a transit company stated, "I was having issue with the broker, they don't pay in time, or they send you a check in the mail, the check gets lost, and you get waiting for two weeks to use your money, the driver is waiting, and give him a penalty, and the insurance fee didn't pay in time. ... Because [one of my clients], they don't do the direct deposit, they

send a check, and they don't send it on time. They send it after 10 days when it's due, and I have to e-mail a million times to send it. And when they send it, it takes a week to arrive, so it's always late." [#14]

- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "They pay us probably within a couple of weeks after they get paid, but the games begin as far as like 'the field hasn't approved the invoice'. And then so you've got to track down the right field person and they say, 'oh yeah, we, I'm pretty sure I approved that invoice, but let me see and then I'll send it to them' and then they're like 'yeah, no we got it,' but then, they didn't put the purchase order number on it... I mean, it's like there's every excuse they can come up with to delay sending payment. And it's just, you kind of walk this line of like, ok, are we going to get paid soon enough or do we need to actually submit a stop notice on the job, in which case, they will then be, the state will withhold, I believe it's 110 percent of the value of that stop notice from their next distribution. And sometimes that gets them to do it more quickly and in other times it doesn't. Some companies are better payers than others, but they use us as a bank sometimes. In our particular case, I believe that we're probably one of the last people to get paid when they get their payment from the Caltrans, then, they have now a pile of money in which to pay things. So, they had to pay the labor, then they pay things that they're going to need over-and-over again, like they pay their fuel bills, they pay their concrete bills because they need, you know, more concrete trucks to roll next week too. They pay things that they're going to have to continue to buy and so that they need to maintain open credit with companies that are going to provide those things, and a lot of times on the products we sell, they're permanent materials, so there's only one shipment of bearing pads and once we've sent them the bearing pads, they don't need to buy any more for the rest of that job, so they don't care if we're going to like put a credit hold on their job because they already have their stuff and they don't need them anymore, so our only, like, hammer is putting a stop notice on their job. But that requires administrative work... it's kind of constant struggle with cash flow. And it's hard because we have other jobs going, like I can't not pay our bearing pad manufacturer because we've got seven other jobs that they're working on for us, and so if they put me on credit hold for this job, then there's seven other jobs that they're going to not ship because I haven't paid my bill, and I think that's a common problem that all businesses have is that cash flow thing. So, you know, you have to you have to live on, live below your means, in-order-to build up cash reserves or have a line of credit that you can tap into and things like that in-order-to be able to bridge that gap of not being paid." [#15]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "My experience with Metro, because that's the only one I have, when even doing that small contract with them, they had me on a prompt payment kind of schedule, or what have you, and while it seemed like that would be great, it still was a 60 to 90 day process of getting paid and that's because you were a subcontractor, right. They kinda had oversight of their big contract [that] had to pay the smaller people for whatever within a timely manner, but it was a lengthy process of getting payment for work, and I think that is a complete barrier for small business... we need our money. We need to pay people and pay the bills. At the time, I didn't have cash flow to float like that, and so it was very tight, which actually in turn kind of deterred me from saying, 'you know what, I'm gonna go after more'. So yeah, if there was some kind of, I guess, grace for, or like a bank

just for the small businesses under a certain amount of revenue per year that you know, all subcontractors, you know, something that was set up so that you can draw from right - then the corporations would have to pay into that bank. Once they were ready to pay, or whatever, that to me would make more sense than making the smaller businesses wait for their money.” [#17]

- The co-owner of a SB- and VBE-certified goods and services company stated, "Many years ago, I got into a situation where the county of Riverside, it was called a broker to sale, and the county of Riverside was supposed to submit the sales tax and they didn't, and so then the Board of Equalization sent me a letter and said that, you know, I had so many days to pay, or they were gonna come and lock my doors, and, and I'm not joking - this is very frightening, and so I contacted the County of Riverside and said, yeah, you know, we forgot to do it. We'll get it done right away, and even their contact with the Board of Equalization was difficult, because the Board of Equalization said to them, well, you know it takes us time to process this stuff, and you know, I was within just a few hours of having the doors of our business locked. ... I would say that is the biggest fear when I go into, let's say, there was a bid or something like that for materials, you know. I don't, I'm not concerned about labor and so forth. I wish that all state agencies would pay within the 30 days because that's what I'm required for all of my vendors. It's just the state agencies, you know, when I like, for example, when I get a purchase order from Cal Fire, they'll ask me for quotation. I send out a quotation, and on the quotation associated with it are the terms. I say that 30 - the purchase comes back, and it's always net 45. They will not pay before 45 days, so that base, and I can't say that that's true about Caltrans okay, but I can say that for sure about Cal Fire.” [#18]
- A representative of a majority-owned goods and services company stated, "Difficult finding good employs and getting paid by state on time.” [#AV141]
- A representative of a Hispanic American woman-owned goods and services company stated, "Things are not good, percentages are not good, we are barely above water, the owner and me have not received a check in a month. I don't think it's going to get better.” [#AV175]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I've learned that if I bring up prompt payment issues, I do so with the possibility of the prime/owner not using my business in the future and fear I may get a reputation as someone who complains. It feels like a double-edged sword in that you're damned if you speak up and your doomed if you don't. I feel like some of them use my business as a bank. I've heard of many small businesses going out of business for issues around prompt payment, or lack thereof.” [#WT1]

**18. Size of contracts or size of the company.** Thirteen interviewees discussed the effects of the size of available contracts and the size of their company on their success in the marketplace [#1, #2, #5, #8, #9, #12, #15, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Yes [the size of contracts is a barrier]. And it always will be. That's just the nature of the construction. I mean, [it] depends on what you're ordering. ... Of course, the

smaller cap contracts are easier. ... It is harder to run a bigger job. ... you have more vendors involved. You have more people. ... Solution I guess would be don't do big projects. ... [We are] a small DBE business [and] you are expected to act like we're some huge supply house and we're not. ... We can't compete. It does make it very difficult to compete in the market. Your margins are a lot lower. ... When your margins aren't that high, it's really hard for a DBE to make any money. ... That's what's hard with small businesses. We don't have a lot of the money and background, per se, to hire people to sit and take care of all of this for you." [#1]

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I think the agencies sometimes write stuff with the certain consultant in mind. Which might pay to their benefits a little bit, but I think, especially like the big ones, I think size is what plays into most of the larger [contracts]... size really makes a difference for the public contracts. ... You have to be of a certain size and have a number of crews before you could go after them [large contracts] and it would be nice, yeah, [if] they would get more smaller companies in and building themselves up to take over and work on bigger contracts. If they offered contracts that are smaller sometimes or a variety like they might choose. I would highly recommend like in a certain district they might have a big contract but also have a smaller one that when you have a small project it's a great opportunity to bring in the smaller companies or the minority or women owned companies or the nonunion companies." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "I do like the Caltrans. It has been introducing some smaller projects and I'm getting more interested in really researching those." [#5]
- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "There's certain extent [to which] there is a built-in barrier because you're only so big, you can only take on so much. So that's why I mentioned earlier that most of the small firms have a limited number of prime opportunities because of the size and scope of the projects. And as I mentioned earlier mentioned, Metro has started something called small business set asides where the size of the projects is consistent with what a smaller business could do and be a prime. ... If anything, most small businesses I know, our multipliers are significantly lower than most big firms." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "The ones that are thorough the private [sector], they're pretty, they're big, they're big companies so their very thorough and very detailed, you know what I mean?" [#9]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "There is no back office here. I mean we, we're very small. If, you know there's nobody sitting around looking for bids here. No one has a dedicated job here; everybody just does whatever it takes to get it done. So, we don't have people sitting on the internet fishing for bids or contracts. It usually falls on me to get them done and again, if I don't feel like we have a shot at it I'm not going to spend the time, I just don't have the time." [#12]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "It's funny, it seems like the size of the contract is not that much of an indicator of the amount of

work involved because it's the same. We go through the same process for, an average job that we do with a large project. It's just more of the item or bigger item or whatever that, but the process remains the same kind of throughout." [#15]

- A representative of a majority-owned goods and services company stated, "[We are a] small company, [it's] hard to land big/sector projects, not a lot of resources, too much documenting for every bid." [#AV142]
- A representative of a majority-owned professional services company stated, "It is highly competitive in our industry. We would like to see more opportunities from government for small businesses to bid on. So many contracts are in the \$20 million plus range which is too large for small businesses to compete on." [#AV165]
- A representative of a Black American woman-owned goods and services company stated, "The bigger businesses get the bigger contracts because they are in a situation where they can go in and sell at a lower price." [#AV176]
- A representative of a majority-owned goods and services company stated, "[We have] problems competing with large corporations." [#AV199]
- A representative of a Hispanic American-owned goods and services company stated, "Costs and pricing has skyrocketed--rent has also increased. As a small company, I can't buy the big containers like the larger companies can, so it is more difficult for me to stay in business. The market is very competitive now." [#AV200]
- A representative of an Asian Pacific American-owned goods and services company stated, "It seems to be a lot more difficult for small business to win contracts—the whole procurement process that the state usually uses is time-consuming, and it seems to be that the state prefers companies that have already worked with them. The labor market is getting very expensive, yet the maximum budget that's published in the procurement specifications does not seem to be increasing. This makes it difficult to be profitable for small companies to find resources to bid on state contract." [#AV212]

**19. Bookkeeping, estimating, and other technical skills.** Seven interviewees discussed back-office work such as bookkeeping, estimating, and other technical skills [#2, #3, #5, #6, #11, #12, #13]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "The overhead rate thing when you did your contract, so the amount of level of detail that's required for Caltrans invoicing is extremely excessive compared to your mom and pa surveys that we do everywhere else, right? I just fill out my timesheet, I put it in there, I pull it out of QuickBooks. It says I worked 8 hours and I bill them at my rate, and I said 'Hey, I did a boundary survey located and marked your corners. Here's your price'. Caltrans requires a lot of document tracking with, maybe this is another question coming on, but task orders where we're going, which district everything has to be in there and that requires a lot of office work, that's not captured in my overhead. Previously, before I went after the contract, so I was able to charge a couple hours for the overhead rate. But ... I had a mentor that helped guide me, and they let me know what was status quo with Caltrans and how you can approach it. And so, we were only able to build one or two hours when we would spend a day or two doing a bunch of paperwork, and that didn't seem fair and

equitable either. And they would ask for stuff and then say. Like the guys weren't supposed to go to the job site until they had the numbers that I needed on the bookkeeping end. But they'd go ahead and start driving anyways while we're playing phone tag. So, there was a lot of awkward documentation. Sometimes when it would be text to me versus in an e-mail or it didn't come through with the original request, and then we were spending a lot of times tracking stuff down. So, I think bookkeeping wise, the fact that you might not have that already in your overhead rate makes it really hard later to figure it in without losing money or knowing that you even need the resources to do that. So, it isn't an obstacle that isn't there on a lot of other projects. ... it was way too much of my time being spent on it, and it's just hire someone to push paper. it's hard [for] just somebody without some experience and training, because that's a hoop that changes too, between change since I started in the last decade, from paper to electronic submittal." [#2]

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Bidding and estimating is very complex. And you have to know what you're doing. And trying to find someone that can walk you through that process is very difficult to find. You almost have to go through the hard knocks yourself, and it might involve losing some money, but to gain the experience you almost have to walk that path by yourself." [#3]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "You have to really look into what you need and have professionals that can manage the expectations of the contracts that are getting more and more complicated, especially with the partnering of Caltrans, ... we do certify payroll all the time. But they will not tell you that they're not going to go on to LCP tracker and upload all the forms the way that Caltrans, that they're not going to go on the DIR website and watch the little circle go round and round and round while you wait to put in one. Right now, I have one person for my company that does DIR uploads every single day. You know, I just hired somebody and [it] didn't go very well in the beginning because I assumed things. So, there's some, I think a lot of small contractors. If there's anything I do, I still see some today where they make assumptions while they, you know, I hire a controller, I hire a bookkeeper or I hire a compliance person. If you don't really know what their job is, you don't understand what their job is. You're never going to be able to measure and see if it's accurate. And I have been the victim of that, I just got sold a bit. You're so busy bidding jobs and you're so busy making sure that you've got, you're the owner. You're going in all his different directions and you're thinking the person that you hired is actually doing it. But I didn't understand how complicated like this like seven years ago. How much more complicated compliance got for our jobs. So, the people that I had hired - they were getting farther and farther behind because they didn't understand it, and I didn't understand it, so I literally got back into it. My general manager was very upset with me because he's going, 'What are you doing?' And I said nobody's answering my questions when I can't get paid because my compliance isn't in order. Then what are we doing wrong? And you guys can't tell me. So, I got to figure out what it is. And they all got fired." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "It's [you] got to hire the right people." [#6]



- The Hispanic American owner of an MBE-certified goods and services firm stated, "I'm learning from whatever we should take, who should we have, and especially really having that because it is paperwork, and all is such an important thing that you want to make sure that you have the right person doing it. Because if not, they can overlook a lot. They don't know what they're looking after, so they don't know if they're right, everything is on the invoice correctly. That is one of those challenges that you want to have someone and yet they don't [know the type of work we do] A great example I had a drill — that we would do is [an estimator], she would have to do is come up for at least an hour, tie my hand and then look at if you see a particular job that she was writing up. — I will come look at it, so you know what you're writing out, what this means. If it's a cylinder head, what does it take? And then realizing and visualizing what it takes for the mechanic to make that happen. How many steps, what is it that we can do to remove that cylinder? Because if they don't know, then they won't know. And that all sounds simple, it's not a sense that we will get of that, — it doesn't sound like it will take that long. But in reality, what it actually takes is a lot of labor hours. The only thing that is challenging, and I would recommend is also having your office personnel, here's some idea. They don't have to do it physically, as long as they've seen and they're watching, and they know exactly what it is. That is actually taking to get to that particular thing done. That's still so challenging for us because we're so used to doing things that were like let's say, I just quote you on this job. And now on a complete bid to say, okay, I'll take over this whole fleet at this certain particular dollar amount. That's our challenge today, is knowing if we were to do something like that, and it is a different type of bid because then you're talking like a bulk amount for the year. That's the challenge now is where should we be at, and when we do bid. We have to bid and taking anything consideration not only with fuel, but also office staffing. Everything it takes to accomplish that, to accomplish the paperwork and procedures that are payables, receivables, all those steps do have to be taken into consideration. Which we didn't before we'd only think about the mechanical, the physical, but we wouldn't think about the everything and now on the office side. That was another learning curve too, because we never would take that into consideration when we should have. I think it has, just because we haven't been bidding long enough, that we need to get better at it." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We've got competitors, larger competitors than us that are able to reduce their prices because their costs are lower. So, if a contract bid or if a bid is out there from a government agency, they go with the lowest price all the time, then you know we're going to lose. So, it quite frankly prevents us from even taking the time to do government bids because it's not worth it to us. We know we're going to lose and there's too much time involved preparing the bid. So, we just don't participate in many of them. There is no back office here. I mean we're very small. There's nobody sitting around looking for bids here." [#12]
- The owner of a WBE- and SB-certified professional services company stated, "When you're going out to cost the contract, that's a whole other beast. But the different ways in which people ask you to price it out, sometimes it just doesn't make sense. And it's like we're literally guessing on all of it. They don't want to give you budgets. There's a lotta key information that they don't want to give you in order for you to accurately cost it out. Because a lotta this stuff for what I do, for marketing budget, having budget numbers is



critical because we know how many people and what we have to staff to manage a certain spend. So, if someone says, 'I've got a \$5 million marketing budget' and that is across all channels, TV, radio, print, digital, and within digital, 'cause you have to know what's within digital. Is it web design? Is it paper click? What is in there? Then we can say, 'Okay, I can guesstimate how many [and] what I need to put on that project.' But a lotta times, that's not the way that it comes over. [...] They want hourly numbers and things like that. And it's just like, 'Oh, my gosh. I have no idea. You're not giving me all the pieces. We'll put it together, but we're totally guessing because you're not giving us all the pieces to the puzzle in order to make the bid.' But we do what the criteria says, and we lay it out exactly the way that they tell us to. And quite frankly, we've not won a bid. So, I don't know if I've ever been on or off." [#13]

**20. Networking and learning about potential project partners.** Ten interviewees described their experiences networking with other businesses, and shared thoughts about developing the relationships necessary to form project teams [#2, #3, #4, #6, #7, #8, #9, #11, #13, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I don't see it as a real big barrier because when I first got into this and did a little bit of research, I know they already have certain opportunities where they do meet the primes. The Calmentor [program], you figure out where people were. I think there's already some stuff in place to help you figure that out." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "[It] takes a lot of a lot of time to do that sort of thing. A lot of fishing, a lot of Googling, and you know the problem all small businesses have right now. Is the fact that just because you have his e-mail doesn't mean he's ever going to return your question to him. And that happens a lot because it's so easy for him just to hit the delete button and you're gone. There's nothing like getting a customer or potential customer on the phone and you've got about 50 seconds to make your spiel, or you're gone. You're history." [#3]
- The Black American owner of a DBE-certified professional services company stated, "Caltrans has to begin to match up primes and subs to the point where a good portion of the subs in their network are getting work and therefore can encourage others to continue this high intensity marketing and administrative requirement Caltrans requires. ... There's some bid meetings and you can try to track them down, who's going to bid this job. But there's a fair amount of work there. Caltrans could submit a list of bidding contractors primes to all the subs early in the process so they can make contact. The issue is to make sure that primes and subs know about each other at the level of detail necessary with a quick response as to any interest." [#4]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "You can pretty much find that information online." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "Another barrier is ... just general contractors feeling safe and secure with, with listing us and subbing some workout to us because [right now] they're unfamiliar with us, there are still companies out there that have their go-to rebar companies and we're not

quite one of them for a lot of the companies that are doing the work on the jobs that we would like to do work on. So that has been a barrier ... Caltrans has one of the best portals, and I think a lot of other owners can copy and use [it]. It's very good." [#7]

- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "I think the most significance is getting to know the potential primes. When you're small, you are rarely going to be a prime with large agencies, Caltrans or anyone else, so getting to know and getting the confidence of the potential primes. ... Being able to sell yourself so that they will be interested in putting you on their team." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "When we started the whole you know small business thing ... we would go to these meetings we would meet other people and let's say it was a trucking company and they haul dirt you know and they've got all these fleets of trucks and stuff. And because we're so unique in the fact that we're just a service for the tires on the truck, we are not actually performing any area on the job bid was for. We have never been able to do that, which you know what I'm saying, because we're not one of the... Let's say there's a job to remodel the backyard and the thing is to remove the dirt, you know bring in more dirt, plant the grass, you know install the pipe, you know install the timers. Well, we just want to give service on the tires you know that hauls that or hauls the plumber's truck, you know what I'm saying? Because we're not directly related to the big at hand it's - we've never been able to get on there, you know what I mean?" [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "In our industry it's small, but a lot of people know each other already. There was a lot of people established way longer than we were. What helped out is that my brother, he specialized in the rebuilding of engines. And that's something that [my other brother] and other people do, but you don't always get the same result. And he was known for that in the industry, so he was sought after a lot, so I think that's what helped us. That's like the main thing I started learning on, was on pretty much the hardest part of the task. I think that helped us get our name out there knowing that we had a good reputation was that in particular, the rebuilding of engines. In that though the hard part is, we didn't have a shop in the beginning too, so we were doing all of that on the road. ... Biggest barrier, I think is just most the time like during a time of day, from a particular time just to make time for you, just to see you. Just to go and knock on their door and hoping that they'll make time to talk to you, kind of over what you're offering. But at times especially during COVID, nobody would even allow you through the door ... that's always been our biggest obstacle, to get the job done that hasn't been a problem, to just get in the door just to be able to get the time of day to see them I think has been our biggest obstacle." [#11]
- The owner of a WBE- and SB-certified professional services company stated, "I actually don't know a way to find that [who the potential primes are] out. We got this business because of another client that we work with that is private. That's how we found out about this one. I don't even know where I would go to try and to make a connection with a prime contractor in my business. I don't even know where to find that." [#13]
- A representative of a woman-owned professional services company stated, "Hard starting a new business and running a new business. I think that public sector request for proposal a lot of paper and [it is] hard build relationships." [#AV52]

**21. Inflation.** Twenty-four interviewees described the effects of inflation on their business [#9, #11, #13, #14, #AV]. For example:

- A representative from a WBE- and DBE-certified goods and services company stated, "A tire that I sold a month ago, I went to enter it yesterday, it's gone up \$60.00. ... I think a lot of it's inflation and it's crazy." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "Right now, with the way things are today, labor rate has skyrocketed. I remember, we used to pay the dealers used to be like let's say \$180, \$190 let's say, and now you have I think \$250 the hour, or \$280 [an] hour. Those hourly rates right now are up there. In the industry when we had started, we were starting at \$55, when we were being fed some other company and this was back in 2000-2002. It was a bigger company; they were constantly feeding us work so they can make some money from what we were doing. I think we're charging like \$55, \$65 [an hour] depending on what the job was." [#11]
- The owner of a WBE- and SB-certified professional services company stated, "All the inflation and the gas prices and just everything. ... It changes our clients, too, because people's buying habits are changing. They're making different decisions on what they're gonna spend their money on. So, for example, I have tire dealers. And even people are willing to drive longer on their tires because they don't wanna to spend the money to get new tires. And that affects the response rate and then how we're spending the money ... we're advising discounts and things like that. So absolutely, it affects all of it." [#13]
- The owner of a transit company stated, "It's really hard during this time how California especially is crazy with the pricing, especially the gas pricing. It's really impacted our business. Our drivers are driving 24/7, so the bill for the gas is crazy," [#14]
- A representative of a Black American-owned transit services company stated, "Inflation is the most concerning financial topic in the business." [#AV5]
- A representative of a woman-owned transit services company stated, "Everything is expensive, and food is going up. Right now it's very dangerous to expand. I would not gamble to make it bigger." [#AV77]
- A representative of a woman-owned goods and services company stated, "It's very hard to run a business here, its next to impossible, can't find employees, sales are down 30-40 %, price increases coming in every direction." [#AV113]
- A representative of an Asian Pacific American-owned goods and services company stated, "Costs have gone up. There is inflation. Inventory is taking longer to arrive and is more expensive. Costs for shipping have gone up." [#AV128]
- A representative of a majority-owned goods and services company stated, "Everything expensive, rising costs." [#AV130]
- A representative of a majority-owned goods and services company stated, "Our biggest difficulty with the marketplace is getting the components we need in a timely manner and at an affordable price. A component that used to be \$42 is now priced at \$500. It is tough right now in the marketplace. The pricing has gone sky high and being a small business, it's

harder for us to compete against the big guys who have a lot more money than we do.”  
[#AV166]

- A representative of a Black American-owned professional services company stated, "Due to the pandemic it was slow, but things are starting to pick up. However, we are now dealing with inflation." [#AV170]
- A representative of a majority-owned goods and services company stated, "The company has inflation and California fuels prices and rental companies lack equipment to get fixed and rental of trucks and parts for trucks very high. ... Food prices going up. Rates too." [#AV173]
- A representative of a majority-owned goods and services company stated, "Inflation and lack of housing that reasonable price and stable employees." [#AV189]
- A representative of a Hispanic American-owned goods and services company stated, "Costs and pricing has skyrocketed--rent has also increased. As a small company, I can't buy the big containers like the larger companies can, so it is more difficult for me to stay in business." [#AV200]
- A representative of a majority-owned goods and services company stated, "Inflation/labor force." [#AV221]
- A representative of a woman-owned professional services company stated, "We are an advertising business and since people are cutting back and watching their budgets and dealing with inflation, our business is usually one of the first ones they cut. ... Inflation is affecting everyone. Everyone is watching their spending and adjusting or doing less which definitely affects our business being in advertising." [#AV256]
- A representative of a Subcontinent Asian American-owned goods and services company stated, "It's very hard right now because the economy is not right. Gas prices are up and buying power is not right and it is difficult for businesses because products are not available, and the prices are high." [#AV259]

**22. Other comments about marketplace barriers and discrimination.** Thirty-two interviewees described other challenges in the marketplace and offered additional insights [#1, #10, #11, #18, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "When I came to [the city], Caltrans came in and said that I wasn't doing what I was supposed to be doing. So, then they shut me down. I had to basically, start over. ... A job being audited, you get penalized, or the general gets penalized for their DBE, or small business, or veterans, whoever not supposedly making their goal, their minority percentage. ... Who takes the brunt of that? Are they allowed to sue you? Are they allowed to short pay you off of other projects you might have with them? There are so many huge barriers when it comes down to an audit." [#1]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "For example, just for example, I bid for \$2.5 million for that project and somebody would come forward with \$900,000.00 only. So where did that go? Where did I make a mistake? Where did... Why, why, what did I miscalculate? But I

found out that those people, the company, their people come from maybe Mexico or something like, without the government checking their backgrounds. So, I cannot bid with that, for example." [#10]

- The Hispanic American owner of an MBE-certified goods and services firm stated, "A lot of times they ask you if you have a shop and a lot of times, they don't want those type of jobs done on their facility. It's too messy. At times, they would ask me do you have a shop, we would tell him no. And we would ask them we just get it done here. And they didn't like it, but some people will comply, and they would us give us a little space and double check that we didn't make a mess. But all it did was make us try harder to produce enough to get our shop. And then we finally did, more like about two years in, or two years then and then we had our first shop." [#11]
- The co-owner of a SB- and VBE-certified goods and services company stated, "I don't believe that it is fair that the State of California makes small businesses finance state agencies, and specifically, I'm talking about sales tax. It can be Caltrans, it could be Cal-Fire, a state agency, okay. And you come to me, and you say, 'I want to buy \$1,000 in widgets'. I say 'alright, here is an invoice for it.' I have to take and charge you sales tax, and usually I do not, and I have to. I have to send those taxes to the State many times before I ever receive them from you. Okay, and so that really is, that's really what I wanted to talk about. I mean, do I have any problems with Caltrans, or Cal-Fire, or CHP - no, not at all. It's, it's all about the sales tax and it makes me hesitate to want to do business because, like I said, many times, I have to submit the sales tax to the State on your behalf, even though you haven't paid me. ... I really would like to see the state say, 'you know what, you don't have to submit the sales tax until you've received it'. I have no problem in that." [#18]
- A representative of a majority-owned transit services company stated, "We can't find new property for the busses, real estate industry has the prices too high in California. A lot that would cost \$40,000 are now \$100,000." [#AV10]
- A representative of a majority-owned transit services company stated, "There are a lot of middle-man companies that are messing up the industry. They lie to shippers and receivers and say that they have trucks and don't have trucks. They are the ones that get the loads lower in the prices. It needs to be regulated more by someone has power to make sure the companies are doing things legally." [#AV14]
- A representative of a majority-owned transit services company stated, "Legislation could be easier for businesses and more business friendly and not just all about the employees." [#AV23]
- A representative of a majority-owned transit services company stated, "California is not business friendly and they tax us too much. Too many taxes and too many regulations etc." [#AV26]
- A representative of a majority-owned transit services company stated, "California heavy tax, [the] worst state. Roads in California [are the] worst roads. Worst in country for gas prices. Heavy taxes very hard and establishing a company is very hard." [#AV29]
- A representative of a majority-owned transit services company stated, "It's really hard in California. Gas is expensive, registration is very hard and expensive can go up to \$900.

Types of vehicles and high tax charges. CA is charging more for commercial fees, insurance high, also the city is charging us to drive on their freeways." [#AV34]

- A representative of a Hispanic American woman-owned transit services company stated, "Transportation isn't getting paid enough to make it. We aren't getting enough to payout employees to make anything for ourselves." [#AV62]
- A representative of a majority-owned goods and services company stated, "We have not had much difficulty because everyone needs their car repaired. The California marketplace is very difficult for new business owners due to all the regulations to open and the taxes and fees." [#AV110]
- A representative of a majority-owned goods and services company stated, "Too much regulation and taxes." [#AV131]
- A representative of a majority-owned goods and services company stated, "Regulations and taxes, too much of both." [#AV134]
- A representative of a Subcontinent Asian American-owned transit services company stated, "The industry, the fuel keeps going higher especially in California, and its hard finding the freight so you can justify the fuel." [#AV135]
- A representative of a majority-owned transit services company stated, "California is horrible. They make it very cost prohibitive to insure a commercial vehicle for passenger transport, and navigating what specific licensing you need, i.e., PSG numbers versus TCP numbers. There are no primers or examples specifically for getting a PSG. The gas and fuel tax are killing us. We're not sure if we can continue next year." [#AV136]
- A representative of a woman-owned goods and services company stated, "Employees, getting people to work. Over taxing of every little thing, supply demand." [#AV140]
- A representative of a majority-owned goods and services company stated, "Carb-compliance. Feast or famine." [#AV167]
- A representative of a majority-owned goods and services company stated, "We incorporated here in 1991 with no problems but now because of regulations, prop 65, and taxes, California is more of a social environment for businesses, and it is more restrictive for businesses that are smaller. California is a very expensive place. CA has a lot of potential business, but it is quite expensive to do business here; but we are maintaining, able to pay our employees and are still in business so we feel quite good about that. We are very committed to the people that work with us." [#AV177]
- A representative of a majority-owned goods and services company stated, "Inflation and lack of housing at [a] reasonable price and stable employees." [#AV189]
- A representative of a majority-owned goods and services company stated, "If this business was my business, I'd get the h\*\*\* out of California. There are too many regulations, wage increases, etc. that are supposed to help the poor people, but they do not. Raising the minimum wage means prices and taxes on the business must go." [#AV198]
- A representative of a majority-owned goods and services company stated, "Problems competing with large corporations, and issues with taxes high taxes and high sales tax." [#AV199]



- A representative of a woman-owned goods and services company stated, "I am being taxed to death." [#AV203]
- A representative of a majority-owned goods and services company stated, "I think California's business climate is the worst in the entire United States because of the taxes and the way the government is giving the money away to illegals and transients. Every time we try to do something new, we are told we can't do this or that." [#AV204]
- A representative of a majority-owned goods and services company stated, "Impossible, as rent is too high for commercial property." [#AV207]
- A representative of an Asian Pacific American-owned goods and services company stated, "Gas is expensive." [#AV216]
- A representative of a majority-owned goods and services company stated, "Bureaucratic red tape in every aspect of doing business in CA is ridiculous compared to other states. The online business services in California are terrible--even the ones in Louisiana are better." [#AV218]
- A representative of a majority-owned goods and services company stated, "Regulations and red tape. Very difficult with the red tape to [do] business in the state." [#AV222]
- A representative of a woman-owned goods and services company stated, "It's very hard to be a small business owner in California due to the taxes and bureaucratic red tape. People don't have a lot of money to spend right now. In our neighborhood we have a big homeless problem too." [#AV232]
- A representative of a majority-owned goods and services company stated, "There is too much bureaucracy in California, and we are always having to do something to stay in compliance." [#AV240]
- A representative of a majority-owned goods and services company stated, "I think the largest obstacle is the bureaucracy of the city government. California really has to look at the permitting process, take way to long." [#AV247]
- A representative of a majority-owned goods and services company stated, "We pay too much in taxes and the streets can be unsafe. We have a parking issue, and the city keeps taking parking away. Customers come here in their cars and their trucks, and they cannot find any place to park when they come to our location." [#AV248]

## I. Information regarding effects of race and gender

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects POC- or woman-owned firms:

1. Price discrimination;
2. Stereotypical attitudes;
3. Unfair denials of contracts and unfair termination of a contract;
4. Double standards;
5. Unfavorable work environment for minorities or women;
6. 'Good ol' boy network' or other closed networks;
7. Resistance to use of MBE/WBE/DBEs by government, prime or subcontractors;
8. MBE/WBE/DBE fronts or fraud;
9. False reporting of MBE/WBE/DBE participation; and
10. Other forms of discrimination against minorities or women.

**1. Price discrimination.** One business owner discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials, and supplies [#1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "This is another thing going through rumor mill is [that] the DBEs need to know, are they only supposed to purchase from a manufacturer? ... DBEs need to know, are they allowed to purchase material from just another supplier, which is known as the distributor because manufacturers. You know, they pick suppliers to be their distributor for their product. So, there's a lot of people that have to buy from a certain distributor. ... What I'm finding is that DBEs are getting penalized for not buying from the actual manufacturer, you know? Instead, they went to the distributor. ... But what the problem is a lot of small businesses can't get a line of credit with these big manufacturers, nor do they even give us a second thought." [#1]

**2. Stereotypical attitudes.** Four interviewees reported stereotypes that negatively affected small, disadvantaged businesses [#2, #15, #17, #18]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Every day when I answer the phone and they go, 'Oh! can I talk to the surveyor?,' it could be they think I'm the receptionist, answered the phone. But usually a female voice, they think receptionist as opposed to the professional." [#2]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "When I walk onto a job site, I'm different, and, you know, contractors are used to dealing with men, you know, first and foremost. So, when you meet someone, you're either a man or woman and then, you know, as far as like walking that fine line between being, you know, helpful, friendly, and trying to make connections to them, you know, having that be like, 'Oh! Is she

flirting with me or is she just being, you know, helpful or whatever.' So, it's like you always have to be super aware of that reality. And you can develop relationships as a man with other men, that are much different than a woman with, you know, a man. ... Or, you know, I mean, this goes all the way to the top. You can be dealing with the head estimator of a company, and if he gets weird on something that can affect your entire business with that company. Or I've been in a situation where I got a text message from a contractor saying, 'Hey! We're meeting up at the Golden something or other.', and I'm like, 'What's that?' And like, that wasn't for you. That was for someone else. And I looked up the Golden such and such, and it's like strip club. ... So, I can't remember who it was, some lumber company was taking them all out to the strip club for lunch or something. And it's like they have this ability to do kind of bro bonding that you can't. It's hard to do any kind of like social stuff with a contractor because then it's weird because 'Is this a date or whatever?'. But I mean, so why just don't do it at all." [#15]

- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "There's some barriers there sometimes when I go on to sales calls and stuff like that. You know, it's like, I don't know, sometimes people aren't [used to women]. So, men are just like surprised, right? They're like, 'Oh! You own the business!' as opposed to like, 'Hey! let me show you around,' and whatever, blah, blah, blah. And I think that's breaking up somewhat in the commercial cleaning world because I know that there's quite a few women now that I'm in it, that are owners of commercial cleaning businesses. But I would say initially, that's what I felt, like there was a sexist kind of thing going on there." [#17]
- The co-owner of a SB- and VBE-certified goods and services company stated, "We all know that many women are looked down on still today. It's not right, but it's the way it is." [#18]

**3. Unfair denials of contracts and unfair termination of a contract.** Two business owners and managers discussed if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract [#2, #12]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "So, in the negotiation when we came in 1st, I already had one contract and we're going after the same contract the next year as the incumbent, and we came in [to negotiate]. We were chosen [as the] most qualified after we went to the whole interview and when we came in to negotiate the prices because we were the most qualified firm for it, negotiating the prices and we sat down and the gentleman doing the negotiating, you know, started off. We were there for that contract and that amount. And I said, 'I'm sorry, that's not the amount of the contract. If it was, I wouldn't have had to spend \$15,000 on an audit.' And then he accused me of where I got my information. ... Who at Caltrans gave me that because that's not what the project was or what the contract was. And he was the one totally in fault and it was very accusatory. And he asked us to step out of the room while they resolved it. And in my opinion, I was like... the guest of a person coming in there, they should have stepped out of the room and taking care of it. So, we have to go stand out in the hall for probably 30 minutes. Why? They tried to figure out what... And it was a mistake. We're all human right, but it came off very accusatory to start with. And it set a very bad tone for the rest of that negotiation, like it was a very accusatory. ... The negotiation I do feel was more

women related and ... it should be, 'Here's the job. Here's what we're going to pay you. If you're interested, go ahead and send us a proposal.' Right, ... they really should say they just pay this percent profit. There's no need to negotiate that. Because that really, I feel, leads to a good old boys' club, you know. Well, I wish the other team had gotten it. So, I'm going to really be hard-nosed, and he pretty much came into the interview saying that his job was to just get as cheap as he could get us. And instead of, 'Hey, we're all professionals here and we want to pay you what's equitable.' ... And I think it was one it's like a bad apple, right? One person in particular that just had a power trip or didn't want to. You know, they wanted to try to put people in their place and make them feel small so they could feel big. The audit department, but he wouldn't let me speak with any of them directly, and when I asked him a question, he didn't answer it and then he just sent out a letter saying we were at an impasse. And I had never indicated I was at an impasse. I was still trying to get information. I feel he had a very domineering attitude, and it was because I was female. He thought he could push me around." [#2]

- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We've had a couple of issues where we started out with a contract and we were dropped for really nothing we did on our part, but the agency decided to go a different direction. So, yeah we've had a couple of instances like that." [#12]

**4. Double standards.** Three interviewees discussed whether there were double standards for small, disadvantaged firms [#1, #2, #15]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "When it comes to discrimination, I feel like ... DBE's or small businesses are expected to be at a higher level than what we could possibly ever be at. ... That's a big star. This is something that I'm thinking that I'm talking about during an audit process. ... We as DBE or you know, small business suppliers are expected to ... take in house and possession of so much material, more than any other normal supplier[s], would take possession of. It's huge, huge things of wire that nobody would possibly a crane has to unload it. Why would we be expected to do it? ... There are double standards of performance. it does directly or indirectly affect us because word gets around. Oh! Well, she got penalized or, Oh! He couldn't do this or do that? Well, it does directly affect us because then people aren't using US." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "On the billing side when I brought up like the overtime, they were happy to just say no till you really call it on it. And then it's like, oh, OK, and I don't think that's fair. And I think it's because they thought we were small. I think was more of a ... big dog, little dog sort of thing. You know, just the size sort of thing." [#2]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I remember being in a meeting with 30 engineers, ... we're all sitting around the table trying to figure out this problem with these really big spherical bearings and they were talking to, 'They're talking about the increased seismic activity requirements on the project that the current bearing design was going to work and how it needed to be interchangeable'. And, you know, I was sitting in the room as well because we were supplying them and all the engineers around the table were like fussing with how it couldn't be done or whatever. And

so, I just was looking at it logically from 30,000 feet. And I thought, I was doodling on a napkin like, well, why wouldn't this work? And I kind of made a design change on a napkin, and I happened to be sitting next to the Bearings and Joint Chief from Caltrans who I had met before, and I was quietly like, well, why wouldn't this work? And he kind of ignoring me at first. And then I'm like, hey what about this? What am I missing here? Why wouldn't this work and so eventually he kind of looked at it and like then he pulled my napkin over. He studied it some more and said Ok, and he stood up and he said, 'Why don't we do it like this if we did this and that?' And he explained my napkin drawing and they were like, 'Oh, well, yeah, that could work' and that's ultimately what they ended up doing, but it's like nobody, nobody could hear me, but because I didn't have the sort of authority that they had. So, you as a woman or someone different, you have to know more about your product and about your situation than the person you're talking to usually. Or you've got to ask some really good questions to get to an answer on something, but you have to go in knowing that if you don't know more or if you don't know your product. That would just be like another box checked for confirmation bias. Like, she's a girl, she doesn't know anything. So, you have to kind of be better prepared and more informed or whatever, than you would if you were a man in order to be taken seriously. That's just the way it is." [#15]

**5. Unfavorable work environment for minorities or women.** Three business owners and managers commented about their experiences working in unfavorable environments [#2, #19, #WT1]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "It's just because we're different genders. That's how it is. It's a lot easier for the guys to just turn around or go not as far. Use the restroom as I have to go if I need to. When we're up in some place more remote. But that's just more of a nature of how things are. But I don't think [they've] always considered stuff like that, like I go all day sometimes without going to the bathroom because there isn't one." [#2]
- The Black American owner of a transit company stated, "Well, as a paramedic, I've experienced much of that over my career. For example, as a paramedic, I'm the highest level of authority on the scene, and so, I've run calls where I've had people completely ignore me, completely ignore my experience or whatever and make decisions and then I'm responsible for their decision making. For example, there's what's called Title 22 which is the state regulations for emergency medical services up and down, in it, it states that the highest person authority from each agency will get together and form a unified command. Very rarely has that happened. Back in 2002, I think it was, I used to work with a guy who was kind of fairly large, and we had learned painfully that one of the fire stations had nicknamed us the [racial expletive] and the fat man, and that's how they referred to us behind our back constantly, and we found out by accident because everybody in the company knew that it was a running joke. I've had it where I've gone in to take transfer from either doctor's offices or hospitals, generally, the standard is, you know, the nurse or doctor would go to the paramedic and give a report so you could have a legal transfer of care from the hospital to myself. Oftentimes, they'd walk up to my white partner. He'd tell them, my partner would say 'Hey look, I'm an EMT, he's the paramedic and you need to report to him.' They take one look at me, throw the paper up on the gurney, walk off, and I wouldn't get a report, and so now I'd have to hunt somebody to find out what's actually going on with my patient, so I can

provide the care they needed. And so that type of thing happened constantly. I had an instance when I worked up in Lake Isabela, we went to a doctor's office and the doctor wanted the patient transferred to the hospital because he had diagnosed this person with the flu. I looked at the patient and something was off, and so, okay, well, whatever, I took the report, got the patient out to the ambulance, started to hook her up to our equipment. When I get her on the cardiac monitor, her hear[t] rate was at 38, which is extremely slow and could be somewhat life threatening or very detrimental to the patient, and so I did what I was supposed to do, started IV, gave her some medication. [The] doctor came out, grabbed, opened up the back of the ambulance and started yelling and screaming at me, and asked what the hell I was doing. So, I showed him the monitors and said 'Look, you misdiagnosed the patient, we're taking care of it, it's not a big deal.' He slammed the door, called the order into my boss, and said, I mean I listened to the tape 'Don't ever send that [racial expletive] back to my office ever again'. To my boss's credit, he actually stood up for me and said 'Look, you will never ever speak to my employees that way again. You'll get whoever we send and deal with it' and so, I've dealt with racism my entire career at various different levels." [#19]

- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I've learned that I must consider the egos of my male colleagues and have learned to work in a way so as not to bruise them. For instance, I shared a solution to an engineering challenge we were having on a large bridge project. The engineer I shared my idea with ignored me the first several times I suggested it to him and then when he finally did take the time to look at it, he suggested it to the group as if it was his own idea, taking all the credit for it. I did not say anything at the time, concerned I might upset him and bruise his ego. ... Women face overhearing inappropriate discussion and unwanted advances from men in the workplace and again we fear being blackballed or retaliated against, if we say anything to the person directly or bring it to a supervisor's attention. Even if the offender is called out on the offense, the company has to weigh the cost of losing an otherwise productive and often times important member of their team with just giving lip service to the problem and then not working with the woman in the future. Option 2 is much easier. We are left with playing off the bad behavior, or ignoring it, or walking away from the business relationship all together. Again, men in my position never even consider this landmine." [#WT1]

**6. 'Good ol' boy network' or other closed networks.** There were a number of comments about the existence of a 'good ol' boy' network or other closed networks. Six firms shared their thoughts [#1, #2, #9, #15, #AV, #WT1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I don't think that will ever go away." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I think it's becoming less and less. [There is] just always the good old boys club sort of thing going on. ... And it's usually, I would say subtle, right? So, they won't say or do something where you'll know. You just kind of get a feeling that that's why they're not bothering to call you back or talk to you or answer your questions or wanna go over your head." [#2]



- A representative from a WBE- and DBE-certified goods and services company stated, "The good old-boy network [is] more in the private sector, not so much with the government stuff... Let's say I go out and I gain this customer and then their previous tire vendor gets wind of it and shows up and offers everybody, you know all the bosses' free tires on their wives' cars to obtain their customer back. ... I think that's like people doing business, but they're actually doing kind of a gangster business move." [#9]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "Some lumber company was taking them all out to the strip club for lunch or something. And it's like, you know, they have this ability, you know, do kind of bro bonding that you can't, it's hard to do any kind of like social stuff with a contractor because then it's like, weird because is this a date or whatever. ... All the other like suppliers and stuff are constantly taking contractors out to dinner, playing golf, going shooting, going to strip clubs, whatever, and they develop those close relationships with them. And so, they're like, after you've had three cocktails over a stripper, 'well, how about we get the order on that big project you have going there' 'Sure, we'll send you a P.O.'. Well, we don't get that. We don't have the access, you know, or that sort of thing. And, so, you have to have relationships that are like business and can be friendly and helpful, but you can't be too friendly and helpful. ... You can develop long term friendly working relationships with people, but you can't, you know, you can only go so far. And so, the old-boys network is still in place. I don't know any way around it other than having some sort of program in place, such as the DBE program that requires them to give you a chance. You know, it doesn't require them to buy from you or whatever, but it requires them to give you a look and give you a chance to compete for their business. And so, I believe that if this program wasn't in place, that it would gradually evolve back to you know, the way it was before the program was in place. It just... people deal with who they're comfortable with and if they're, if you're like me, then you're comfortable. ... Although there's, you know, more and more women on site and things with project management, engineering, things like that, business managers and things still, there's still barriers, and that's a fundamental barrier that we see. And then you add all the other business barriers to that and that's where we are. You know, if I was dealing with, if a contractor was whatever race, you know, or if I was a dude or whatever race, they would still be able to have that experience together. But not if I'm a woman." [#15]
- A representative of a Black American-owned goods and services company stated, "Tough for a minority-owned business to get work in the advertising sector. Contracts go to 'good ole boys' club." [#AV197]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "Being a woman working in a predominantly male industry, I recognized early on that I must learn to navigate the landmines that exist for women. For instance, realizing I cannot be 'too' friendly with male colleagues as to not lead them to think my 'friendliness' is anything more than just that. Men in my position never have to think about 'sending the wrong message' to a customer or vendor and are free to develop close personal relationships through 'out of office activities' such as meals out, golf trips, ball games, mountain biking and yes, even strip clubs. The friendships that develop and 'coupons' that are earned are the heart and soul of the 'old boys club' and unfortunately where a lot of business is done. None of this relationship building is available to me as a woman without the very real risk a wrong message being received and anything from an awkward moment to full on exclusion from

future business resulting. 'Boondoggles' are not only common sales tools, but many companies expect their SALESMEN to indulge their contractors/customers in these extras. I can't even take a customer to lunch without risk. ... I was once asked by a contractor to purchase material from another non-DBE supplier at a higher price than what we had quoted them for a job. It appeared that the contractor bought the material first from another supplier at the higher price, realized they had committed to purchasing it from my company at a lower price at bid time, the job site staff purchased it from their 'guy' at a much higher price than our bid day quote and then wanted us to 'run the paperwork through our company' in order to not violate the DBE commitment. Question: Why would a contractor purchase material at a higher price from a non-DBE company? Answer: 'Old Boys Club.'" [#WT1]

**7. Resistance to use of MBE/WBEs by government, prime contractors, or subcontractors.** Thirteen interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm [#1, #2, #3, #5, #6, #7, #10, #11, #19, #20, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I think a lot of people are really skeptic[al] about using the DBE now. People are just scared. They don't like to use us. They don't wanna have DBE. They'd rather get their contract without using a minority [or a] small business. So, we are a pain. ... There's rules and regulations that they're not used to doing, so that's why businesses are deciding not to do it. They're shutting down. ... There is a gonna be higher resistance because people are thinking 'why? Why are we gonna do this?'" [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "If it was because they had a preconceived idea of me as a woman, I'll move on to who is interested in working with me" [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "They don't really come out and give you a feeling that there [is] some discrimination there. ... If they're not doing their job, you can be brown, black, yellow, green, they're all treated the same. These people don't give a rip about helping you, honestly." [#3]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "The biggest thing that's been said, 'how do you like it when people just give you work' and I'm going, 'what? Nobody gives me work.' You know, I bid it. This is 43 years of this is blood, sweat and tears. But I can see on their point, you know, there's contractors who still say to me, 'I don't like anyone telling me who I have to use.' I'm very aware of that." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Caltrans has good goals for their projects that they release, but we've noticed when we provide DBE quotes to general contractors on these large Caltrans jobs some contractors are motivated in using us for their quote, but some aren't. And we've noticed also on some jobs, even though contractors don't meet the DBE goals, they're still awarded jobs. So that's the barriers we see getting jobs." [#6]

- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "[Being a] DBE on nobody really wants to work with you. In a sense, they just doing that because it's a requirement." [#7]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "The company will not support you, because they already have a service-disabled veteran in their company then they will not let you in. For example... a big company for sleep apnea, their machine. I tried to get in. I do have an account with them, but I cannot sell for the government because they already have a SDVOSB to sell their product. It's not only [that company], I'm just giving you an example. [Another company], they gave me a contract before to do their x-ray, not me, but their contract with the x-ray and use their people, but now they shut me down because they have SDVOSB. That's a money making for me before because it was like a four-years contract." [#10]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "It's the older white guys that get the best jobs, or the older white guys are the ones that get the best work. ... My age is what I've been discriminated against. since I'm the owner and [and] a Latino. I had a really good friend, my high school friend of mine [that is] Hungarian; he looks like just a white guy. And there's times that we have to go meet someone, talk to someone, and they only focus their attention on him. Then I have experience, but I mean, for me as long as I'm getting the work and he was the face of it then that's fine. I wouldn't let it get to me, but I did have that where they would not acknowledge me. Even being the owner, they will not acknowledge me, they would only focus their attention on him." [#11]
- The Black American owner of a transit company stated, "As far as the safety business goes, that has been a nightmare. There's a lot of political issues and I really loath to even say, but I'm fairly sure there's some racial issues. To give you some of my background a little further, when I was licensed as a paramedic, I was [one of the few] Black paramedics ever licensed in this county. ... So, trust me, if you want to have discussion on racism, I can spend days telling you about the stuff that I've had to deal with, with county individuals and city individuals and stuff like that. At present, there's a group of people in charge of our EMS office that have some issue with me." [#19]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "I've seen overt racism in the industry with very large prime contractors. Even recently, I've seen it. I personally haven't felt it directed at myself, or my company in probably five or ten years. It's probably because of, you know, our own reputation that we've developed. I think that there were project managers at Caltrans that were not necessarily excited to see our firm at the beginning when we started to do Caltrans work, or that, racism, or just the fear of the unknown. Hard to say, cancel out one or the other, but I believe over the course of those years, we were able to show that we had the capacity that diminished their maybe, their opinion of us, personal opinion of us, probably not, but on a professional basis, it was no longer an issue of us being on the job for fear of failure of the job. They know we could get the job done. Maybe they grew accustomed to us. ... I've seen it in the industry. I've seen comments by project managers. I've seen comments the contractors that may have felt comfortable, or have put their guard down that, you know, that intended bias, or implied bias towards a certain type of

contractor or unknown contractor ... Primarily race and gender... race would be the overwhelming bias, closely followed by gender bias." [#20]

- A representative of a majority-owned transit services company stated, "[The] government [is] behind [the] times; promote minority." [#AV13]
- A representative of a woman-owned professional services company stated, "Barriers [include] being female." [#AV161]
- A representative of a Black American-owned goods and services company stated, "Tough for a minority-owned business to get work in the advertising sector. Contracts go to 'good ole boys' club. Agencies need to reach out to minority owned business[es]." [#AV197]

**8. MBE/WBE/DBE fronts or fraud.** Three business owners and managers shared their experience with MBE/WBE/DBEs fronts or frauds [#1, #2, #WT1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I know there's tons of fraud DBEs out there. I understand why they're doing their audits and why they're going [out] and checking people. I get it and I agree with it. ... The DBEs that are real ... they need to make that known." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "You hear when I talk to other people like, well, they're just a figurehead and you're like, yeah, they're not licensed or, you know what I'm saying?" [#2]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I was once asked by a contractor to purchase material from another non-DBE supplier at a higher price than what we had quoted them for a job. It appeared that the contractor bought the material first from another supplier at the higher price. [I] realized they had committed to purchasing it from my company at a lower price at bid time. The job site staff purchased it from their 'guy' at a much higher price than our bid day quote and then wanted us to 'run the paperwork thru our company' in order to not violate the DBE commitment. Question: Why would a contractor purchase material at a higher price from a non-DBE company? Answer: 'Old Boys Club'." [#WT1]

**9. False reporting of MBE/WBE/DBE participation.** Six business owners and managers shared their experiences with the "Good Faith Efforts" programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith Efforts programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals [#1, #2, #5, #6, #7, #12]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I got a call from an agency. ... and they asked me all kind of questions [like] 'did you give so and so quote with this company' and that's my first and only experience I had [were I] was like 'what are you talking about? No, I didn't quote this project and I never talked to this person.' ... That was my first thought of 'Oh my God, that's he listed me.'" [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I had experience not with Caltrans, but with high-speed rail where I was on a couple teams and never got any work, which there's never any guarantee. But I don't think they were

held accountable. I don't really think there was effort. We were put on the contract to show that they had a DBE or something like that, but they didn't use this or utilize this in a way that was beneficial to them. A lot of times you spent more time going, 'oh, that's not even near here or they're not even really talking about the same services that we offer.' So, it's nice if it's published, so you can decide whether it's applicable to you versus having to wave through, like, because I'm certified. I get emails all the time. Are you bidding on this project? And then I gotta sit there and look to see if there's even a survey component, you know? And then I'm like, no. Well, that was 15 minutes just to read because they didn't bother to read before. They just said and send it out. ... To just check a box doesn't add value. What adds value is actually engaging ... Diversity and encouraging next generation of diversity so people can see what's available." [#2]

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "There are superintendents, they're out there in the field and they're kind of like bringing in some subcontractors through the back door. And they're not getting, you know, they're not having to adhere to the rules and regulations like we heart with the contract. So, it's a bit unfair." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "I guess each job is different. Sometimes they have mandatory goals and sometimes good faith effort work. So, contractors don't have to list the DBE as long as they follow all the good faith efforts. ... the good faith effort versus like mandatory goals, it was just a good faith effort. Then the contractors don't care about actually working with the business like ours. ... They're just, they'll just do the paperwork to do the good faith effort. If it's a mandatory goal, then most contractors are serious about meeting it, but some still aren't. ... This happens a lot the last couple of years to us, but at a recent one we just did. I think 2nd, 3rd and 4th place listed us, but first place did not. This was a RCTC project with Caltrans. It's Caltrans, administered Caltrans plans and specs. First place did not meet the goal. But I think there's still going to be awarded just because they were \$20 million lower than second place. So, it's a big cut for the owner. When they don't always take it seriously, some contractors, and it doesn't matter. ... Make major goals. Don't even allow a good faith effort and always just have a mandatory DBE goal. ... I think originally the good faith effort was out there just in case or people were unclear if the DBE goal could be met. ... And I think from being in the industry, I mean I'm seeing it being met." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "The general contractors they have ways to get around them. I call it fake good fake efforts. Yeah, I call it good fake efforts because they'll send us request for request for proposals. And we'll try to reply back to them, and they don't even respond. So, I don't know if they're checking a box off saying that they did try to reach out. ... [Being a] DBE on nobody really wants to work with you. In a sense, they just doing that because it's a requirement above ... I guess holding folks accountable when they don't meet, meet the goal, like really accountable like you cannot be at on a job for like a year." [#7]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "Sometimes a prime contractor will put us in the bid as a DBE subcontractor and then they're awarded the bid and they choose somebody else, they kick us out, we call it 'bait-and-switch' and they go with one of their friends or they go with I

don't know somebody that they feel more comfortable with. They just used us. ... It's happened many times. So, you know when we go into a bid relationship with a prime, we always, not always, but a lot of times I will just remind them that if you are awarded the bid, we expect them to use us for the contract. ... We need pressure from the agencies, the government agencies that are either giving the prime federal money or supporting them in some way or awarding the prime the contract to begin with. that they insist upon and actually police the situation to where all of the subcontractors that are listed in the bid are utilized. So, I have made that point to agencies, government agencies, 'If you're receiving federal money because of us being in that bid and you've awarded that bid to a prime you know use your hammer, use it effectively to make sure that they use us.' ... We're kind of, you know we're kind of at a disadvantage. We can't yell and scream too much, but certainly the agency that's awarded the contract can and should demand that we be used. ... A lot of times I don't get copies of the contracts so I don't know if we were put in first of all to the bid, second of all, if they did, they were awarded the bid how come I didn't copy of the contract you know on record so that I can say, 'Hey, you know we're in there' and go back. I have some argument, something to stand on. A lot of times we don't know. We just assume that we're in the bid and then we find out, 'Yeah, the prime got the bid. They were awarded the bid.' 'Okay, great, were we in there?' Then I have to kind of backtrack through the business development group and everybody else, 'Yeah, you were put in the bid.' 'Okay, where's the order,' you know? What happened? Then that's where you get ghosted. 'Well, you know we don't know.' So that happens too many times actually." [#12]

**10. Other forms of discrimination against minorities or women.** Six interviewees discussed various factors that affect entrance and advancement in the industry [#1, #2, #11, #17, #19, #20]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I have never had any discrimination because I'm a woman or Mexican Indian woman, female. No discrimination. And I'm not even aware of anyone in my industry. ... I'm sure it's out there. Oh my God, I'm sure it's out there, but ... I haven't had to worry about that." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I still find myself when we go into a meeting, if I don't think to put my hand out to shake hands, I wasn't taught to do that. Guys will go around shaking hands and I feel like I get left out because I don't step up to the plate and or they don't feel comfortable with it either. Everyone's afraid of the elephant in the room, so doesn't get addressed. So, it becomes just an awkward thing, or you get used to it. So, that's just [why] I [have] never done it. So, because I don't shake a lot of hands, it doesn't become a habit for me. So, I really do think gender plays into it. ... I don't think it should be an excuse, and I don't like playing that card, but I think you're not being realistic if you're not acknowledging." [#2]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "If anything, I had it and I don't know if it's considered based on race, [but] it was more of my age, I would get in certain facilities. At the very beginning, because I was young, I was 18 when I had started working with all these engines [with] my brother-in-law, I know he had taught me a lot. That wasn't [because] engines [were] his specialty, engines [were] my



specialty in that sense. They were called to go do these particular jobs, and when I would show up, some of the guys would be like, 'Well, what are you doing here?' Like, well I'm here to do let's say a particular engine job. They were like 'Why did they send you?' And well because that's what they sent me to do, so then now in this particular case, a guy called [name] tells his boss, 'Do you know I don't know Spanish?' But he called me a mocoso [brat or punk] ... [and said], 'He's not going to do that job, don't tell me he's going to do it.' ... He [could not] grasp that I was going to do that particular job. At that time, I think I was like 18, 19, and he was like in his mid-30s I think at the time. That's why when he had brought that up, it was just said the thing about my age, he was doubting what I knew because of my age." [#11]

- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "I'm not quite sure I feel anything toward like or felt anything in the way of being black, or in this industry, not necessarily. But I tell you this, you go to the conferences, it's like we are a rarity. Right, if there's a room of a 1,000 people, there's probably like a handful of us that are in the audience at a janitorial conference, or something like that. So, I do see that it's not as common as I would have thought it would have been to be black in this particular industry. But I guess I'm seeing that more and more, the more I get involved into the industry and I attend some of those things." [#17]
- The Black American owner of a transit company stated, "I'm not quite sure what, for example in 2020 when I filed to become certified as a BLS company. Our county regulations state that they have 30 days to provide an answer: yes or no. It took them 6 months before I heard from them. I sent an email every Friday. Never got a response. It wasn't until my partner went down to the EMS office and pound the door and said 'Hey, what the hell is going on?' The person she met with said 'Oh! we found a couple of things wrong with your application. We'll send you an email and you guys just address that.' So, we did. We addressed the issues, gave them a solution to it, resubmitted and 6 months later still hadn't heard from them. I finally sent an email and said 'Look, we're going to start operations in January. It's been a year we haven't heard from you guys. What's going with our application?' Suddenly, I got this two-page laundry list of everything they could think of that was wrong with the company and said we're denying your application. That was it. Haven't heard, gotten any responses since, and so they violated their own policy. ... There are two other companies here that were doing the same type of work already that I wish to get into and speaking with their owners, when they applied, they were assigned an agent from the county EMS department to help them through the application process, and they're up and running in less than 5 months. So, there's obviously an issue between myself and the EMS department. I'm not sure what that issue is." [#19]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Younger in my career, yes, and I can't, in all fairness, I can't see that I'm paying attention to it very much anymore. Maybe just because I can't hear very well anymore, so I don't know if anybody is saying stuff behind my back, but it, it doesn't seem to affect me personally as it did professionally in my thirties." [#20]

## J. Insights Regarding Business Assistance Programs

Business owners and managers were asked about their views of potential race- and gender-neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

1. Awareness of programs;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;
5. Joint venture relationships;
6. Financing assistance;
7. Bonding assistance;
8. Assistance in obtaining business insurance;
9. Information on public agency contracting procedures and bidding opportunities;
10. Pre-bid conferences;
11. Other types of agency outreach;
12. Streamlining/simplification of bidding procedures;
13. Unbundling contracts;
14. Price or evaluation preferences for small businesses;
15. Mandatory subcontracting minimums;
16. Small business subcontracting goals; and
17. Formal complaint/grievance procedures.

**1. Awareness of programs.** Eight business owners discussed various programs and race- and gender-neutral programs they have experienced. Multiple business owners were unaware of any available programs for small business assistance [#1, #2, #3, #5, #9, #13, #19, #AV]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I know of outreach programs, but not necessarily for what I do. ... I am aware of them. I don't know how often they happen." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "If you're a small business, you wouldn't have a clue how to do this, so Caltrans has a CalMentor program which has some great things going for it. I went through that program; I learned a lot. ... I do think that program has a lot of merit to it and who I was paired with was a great company because anytime I needed something I was like, I don't know what to do and they're like, OK, here, here's an example. And if I filled it out, I said, could you look at this before I submit it because we had to estimate before we did our work. ... We had to

spend time putting together those cost proposals. So, I think without a mentor of some sort, it would be very hard to get in and put together the type of proposal that they're worth looking for, for the RFP's. I went through the Small Business Administration trying to get information even though the business is already established, and I think they have some really good stuff, but I think it's very broad. And it's hard when you don't know anything to try to pencil that down to get it to apply to your case or your situation on how you put stuff together." [#2]

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Like the SBA has [programs] and I've been to a few of those. Many years ago, I met a professor at Fresno State University in Fresno State, he helped me. He was my mentor. I got to know him personally, would go up to his office at the university's second floor, have cup of coffee with him. And we talk about marketing. He helped me. He generally really, really helped me. But finding anybody else? Good luck." [#3]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "We were the product of an SBA loan early in the early years and they can do that. ... Everyone gets really excited to get an SBA loan, but they don't understand that they're gonna collateralize everything, including your first child. So, then it could handcuff you so that if you needed to do additional like a line of credit, if you're already all your assets or your equipment is sucked up by, you know, by an SBA loan. ... That's a real key. You know understand what you're getting into. ... There are resources, there's plenty of those out there, you know who are wanting to lend you money. But again, you want them to be understand that the higher rates or you know if they just had some key points that they would point out to do ... The city of Los Angeles has a bonding assistance program where if in like in our case you know we had too many projects and we still need a little boost on a on a Metro project and they came in, it's the Los Angeles Bonding assistance program and that was really, really helpful." [#5]
- A representative from a WBE- and DBE-certified goods and services company stated, "I've done a lot of workshops and you know going through with all the small business, there's a lot of things that California provides. Different consultant companies provide the woman-owned small business that assisted us initially in getting the certifications. They put us through with a lot of different entities. So, like there's a Small Business unit at Cal State Bakersfield here, which was very, very helpful. When COVID hit, because they would have a weekly meeting on Wednesdays that I sat on there for almost 27 weeks of calls every week and they are the ones that, with everything all the new news that would come out, they would have it and so it would behoove anybody who had a small business to be on those calls, because we learned about the payroll protection program, the EIDL, you know the requirements for this paid sick leave, it was very, very helpful. So, we always leaned on any workshop." [#9]
- The owner of a WBE- and SB-certified professional services company stated, "They [Caltrans] do a decent job with having different summits and this and that. I know that they had, with the small business - I don't know what the name of it was. But the Small Business Association or something like that had a training. And I went through the training years ago to try and get these steps ready. But what's missing is, I think, some type of entity, if it's not an entity for all of California or each district or whatever, but let's say Caltrans has a

department where that's all they do, is engage with businesses that want to do business with them and takes them and introduces them to the right people and say maybe there's a summit once a month or something where they can meet with people that might be a good fit for them." [#13]

- The Black American owner of a transit company stated, "I was working with an SBA group here and really didn't get a whole lot of traction on that. So, the SBA group I was working with basically, you know, ask if there's any loans, any grants, they couldn't assist me with what I wanted to do. I don't think they really understood the type of business I was trying, I'm trying to start, and so that kind of fizzled out more or less." [#19]
- A representative of a Hispanic American-owned transit services company stated, "Access to resources/programs [about] how to expand, without it being out of pocket? Just have resources where travel is needed, where do we go?" [#AV33]

**2. Technical assistance and support services.** Four business owners and managers discussed the effect technical assistance and support services might have for small and disadvantaged businesses [#1, #2, #5, #17]. Comments included:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Maybe classes that can help your employees understand more about the CUF [Commercially Useful Function] and federal funding." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "I think training would be [helpful], but circling back around to if you're not already doing it, it's not in your overhead rate. Even with training, I should be able to bill for it. And so, if I'm not able to bill for it, it's gonna come out of my overhead and then it's not captured in my overhead. So, for example they [Caltrans] say, 'well, you invoice all your other clients.' You're like, 'yeah, but not to this level or degree', right. So, it's a requirement specific to Caltrans. So, I should be able to invoice for that item and training would be helpful. I don't remember seeing a training video or like an instructions sheet. ... I think mainly being able to charge for what you have to do. To prepare it is more important to me than instructions, because if they don't want me to build for some much, then they should communicate clearly how to do it and I won't have to bill them so much for doing it." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "How to read your insurance specifics and these are just, you know things that come find out my head. How do you read your profit loss? That can come down the rate but to bid a job, what do you need to look for? And that could be like [the] 1.1 module, and the next module is understanding the labor the compliance requirements and you know specifically layout the forms because everyone uses the same forms. ... Initially getting into a program if this disparity [study] is looking at how to get more DBEs or smaller companies involved you have them an introduction on what the requirements are and the key items we discussed, [it] could be specific modules that would help them." [#5]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "Recently [we] started to work with a person who, you know, will procure government contracts for us, or help us to procure government contracts. We, we just started working together last month and she's identifying opportunities for us, and so

I've learned from her marketing to government agencies and, or larger corporations, is a lot different than what we've originally been doing." [#17]

**3. On-the-job training programs.** Six business owners and managers shared thoughts on-the-job training programs. Support varied across industries [#1, #2, #3, #11, #14, #20]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I think on the job training would help, yes. ... Well, I think they would start out by. Letting all small business DBE veterans, whoever certification they're getting, let them know that this outlet is available to you." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "It's hard just or somebody in and without some experience and training, because that's a hoop that changes too, between change from since I started in the last decade, from paper to electronic submittal. ... I wouldn't be a surveyor if Caltrans hadn't had a summer intern. Program where I could actually try surveying and like[d] it." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Not at all. You can't just throw 12 cans of worms at a guy. ... What do you think of these guys? You really have to work with these people to find out number one, if they're capable, and number 2, if they're interested enough to learn about what you honestly do for a living and learn about the product that you are asking them to market for you. It's almost... I haven't had any luck, let's put it that way." [#3]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "We pay, we help out, they get raises and they take certain courses. If they get certain licenses, class A, class B, we pay extra for that. But you don't always have that. Well, you can offer that up to let's say, a young guy, for example one of the young guys that I had, and you offer these things and also what if then they have to go to school. Like yes, I will, I'll think about it, compared to somebody that's a little bit older, so they know where you want to take this course if you have the money. Oh, yeah, you know what change up my schedule so I accommodate, so I could go to school and work. That's the difference that you'll get from a person, not really from the industry because there's plenty of places to learn. Especially on the south side, I think [school name] is a good school for our industry, and then there's a LA Trade Tech. But there are options, it's up to the person if they want to go that route." [#11]
- The owner of a transit company stated, "Our broker requests a lot of [certifications for the] driver, like CPR, First Aid Certificate, Wheelchair Pass, all of those certificates. So, the training part is hard on its own, too, at the same time. ... They do the training with one of the dispatchers. It's all licensed certificates. So, they do all the certificates in the office, all the training here, and as soon as they pass, we send the certificate to the broker to ask them to assist them. But I wish there was a training, like a training program they can join, they can do all this on time. It's even expensive, providing with all this certificate, it costs a lot of money." [#14]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "Given that we have collective bargaining agreements with all our trades unions, that portion of training, technical things, it falls on to

the union. So, the initial training is given by the unions, and from there, we try to acclimate them to working in the field with regards to budgets and deadlines, and make sure that they understand their nuances of how we perform and how we like to do things, ... and so that's when the top shelf superintendent foremen people come into play. They're there to give onsite training, and if they're training more than they are actually building things, it becomes a hinderance, and so we can't bring in too many people at once. We have to add them sparingly and appropriately when we have opportunities for them to excel, but that comes with carpenters, laborers, operating engineers, cement masons. So, all these different unions have different levels of understanding of how to build things, and so we do our best." [#20]

**4. Mentor/protégé relationships.** Five business owners and managers discussed mentor/protégé relationships for small and disadvantaged businesses or mentioned their participation in unofficial mentoring relationships with other firms [#1, #2, #3, #5, #7]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Oh! Yes, definitely." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "If you're a small business, you wouldn't have a clue how to do this, so Caltrans has a CalMentor program which has some great things going for it. I went through that program; I learned a lot. ... I do think that program has a lot of merit to it and who I was paired with was a great company because anytime I needed something I was like, I don't know what to do and they're like, OK, here's an example. And if I filled it out, I said 'Could you look at this before I submit it? Because we had to estimate before we did our work.' Even though ... we had to spend time putting together those cost proposals. So, I think without a mentor of some sort, it would be very hard to get in and put together the type of proposal that they're worth looking for the RFP's." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Like the SBA has [programs] and I've been to a few of those. Many years ago, I met a professor at Fresno State University in Fresno State, and he helped me. He was my mentor. I got to know him personally, would go up to his office at the university's second floor, [and] had a cup of coffee with him. And we talk[ed] about marketing. He helped me. He generally really helped me. But finding anybody else? Good luck." [#3]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "I think a mentor protege program is fine [for] the smaller contractors. You're going to need some very specific training and I went through the small businesses program for Goldman Sachs, and we had everything was done through modules. And so, I would partner, I mean I would mirror that model where you have the module on how to read your contract maybe, [and] ... how to read your insurance specific and these are just things that come find out my head. How do you read your profit loss that can come down the rate but to bid a job and what do you need to look for and that could be like 1-1 module. The next module is understanding the labor, the compliance requirements and specifically layout the forms because everyone uses the same forms. There's lack of consistency in the industry." [#5]



- The Black American owner of a CBE-, DBE-, MBE-, WBE-, and LGBTBE-certified construction company stated, "I have a mentor who owns a construction company, a concrete company and a bunch of other friends who are in contracting, whether it is electrical, demolition, painting and whatnot. Mentor protege programs that are actually being tracked and ensuring that general contractors are actually sitting down with a small business prior to doing work. No work really has to be done, but just getting to know because one thing that I do is I want to get to know a general contractor and how they operate prior to doing work with them. So, I know what to look forward to. ... Am I going to have to learn more on admin or it is more field stuff because you know every general kind is different?" [#7]

**5. Joint venture relationships.** Three business owners and managers shared thoughts about joint venture relationships with regard to small and disadvantaged businesses or shared their experiences with joint ventures [#1, #2, #17]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Yeah, I think that would be very useful." [#1]
- The owner of a WBE-, Micro-SB, and UDDBE-certified professional services company stated, "I think having teams is good and that is a way to get the smaller ones in, but when they still only get a very small chunk and they're not involved in all the phases, it's really hard to make the jump to be the prime on the contract. So, to have a smaller contract let[s] you get your feet wet. It's not the best term because it means you're might not be up to par, but to do it the first time, a smaller contract would really open doors and provide opportunities." [#2]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "I have not run into any opportunities to partner up and collaborate when I heavily was attending the Metro meetings, and finding out about opportunities in their board meetings, and stuff like that. It really did feel like everyone was like competing for the same thing as opposed to trying to link up." [#17]

**6. Financing assistance.** Five business owners and managers discussed potential financing assistance and its effects for small and disadvantaged businesses [#2, #14, #17, #20, #AV]. For example:

- The owner of a WBE-, Micro-SB, and UDDBE-certified professional services company stated, "I think the [way] to help with the finance would be definitely a prompt payment. ... Because then you could count on it for making strokes on any loans or anything that you had going. They would reduce the invoice, so they pay you less, but they pay it within like 2 weeks. And I want to say it was like a percent or two less for the quick turn around and that makes a huge difference. Like I said for cash flow." [#2]
- The owner of a transit company stated, "If I have my really good financial support ... a little bit of help, but ... a contract, because you cannot apply for any contracts until you have all your paperwork is ready, like they want you to have the insurance, everything, even though they will not sign with you until they get three or four months of process. So, you are responsible to still pay the insurance, still pay the MCS, still pay all the service, even if you don't have a contract, which has really affected me. I opened in 2019, and I didn't start

working until February 2020. So, I was responsible to pay insurance, car payments, MCS during a whole year, and I'm not getting any benefit. They don't care if you are working or not, you are still responsible to pay for the medallion number, and for the permit." [#14]

- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "When I started my business, I literally was doing it bootstrap. I had no capital. The thing that I saved, and a lot of what I had, a lot of it was a lot of sweat equity in the beginning, just looking at how to do the business, and how it ran, and all that good stuff. And then, once the pandemic hit and we were able to acquire the EDIL loan, but we also got, we didn't mention, we also received a bunch of grants and a lot of the grants weren't necessarily from the pandemic per se, but more or less from the civil unrest that was happening in the country. And we were awarded a significant amount of grants as well, and so I would say having that capital or getting that capital was literally like a game changer, like I didn't even know what was possible or what you could do given that you had capital and having received it, and stewarding it and figuring out like what are the best things to do with the capital to grow the business. It helped give me a lot more ability to relax and be creative. And, also, like do some things that I wouldn't necessarily or normally do which were very useful for the business. Is there anything else in that? Yeah, and now I mean I guess the saying goes like 'It takes money to make money', I didn't really get it until you like have something and it's like, oh, ok, got it now. Everybody wants to give you something because they think you have something. So yeah, now, you know, we're continuing to go after grants for capital and it is easier. I mean, I get a notice, 2 or 3 or 4 notices every day about we'll give you a loan for \$250,000 or whatever. So, yeah, it's more accessible now that we have some cash flow." [#17]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "We were given a road map to be successful to apply for and receive a substantial amount of credit from my community bank within three years after having three years of financials. It was a road map that was given to us by the bank, we followed the road map, and in our 4th year we were able to secure our first line of credit which was about half a million dollars." [#20]
- A representative of a majority-owned transit services company stated, "It's really hard in California. Gas is expensive, registration is very hard, and expenses can go up to \$900, types of vehicles and high tax charges. [California] is charging more for commercial fees, insurance [is] high, also going inside LAX Airport is a hassle. The city is charging us to drive on their freeways. During the pandemic the government gave us \$15,000, [which] was not much because we have big expenses." [#AV34]

**7. Bonding assistance.** Two business owners and managers shared thoughts regarding bonding assistance [#5, #6]. For example:

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "The city of Los Angeles has a bonding assistance program where if we had too many projects and we still need a little boost on a Metro project or something. The Los Angeles Bonding assistance program was really, really helpful." [#5]

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "We were on [a project] and the agency was flexible with us, so we never really hit a hard barrier with that. So, we were able to grow, meaning they only you know, they only made us bond what we could bond. ... And [they] slowly gave us contracts that needed bonding so we could grow it to the amount it is now." [#6]

**8. Assistance in obtaining business insurance.** Two business owners and managers discussed assistance in obtaining business insurance [#9, #11]. For example:

- A representative from a WBE- and DBE-certified goods and services company stated, "To assist businesses it's going to be undoing what the government did five or six years ago. But I don't think it's going to happen." [#9]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "I think it's doing the proper research on which insurance helps you particularly the best, cause there's like hundreds of insurances that're always going to be what's best for your company." [#11]

**9. Information on public agency contracting procedures and bidding opportunities.** Four business owners and managers provided their thoughts on the need for and accessibility of information from public agencies regarding contracting procedures and bidding opportunities [#11, #17, #AV]. For example:

- The Hispanic American owner of an MBE-certified goods and services firm stated, "Because we would go like knock on doors and I would see, like [an employee at] Caltrans or somewhere so we would go, and we will leave our business cards. But they were telling me you guys have to bid, and I was thinking how do you bid? How do you go through those steps? Like do you have to talk to the right person? And then that's when we started kind of getting to know those women more. And I actually said no, you got to put in your bid, you got to start applying. And that's when we started, a little bit of a learning curve, growing because we would go there physically, and then suddenly you guys got a bid. It's just not that simple. Then figuring out a way how to start putting in those bids, that's when I started catching up." [#11]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "I find it very challenging to navigate all of it without really knowing what it is, you know, like from the onset. Like a few years ago, when I got the Metro thing was because I was really focused in on Metro. I would go and just hang out and be in Metro meetings and stuff like that, and then once we did get the contract with Metro, it's like, for a small business owner to have multiple contracts with the government and, like to sustain that level of documentation, and you know, documentation that they require for it is something, like I had known what was involved. I would have also put that into the pricing. Does that make sense?" [#17]
- A representative of a Black American-owned goods and services company stated, "There is very little support for small companies in California that are minority owned. There is not enough guidance for bidding for small companies. Small companies have to wait [for] years. Non-minorities are able to get more assistance. California taxes are ridiculous. There is no

guidance. I'm already in debt. There should be waiver on taxes for small businesses."  
[#AV157]

- A representative of a majority-owned goods and services company stated, "I think the company wants to do business with government public sectors, but we do not know how. It is basically more difficult now to start and it has become more high tech, which is a good thing, but we need resources for that." [#AV185]

**10. Pre-bid conferences.** Three business owners and managers shared thoughts about pre-bid conferences where subs and primes meet, noting the potential to network and develop relationships with project managers and primes [#3, #11, #12]. For example:

- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Yes, they can be [helpful]." [#3]
- The Hispanic American owner of an MBE-certified goods and services firm stated, "We do, we go over. We try to analyze exactly who else we see that's in the industry already. Let's say, if I go to a certain [meeting for a contract] I want to bid. A lot of times with these other companies, when you get there, there's already somebody working there. What my strategy has been is just investigating these companies that they use already, and what their hourly rates are. Because I can see, he just gave me a quote on this or put me on that. And then I know to stay within those parameters. I set up kind of just going in there blindly, and then I got to be somewhat competitive. That's why it has been our strategy now, before we learnt, we will just throw in our bid and see how it goes. But it wasn't strategizing, it wasn't doing enough research." [#11]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "I attend them occasionally if they're local, but they're really not very helpful. It's really more for me to establish a relationship with the potential customer. It's really not finding out any more information, most of what they tell me I already know." [#12]

**11. Other types of agency outreach.** Three business owners and managers explored other types of agency outreach, such as vendor fairs or other networking events, which could be helpful for small and disadvantaged businesses. Many shared their experiences with Caltrans' outreach efforts [#2, #3, #6]. For example:

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Vendor fairs are helpful if you're trying to develop a team with other private firms. ... I don't know how much vendors have fairs help working directly with Caltrans." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "Yeah, they're [vendor fairs] good. I'd like to see more of them, because then we're talking to many of the people that you're going to end up working with. We don't have enough of those." [#3]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Programs like the meet the prime programs, that's what got us started in the first place. So that was helpful." [#6]

**12. Streamlining/simplification of bidding procedures.** Two business owners and managers discussed streamlining/simplification of bidding procedures [#8, #9]. For example:

- The Hispanic American owner of a DBE-, DVBE-, SB-, and MBE-certified professional services company stated, "Make the responsibilities and the insurance requirements proportionate to your role, [it] is going to be, what, 1/2? Focus on all of the documents that are required from the prime and do a conscious separation, if you will, of those that really apply to a small subcontract. I mean, if you [are] already doing 3% of a contract, or 5% of a contract, why do you have to fill out 50- 60 different pages of documents? And when you were a small contractor and you're starting your business and you're trying to do the marketing and networking and run a business, run the financials and then you're staying up till 3:00 o'clock in the morning filling out forms that are have no impact on the decision maker. We're not going to be the determining factor." [#8]
- A representative from a WBE- and DBE-certified goods and services company stated, "I say it's not easy. It's not a barrier for me, because I know how to fill out all the paperwork, but there is a laundry list of papers every time they send in a quote. An RFQ you have to fill out [some sort of] Act and you've got to fill out their RFQ page, you got to fill out their Disabled Veteran page, you got to fill out their Recycled Content page. ...There are all these pages that have to be filled out in order just to submit, you know a quote, a request for quotes they send out to us and we do it you know. It's different for every single one of them and you have to do the same papers every single time, that they call today and want five tires, it's on this RFQ, you got to fill out all those and it can be anywhere from five to eight different forms. They call tomorrow they want another two tires. You fill out those same five to eight different forms." [#9]

**13. Unbundling contracts.** Four business owners and managers shared mixed thoughts on breaking up large contracts into smaller pieces. Many thought that it could be helpful for small and disadvantaged businesses, especially when creating subcontracting opportunities [#1, #2, #5, #17]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Yeah, I think that would be very useful." [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "Some smaller contracts that you can pursue [would be helpful]." [#2]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "We should have our own items. But what they do they'll put our item in like heavy construction and it'll include socketing. Which is what we do. And then maybe another subcontractor's gonna go in there and pull out the concrete. And then another subcontractor's gotta backfill it and another one has to pour the concrete back in it and then then the item is done and then they can pay for it. So here we are. We've done the work, the initial work and for the convenience of the contractor, they'll have us do 20,000 miles. And which is like maybe a \$300,000 bill that we do, and this goes back to April, but we can't get paid, and they won't submit our work until all their other subcontractors have done their work so. We might not get paid for 120 days. We've asked in our meetings before; I've asked that our work be separated. You know that each subcontract is doing their work,

have their own item number, and not be bulked into one whole one so that it can delay them." [#5]

- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "I think a lot of these agencies tend to put janitorial in with the larger scope as opposed to separating it out from, you know, like the 125-page RFP to say look, we need this service and we're, you know, like we also need you. They tend to put them - they bundle it up and, and I feel like ... those larger companies do go after the larger scope, like the big scope of the project, they're looking to save money and pinch pennies and make sure they get the best profit. And so, when it comes down to, you know, the janitorial piece, or whatever, they are like well, we can only go this much, and in reality, it's not. It's not necessarily advantageous for the smaller companies to even subcontract with them, because they're pinching your pennies for the larger bid." [#17]

**14. Price or evaluation preferences for small businesses.** Two business owners and managers discussed their thoughts regarding price or evaluation preferences for small and local businesses [#6, #7]. For example:

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "I have seen other agencies where they have the general contractor get a better score on their proposal if they use more small business, so [that] would help too." [#6]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "There's been a lot of jobs that I feel we should have gotten because we're DBE. But we were we lost them by \$2000. Or the price got dropped by the ER competitor by \$100,000 ... Because when I do get Caltrans work just to get the job, I'm cutting overhead. I'm cutting profit." [#7]

**15. Mandatory subcontracting minimums.** Two business owners and managers shared their thoughts on mandatory subcontracting minimums [#4, #6]. For example:

- The Black American owner of a DBE-certified professional services company stated, "All of that would be progressive for Caltrans." [#4]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Absolutely, yeah. Like mandatory goals ... if they say at 20% DBE goal, you know, make it mandatory." [#6]

**16. Small business subcontracting goals.** Three business owners and managers mentioned small business subcontracting goals [#6, #9, #17]. For example:

- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "Make major goals. Don't even allow a good faith effort and always just have a mandatory DBE goal." [#6]
- A representative from a WBE- and DBE-certified goods and services company stated, "Another thing also is you know before these big contracts for the state, you have the offices where all these people are working on the high-speed rail. Well, before they could use, 'Hey,



we hired the cleaning lady to clean our office. She's a small business we could use that as part of the percentage.' Well, they blocked them from doing that kind of stuff. So, in the same sense that's one of us is because we're not out doing the work on the project, but we are working on the vehicles that are working on the project. You know what I'm saying?" [#9]

- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "How I feel it's presented, or that I hear it being presented as a whole when I go to, you know, like LAWA meetings or Metro meeting or whatever, it's like, yeah to get 20% of this, you have to have 20% and we're making sure you have, you know, these smaller businesses in tow, but even but that's their incentive, they don't have anything that's against them if they don't do it, or at least I haven't heard of it or seen it." [#17]

**17. Formal complaint/grievance procedures.** Seven business owners and managers discussed their experiences with and thoughts on if formal complaint and grievance procedures are helpful for small and disadvantaged businesses. Most firms stressed the need for confidentiality in these procedures [#1, #2, #5, #6, #10, #12, #WT1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "I'm trying to do it right now and I'm just sitting on the floor because I don't know what to do with it. Formal complaints for people like us, DBE, small business. A very, very, very big barrier. ... I haven't complained. I'd like to file ... I have it all filled out. It's ready to go, but apparently, I have to mail my backup documents and there's hundreds and hundreds and hundreds and hundreds of pages from attorneys and back and forth documents. And my question is, do I really have to mail all of this? ... How am I going to even do that? Do I stick it on a drive and stick that in the mail again? I have nobody to ask. ... I have no idea what I'm supposed to do with this huge complaint that I have other than supposedly having to mail it. ... Outreach program for complaints for try to get a hearing with Caltrans [would be helpful]. ... Someone you can talk to, 'Hey! I have a complaint. Hey! it's 1000 pages. Do you really want me to copy 1,000 pages and mail them to you and assume it's not going to get lost in the mail?' Have someone write to tell you it's been received. You're not being ignored. We got it. We'll get back to you soon. My suggestion would be can we e-mail our formal complaints?" [#1]
- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "There's only a short window you can go back to recoup costs. So, then it was a matter of how much time do I want to spend trying to retrace that and ruin my relationship with them for the contract as opposed to just calling it water under the bridge and learning experience and moving forward. ... I'm going to say yes, because I asked Caltrans that I said how do I get information about this contract and the freedom of information. And nobody ever replied back to me. So, I think the information on how to file a formal complaint or where to go for information is not easily accessible or shared. Hierarchy is not the right word, but I don't know who [and] how they're laid out. So, in other words, I wouldn't know if I have a problem. Who's the appropriate person to express a complaint to even if you're not looking at formally filling something, just to be able to say, 'Hey! this doesn't seem right and take it to the next level'. ... just I wouldn't know where to go to get it." [#2]

- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "Prior to last year, they were anytime I would place a complaint, nothing happened. I mean zero nothing, nothing but this. Last year there [was] a group and I know that it was one man band. It was just one gal who I wrote [and] she called me, she said, 'I understand you brought [up] this problem.' She listened, and then she started, you know, working and it really has flourished into a whole department now. ... It was right after the FHWA audit. You know, they, I guess, failed miserably. And so, I think they've understood how." [#5]
- The Asian Pacific American owner of a WBE-, DBE-, LBE-, and 8(a)-certified construction company stated, "I wonder if a third party could be in charge, like require a third party to be in charge of that. Or have someone like a mediator [to] follow up. I guess the Caltrans channel job we had to go to the DRB. We won the DRB, and they still didn't pay us. It was just the calendar, that district level just did not want to pay, even though they lost everything. Eventually we got paid, but it was like 3 years down the road. So [maybe] there's like a third-party mediator to help push payment?" [#6]
- The Asian Pacific American owner of an MBE-, SDVOSB-, DVBE-, and SB-certified professional services company stated, "If you fight it, you know how people talk. They just don't get that company again. You have a bad mark at the VA, the government, if you have a bad mark then that's it. So, that's why I lost money. It's okay, I don't contradict with their own likings, I don't complain, otherwise they will put you a bad mark, which they do. The government has their ways of doing that and they rate you on their checklist, 'Okay, who's this guy? Who is this guy?' Okay, then they look on their secret file I guess and then they see your name, hey this is only like a wishy-washy guy, 50 percent, forget him. So, those are the kind of things that you have to avoid." [#10]
- A representative from a Hispanic American-owned, MBE-, SB-, and DBE-certified goods and services firm stated, "We're kind of at a disadvantage. We can't yell and scream too much, but certainly the agency that's awarded the contract can and should demand that we be used. They won't use us again; they won't use us. I mean we kind of hope that they'll use us, keep using us to attract bid offers, but you know if they're a big customer of ours we're not going to yell and scream too much about, because we'll lose them as a customer, even though we're not getting the support from them on the bids. So, we have to walk a tightrope there." [#12]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "I've learned that if I bring up prompt payment issues, I do so with the possibility of the prime/owner not using my business in the future and fear I may get a reputation as someone who complains. It feels like a double-edged sword in that you're damned if you speak up and you're doomed if you don't. I feel like some of them use my business as a bank. I've heard of many small business[es] going out of business for issues around prompt payment, or lack thereof." [#WT1]

## K. Insights Regarding Race- and Gender-based Measures

Business owners and representatives shared their experience with Caltrans' and other agencies certification, minority business programs, and small business programs and provided recommendations for making it more inclusive. For example:

1. Experience with Caltrans' programs;
2. Experience with the federal DBE program; and
3. Recommendations about race- and gender-based programs.

**1. Experience with Caltrans' programs.** Three business owners and representatives shared their experiences with Caltrans' programs [#1, #4, #20] For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "DBEs are being audited right now. Which is great. ... We're getting audited, but we have no answers. You can't just pick up the phone and call someone and go, 'Hey, someone asked me this question. Do you have the answer for it?' ... We don't have that outlet." [#1]
- The Black American owner of a DBE-certified professional services company stated, "Our firm ... served for many years the Caltrans in trying to bring a qualified and small businesses into their network. ... Caltrans' biggest barrier is itself and its red tape... whereas they spend ... pretty large amount of effort and expense to identify and approach small businesses, but they don't give them any work after requiring them to spend many man hours in certification, training and pursuit of ... opportunities." [#4]
- The Hispanic American owner of an MBE-, LBE-, Micro-SBE-, SB-, DBE-, and HubZone-certified construction company stated, "The original coordinator that I knew five years ago, he was constantly looking for new DBEs, small businesses that could start to do some of the smaller things. So, they were trying to proactively build capacity within their small business community. That's just District 4. It's real important to understand, District 4 is not like the other 11 districts. There's a diametrically different way of doing business at every single district. District 4 has always been at the cutting edge of inclusion and diversity." [#20]

**2. Experience with federal DBE program.** One business owner shared their experiences with the federal DBE program [#1] For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Is there a different program?" [#1]

**3. Recommendations about race- and gender-based programs.** Interviewees provided other suggestions to Caltrans about how to improve their programs for certified firms [#1, #2, #3, #4, #5, #7, #13, #14, #15, #17, #AV, #WT1]. For example:

- The Hispanic American woman owner of an SB- and DBE-certified goods and services company stated, "Biggest barrier and the biggest challenge right now. ... And even continuing my firm is answers. Having an outlet, having somebody out there to guide you to tell you right from wrong and tell you no, you shouldn't be doing this. Or yes, you do need to

do this or... Just an outlet, that's the biggest barrier right now is for someone like me, a small business who's been doing this for a while. We need an outlet. I'm not talking [about] 'just go on a website and get your answers'. That doesn't work. ... People that can help you and answer your questions on a day-to-day basis. You know how people go on a website and they'll there's a list of questions and answers? No, it has to be one-on-one better communication. Have a 1-800 DBE line. These general contractors and customers, they need to be aware if we're going to continue with the DBE program or veterans or small business ... there has to be a better line of communication for us to communicate to the generals and the customers... If you wanna use the DBE or minority participation on your project ... instead of again communication and clarity, you know, everyone's just speculating and running [saying], 'oh this person's a pass through' or 'this one does this' and 'this one does that' when nobody really knows. I like our DBE guy, but a barrier with our local DBE personnel is maybe them not having the full knowledge they should have. That when we do call them up and say, 'hey, can you do help me with this, or you heard of this, or you heard of this?' They don't necessarily have the knowledge of everything that they could possibly have their knowledge for. Does that make sense? I mean, I thank God my DBE person always answers the phone and he is my go-to person. But he doesn't have all the answers and maybe nobody really does when it comes to stuff like this, but ... Maybe more training for them. ... Maybe more training about the CUF [Commercially Useful Function]. It's too much room for interpretation of other people. You know, we all interpret it the way we want to interpret it, so it has to be better clarified. ... Just have everything out there for them to know that it's available. I just really think they need to be more supportive of their DBE programs. I really don't feel like the support is there. I feel like they need to have more knowledge. Train their employees, and not, you know, not one district does one way, and one district does it another. ... Just knowing the fact that they should take their DBE under their wing and guide them instead of punishing them, guide them to the next step" [#1]

- The owner of a WBE-, Micro-SB, and UDBE-certified professional services company stated, "There's huge advantages to numbers and quotas, but there's huge disadvantages because it really needs to be quality based and getting people in those positions who are qualified, which is more than just saying you need so many women- or minority-owned business, you have to actually help develop those businesses." [#2]
- The Black American owner of an MBE-, SB-, and DVBE-certified goods and services company stated, "I think [Caltrans] needs the people that are trying to help small businesses to be more involved... if they're trying to get them [Caltrans] to buy from the small company. That's very difficult. I've been certified for many years. I've been to many of Caltrans meetings only to hear this old duffer that's going to be retired in five years, say the same thing over and over and over, and he can really care less about helping you. And trying to find someone in the state that does not have that mentality is very difficult, almost nonexistent. I think the biggest thing would be, [if] say when the state of California hires that DBE liaison person, small business assistant or what do you want to call them, they should pick one out that they feel is going to do the best job, not just a job [or] a position that they're just passing through and holding for six months because you know he's going to go into another field. Don't waste small businesses' time with people who are not honest about wanting to help you." [#3]

- The Black American owner of a DBE-certified professional services company stated, "Caltrans has to begin to match up primes and subs to the point where a good enough portion of the subs in their network are getting work and therefore can encourage others to continue this high intensity marketing and administrative requirement Caltrans requires." [#4]
- The Hispanic American owner of a WBE-, SB-, and DBE-certified construction company stated, "On this task group when they're saying, where can we find more DBE's like you? Well, you know, this has taken 40 years for me to figure this out, and a lot of money and a lot of, you know, special consultants to do this. In order to enhance smaller DBEs, to get their feet wet, you have to provide them with very specific understanding of what getting into the DBE world for public works that Caltrans is gonna take and it's almost like a hand holding where... The compliance issues are so complicated, and they're not easily found. You know you can read the 1000-page specifications, but they're gonna say I need to work. I need to go out and do my work. Some of these people are husband and wives or families. ... They'll [a Caltrans person] may say 'Well, you know, get a certified payroll company to do it.' Payroll companies do not provide certified payroll the way Caltrans like your DIR. Your, your LCP tracker. Your if you're in San Diego, you're on Prism. You know all these different you know, third party compliance portals that you have to go to. They don't tell you when you're bidding on these jobs. ... Every DBE there's ever come to me, they're going like, you know, like just there's just no way. No way I can do this. And then when they have done it, they've hired someone. We had to literally go to their offices and show them how to fill out the forms and stuff ... I think before anybody even considers bidding on a Caltrans or public works [job] should really have some kind of training. So, they know full disclosure of what they're getting themselves into and it'll set them up for success. ... I would provide a workshop. This is how you do certified payroll for Caltrans. These are the different agencies. These are different portals that you need to go into, and this is how you do it. ... Get their feet wet and say, 'OK, this is, this is the training, these are the tutorials.' ... I think it's a faster way to get them integrated into to wanting to work on that, you know, small Caltrans projects that they're available for. ... Of course, they're gonna have to meet halfway by going down each point and following, you know, doing their due diligence to figure it out. But if you start giving him what to look for, then they can be successful. They can get the pitfalls that will harm them if they don't understand what they're getting into [out of the way]. ... They're gonna know what they need to do. It's gonna make the general contractors lives much easier. People will flood to the gates. I swear to God. If you just show them how to do it, not tell them how wonderful it is. But show them how to do it." [#5]
- The Black American owner of a CBE-, DBE-, MBE, WBE-, and LGBTBE-certified construction company stated, "I'm pretty sure Caltrans has some programs where they're teaching people how to do certified payroll cause that's a whole ... That's a learning curve as well. I'm not sure of the setup of other small businesses, but I would imagine we're limited on human capital in regard to administrative responsibilities. But being finding a way to be able to lessen that stress or that strain on us by providing a pathway or a roadway on how to do things. ... Of course, we're gonna learn the hard way. You get thrown into the lion's den and find for yourself. But if there's some extra programs that could be set in for that. ... Another thing I noticed that is when there are programs out there, they're not, they're not trade specific. I don't know how much it would cost to state of California or America to provide

programs that are trade specific or either tailor the whole billing and how Caltrans project is read, make it the same all the way across the board... To make those elements a lot better if you guys can hire somebody to come and work with me and you guys pay. It ultimately comes down to limited financing or limit limited capital and limited human capital. ... Maybe a training or workshops on Caltrans specs standards. You know what's expected for an inspection? Of course, we have to know the work prior to, but just, you know, training for just anybody that wants to learn about how Caltrans' 'Bible'. And this is we're going to go by these verses. And I mean not that we need it, but it's it would always be helpful. If they're not union, there should always be workshops, seminars, and trainings. Because there's no college that you can go to for this stuff [except] the school of hard knocks, but providing those on a regular basis, ensuring that when a when a job is awarded, ensuring that any non-union or union contractor, [is included]. Of course, we have to read through the contract and try to figure stuff out but recognizing when these when small businesses are getting awarded these projects have someone reach out to us and give us a class on how to manage, you know, certified payroll and dealing with unions and PLA's and all that good stuff. ... Metro does set aside where they only allow companies that make a certain dollar value to bid on those projects. That would make it better for me and my counter small businesses to compete against each other and not. ... Why did I get this certification if it doesn't assist with me getting or opening up opportunities? Cause if I'm bidding like I am a regular large business. Then there's no point of the whole program. So maybe more events as well to pair general contractors with small businesses, especially those that Caltrans has a gives a lot of work too." [#7]

- The owner of a WBE- and SB-certified professional services company stated, "They do a decent job with having different summits and this and that. I know that they had, with the small business - I don't know what the name of it was. But the Small Business Association or something like that had a training. And I went through the training years ago to [learn] how to get these steps ready. But what's missing is, I think, some type of entity - or if it's not an entity for all of California or each district or whatever, but even like, let's say Caltrans has a department where that's all they do, is engage with businesses that want to do business with them and takes them and introduces them to the right people. Maybe there's a summit once a month or something where they can meet with people that might be a good fit for them ... 'cause we're not allowed to contact these people, right? Once it goes on the portal and it's been put out to bid, you're not allowed to contact these people to make a personal connection. You have to go in and do the process, but you're not supposed to contact them. Well, if you're not able to get face time with these people or make a connection somehow before or after or outside of the window, because they don't either A., take meetings or B., there's no system put into place ... I'm just saying they need to implement a system. Because it's not fair that the same people keep getting awarded the same contracts. It's just not. We all live here. We all pay our taxes. We're all small businesses. And if we go through the proper steps that the government has asked us to do, then we should be getting some of these contracts, as well." [#13]
- The owner of a transit company stated, "They should have a financial support that supports them to buy vehicles, because I lost one of the contracts because they were requesting to buy [an] ambulance for them, not an emergency ambulance. That is really expensive, and they requested to buy multiple ones, and I couldn't provide it on time, so I lost it. I wish they



have someone we can contact them directly on if we have a portal we can access our trips, our payments or invoice, that's gonna save a lot of time and a lot of money for each part.” [#14]

- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "Keep women as part of the disadvantaged group. At different times, I think there's been a push to, and not a push, but like the way some maybe that the numbers were counted to [show that] kind of - the women are, like a higher percentage of participation than we experience.” [#15]
- The Black American owner of an MBE-, WOSB-, SB-, LBE-, and DBE-certified goods and services firm stated, "My experience with Metro, because that's the only one I have, but even doing that small contract with them, they had me on a prompt payment kind of schedule, and while it seemed like that would be great, it still was a 60 to 90 day process of getting paid and that's because you were a subcontractor, right. So they kinda had oversight of... their big contractor had to pay the smaller people for whatever within a timely manner, but, it was a lengthy process of getting payment for work, and I think that is a complete barrier for small business, or not, it doesn't even have to be a barrier, but it could be like a complete turn off, it's like we need our money. We need to pay people and pay the bills and at the time, I didn't have cash flow to float like that, and so it was very tight, which actually in turn kind of deterred me from saying, 'you know what, I'm gonna go after more'. So yeah, if there was grace for, or like a bank just for the small businesses under a certain amount of revenue per year that you know, all subcontractors, you know, something that was set up so that you can draw from [and] the corporations would have to pay into that bank. Once they were ready to pay, or whatever, that to me would make more sense than making the smaller businesses wait for their money.” [#17]
- A representative of a Black American-owned goods and services company stated, "There is very little support for small companies in California that are minority-owned. There is not enough guidance for bidding for small companies. Small companies have to wait for years. Non-minorities are able to get more assistance.” [#AV157]
- The owner of a WBE-, SB-, and DBE-certified goods and services company stated, "The DBE program is essential to protecting our access to the massive amount of public works projects. When I show up at a job site, face to face meeting, phone call or even written communication, I am first received as a woman, then appearance, then color, and eventually my knowledge and ability to solve a problem. If we don't even get the opportunity to participate, how do we ever make progress and break down years of stereotypes imposed on us by others and even ourselves? The DBE program is important and the entire industry benefits from women having access to this work.” [#WT1]

# **APPENDIX E.**

---

## **Availability Analysis Approach**

# APPENDIX E.

## Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of California businesses for the transit-related prime contracts and subcontracts the California Department of Transportation (Caltrans) and subrecipient local agencies award.<sup>1</sup> Federal courts—including the Ninth Circuit Court of Appeals—have approved BBC’s approach to measuring availability. In addition, federal regulations around person of color- (POC-) and woman-owned business programs recommend similar approaches to measuring availability. Appendix E expands on the information presented in Chapter 5 to further describe:

- A. Availability Data;
- B. Representative Businesses;
- C. Availability Survey Instrument;
- D. Survey Execution; and
- E. Additional Considerations.

### A. Availability Data

BBC partnered with Davis Research to conduct telephone and online surveys with thousands of business establishments throughout Caltrans’ *relevant geographic market area (RGMA)*, which BBC identified as the state of California. Business establishments Davis Research surveyed were businesses with locations in the RGMA that BBC identified as doing work in fields closely related to the types of transit-related contracts Caltrans and subrecipient local agencies awarded between October 1, 2017 and September 30, 2020 (i.e., the study period). BBC began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations.

As part of the survey effort, the study team attempted to contact 9,446 local business establishments that perform work relevant to Caltrans’ transit-related contracting. The study team was able to successfully contact 1,513 of those business establishments, 1,049 of which completed availability surveys.

### B. Representative Businesses

The objective of BBC’s availability approach was not to collect information about each and every business operating in the RGMA, but rather to collect information from a large, unbiased subset

---

<sup>1</sup> “Woman-owned businesses” refers to non-Hispanic white woman-owned businesses. Information and results for businesses owned by women of color are included along with their corresponding racial/ethnic groups.

of local businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of POC- and woman-owned businesses in an accurate, statistically valid manner. In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing transit services, professional services, construction, and goods and services work. Instead, BBC determined the types of work most relevant to Caltrans contracting by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure E-1 lists 8-digit work specialization codes within transit services, professional services, construction, and goods and services work most related to the relevant contract dollars Caltrans and subrecipient local agencies awarded during the study period and that BBC included as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure E-1.

### **C. Availability Survey Instrument**

BBC created an availability survey instrument to collect information from relevant business establishments located in the RGMA. As an example, the survey instrument the study team used with construction establishments is presented at the end of Appendix E. BBC modified the construction survey instrument slightly for use with establishments working in other industries to reflect terms more commonly used in those industries. (e.g., BBC substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying professional services establishments.)

**1. Survey structure.** The availability survey included 14 sections, and Davis Research attempted to cover all sections with each business establishment the firm successfully contacted.

**a. Identification of purpose.** The surveys began by identifying Caltrans as the survey sponsor and describing the purpose of the study. (e.g., “The California Department of Transportation is conducting a survey to develop a list of companies that have worked with or are interested in providing construction-related services to Caltrans and other local public agencies.”)

**b. Verification of correct business name.** The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information (see areas “X” and “Y” of the availability survey instrument).

**c. Verification of for-profit business status.** The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

**Figure E-1.**  
**Subindustries included in the availability analysis**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Transit Services</b>			
<b>Paratransit services</b>		<b>Transit operations</b>	
41199906	Vanpool operation	41110101	Bus line operations
47299901	Carpool/vanpool arrangement		
<b>Professional Services</b>			
<b>Advertising, marketing and public relations</b>		<b>Transportation planning and environmental services</b>	
73190100	Transit advertising services	87489905	Environmental consultant
73199902	Media buying service	87420410	Transportation consultant
		87480204	Traffic consultant
<b>IT and data services</b>			
73730101	Computer systems analysis and design		
<b>Construction</b>			
<b>Electrical equipment and supplies</b>		<b>Trucking, hauling and storage</b>	
36690206	Traffic signals, electric	42120000	Local trucking, without storage
50630504	Signaling equipment, electrical	42129905	Dump truck haulage
<b>Goods and Services</b>			
<b>Automobiles</b>		<b>Petroleum and petroleum products</b>	
50120208	Trucks, commercial	28690400	Fuels
50840608	Trucks, industrial		
<b>Cleaning and janitorial services</b>		<b>Security systems</b>	
73490102	Building maintenance, except repairs	50659903	Security control equipment and systems
<b>Communications equipment</b>		<b>Uniforms and apparel</b>	
57319907	Radios, two-way, citizens band, weather, short-wave, etc.	56990103	Work clothing
59990602	Communication equipment		
36639906	Mobile communication equipment	<b>Vehicle parts and supplies</b>	
<b>Computers and peripherals</b>		50149905	Truck tires and tubes
57340100	Computer peripheral equipment	<b>Vehicle repair services</b>	
		75320203	Truck painting and lettering
<b>Furniture</b>		75320400	Exterior repair services
50210100	Office and public building furniture	75429901	Carwash, automatic

**d. Confirmation of main lines of business.** Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B's work specialization codes were incorrect, businesses described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

**e. Locations and affiliations.** The surveyor asked business owners or managers if their businesses had other locations (Question A4). The study team also asked business owners or managers if their businesses were subsidiaries or affiliates of other businesses (Questions A5 and A6).

**f. Past bids or work with government agencies and private sector organizations.** The surveyor asked about bids and work on past contracts and procurements. Davis Research asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).

**g. Interest in future work.** The surveyor asked businesses about their interest in future work with Caltrans and other government agencies. Davis Research asked those questions in connection with both prime contracts and subcontracts (Questions B3 through B5).

**h. Geographic area.** The surveyor asked businesses where they perform work or serve customers in California (Questions C0 through C11).

**i. Largest contract.** The surveyor asked businesses about the value of the largest contract on which they had bid or had been awarded during the past five years. (Questions D1).

**j. Ownership.** The surveyor asked whether businesses were at least 51 percent owned and controlled by POCs or women (Questions E1 and E2). If businesses indicated they were POC-owned, they were also asked about the race/ethnicity of the business's owner (Question E3). The study team confirmed that information through several other data sources, including:

- State of California Unified Certification Program certification and ownership lists;
- Caltrans vendor data; and
- Information from other available certification directories and business lists.

**k. Employees.** The surveyor asked questions about businesses' size in terms of their employees across all locations (Questions F1 and F2).

**l. Business revenue.** The surveyor asked questions about businesses' size in terms of their revenues across all locations. (Questions F3 and F4).

**m. Potential barriers in the marketplace.** The surveyor asked an open-ended question concerning working with Caltrans and other local government agencies and general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).



**n. Contact information.** The survey concluded with questions about the participant’s name and position with the organization (Questions H1 through H3).

## **D. Survey Execution**

Davis Research conducted availability surveys in 2021 as part of the 2021 Caltrans Federal Highway Administration (FHWA) Disparity Study, which we integrated into the availability analysis for the 2022 Caltrans Federal Transit Administration Disparity Study. (BBC was the prime consultant on the 2021 Caltrans FHWA Disparity Study.) We only brought forward survey data from the 2021 Caltrans FHWA Disparity Study that pertained to California businesses that perform work in industries and subindustries directly relevant to Caltrans’ transit-related contracting. Davis Research conducted additional availability surveys in 2022 with businesses that perform work in industries and subindustries that BBC did not study as part of the 2021 Caltrans FHWA Disparity Study but that are relevant to Caltrans’ transit-related contracting. Davis Research made multiple attempts during different times of the day and on different days of the week to successfully reach each business establishment. The firm attempted to survey the owner, manager, or other officer of each business establishment who could provide accurate responses to survey questions.

**1. Establishments the study team successfully contacted.** Figure E-2 presents the disposition of the 9,446 business establishments the study team attempted to contact for availability surveys and how that number resulted in the 1,513 establishments the study team was able to successfully contact.

**a. Non-working or wrong phone numbers.** Some of the business listings BBC purchased from D&B and Davis Research attempted to contact were:

- Duplicate phone numbers (8 listings);
- Non-working phone numbers (1,449 listings); or
- Wrong numbers for the desired businesses (510 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them.

**b. Working phone numbers.** As shown in Figure E-2, there were 7,479 business establishments with working phone numbers that Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts at different times of the day and on different days of the week for 4,895 establishments.
- The firm could not reach a responsible staff member after multiple attempts at different times of the day on different days of the week for 1,024 establishments.
- The firm could not conduct the availability survey due to language barriers for 47 businesses.

Thus, Davis Research was able to successfully contact 1,513 business establishments.

**Figure E-2.**  
**Disposition of attempts to contact business establishments**

Source:  
BBC Research & Consulting availability analysis.

	Number of Establishments
Beginning list	9,446
Less duplicate phone numbers	8
Less non-working phone numbers	1,449
Less wrong number/business	510
Unique business listings with working phone numbers	7,479
Less no answer	4,895
Less could not reach responsible staff member	1,024
Less language barrier	47
<b>Establishments successfully contacted</b>	<b>1,513</b>

**2. Establishments included in the availability database.** Figure E-3 presents the disposition of the 1,513 business establishments Davis Research successfully contacted and how that number resulted in the 354 businesses the study team included in the availability database and considered potentially available for Caltrans work.

**Figure E-3.**  
**Disposition of successfully contacted business establishments**

Source:  
BBC Research & Consulting availability analysis.

	Number of Establishments
Establishments successfully contacted	1,513
Less establishments not interested in discussing availability	402
Less unreturned fax/online surveys	62
Establishments that completed surveys	1,049
Less no relevant work	365
Less not a for-profit business	34
Less line of work outside of study scope	201
Less no interest in future work	78
Less multiple establishments	17
<b>Establishments potentially available for organization work</b>	<b>354</b>

**a. Establishments not interested in discussing availability for Caltrans work.** Of the 1,513 business establishments the study team successfully contacted, 402 establishments were not interested in discussing their availability for Caltrans work. In addition, BBC sent e-mail availability surveys upon request but did not receive completed surveys from 62 establishments. In total, 1,049 successfully contacted business establishments completed availability surveys.

**b. Establishments available for Caltrans work.** BBC deemed only a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 365 establishments that indicated their businesses were not involved in relevant contracting work.
- BBC excluded 34 establishments that indicated they were not for-profit organizations.
- BBC excluded 201 establishments that indicated their businesses were involved in relevant industries but reported that their main lines of business were outside of the study scope.
- BBC excluded 78 establishments that reported they were not interested in contracting opportunities with Caltrans or other government organizations.
- Seventeen establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions, BBC compiled a database of 354 businesses that were considered potentially available for Caltrans work.

**c. Coding responses from multi-location businesses.** Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, BBC considered the business to have bid or worked on a contract in that subindustry.
- BBC combined the different roles of work (i.e., prime contractor or subcontractor) establishments of the same business reported into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts within the relevant subindustry.
- BBC considered the largest contract any establishments of the same business reported having bid or worked on as the business's relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC coded businesses as POC- or woman-owned if the majority of its establishments reported such status.

## **E. Additional Considerations**

BBC made additional considerations related to its approach to measuring availability to ensure estimates of the availability of businesses for Caltrans work were accurate and appropriate.

**1. Providing representative estimates of business availability.** The purpose of the availability analysis was to provide precise and representative estimates of the percentage of Caltrans contracting dollars for which POC- and woman-owned businesses are ready, willing, and able to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for Caltrans work and should not be used in that way.

**2. Using a custom census approach to measuring availability.** Federal guidance around measuring availability recommends dividing the number of POC- and woman-owned businesses

in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of POC- and woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when measuring the availability of businesses for Caltrans work is that dividing a simple headcount of certified businesses by the total number of businesses does not account for business characteristics crucial to estimating availability accurately. The methodology BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple headcount approach. For example, the availability surveys the study team conducted provided data on qualifications, relative capacity, and interest in Caltrans work for each business, which allowed BBC to take a more detailed approach to measuring availability.

**3. Selection of specific subindustries.** Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. Specifically, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify their main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

**4. Response reliability.** Business owners and managers were asked questions that may be difficult to answer, including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures. BBC explored the reliability of survey responses in a number of ways.

**a. Certification lists.** BBC compared data from the availability surveys to information from other sources such as vendor information the study team collected from Caltrans. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses.

**b. Contract data.** BBC examined Caltrans contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts businesses won during the past five years with actual contract data.

**c. Caltrans review.** Caltrans reviewed contract and vendor the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

# DRAFT Availability Survey Instrument [Construction]

**A1. SCREENER [BUSINESS RECORDS CODED AS SCREEN-YES ONLY]** Hello, does your company do work related to transit services or transportation?

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the California Department of Transportation.

This is not a sales call. The California Department of Transportation is conducting a survey to develop a list of companies who have worked with or are interested in providing construction-related services to Caltrans and other local public agencies.

The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

*[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]*

*[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES WHO HAVE WORKED WITH OR ARE INTERESTED IN WORKING WITH CALTRANS]*

**X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?**

- RIGHT COMPANY – **SKIP TO Q1**
- NOT RIGHT COMPANY
- REFS TO OTHER INFORMATION – **TERMINATE**

**Y1. What is the name of this firm?**

1 \_\_\_\_\_TIM

**Y2. Is [new firm name] associated with [old firm name] in anyway?**

- YES, I DO OR DIRECTLY
- YES, THROUGH OR CO
- NO, NOT DIRECTLY OR CO
- NO, DO NOT OR – **TERMINATE**
- REFS TO OR – **TERMINATE**

**Y3. Can you give me the complete address or city for [new firm name]?**

*[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:*

. STREET ADDRESS

. CITY

. STATE

. ZIP

1000R00TIM

**A2. Let me confirm that [firm name/new firm name] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?**

100000 0000000

000o0ot00r – T00RMI00T0

**A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is that correct?**

*[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]*

10000 – SKIP TO 000

000o

000DO0T K00 0

000R000S0D0

**A3b. What would you say is the main line of business at [firm name/new firm name]?**

*[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]*

1000R00TIM

**A3c. What other types of work, if any, does your business perform?**

000T0R 00R00TIM R0SPO0S00

1000R00TIM



**A4. Is this the sole location for your business, or do you have offices in other locations?**

- 1  Sole location
- Other locations
- Don't know
- Refused

**A5. Is your company a subsidiary or affiliate of another firm?**

- 1  Definitely – **SKIP TO Q1**
- Somewhat or somewhat
- Don't know – **SKIP TO Q1**
- Refused – **SKIP TO Q1**

**A6. What is the name of your parent company?**

- 1  RTIM
- Don't know
- Refused

**B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or received an award-for either the public or private sector-for any part of a contract as either a prime contractor or subcontractor?**

*[NOTE TO INTERVIEWER – THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]*

- 1
- **SKIP TO Q2**
- Don't know – **SKIP TO Q2**
- Refused – **SKIP TO Q2**

**B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?**

[MULTIPUNCH]

- Prime Contractor
- Subcontractor
- Trucker/Hauler
- Supplier or other provider
- Other (Specify) \_\_\_\_\_
- Don't Know
- Refused

**B3. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company *interested* in working with public agencies such as Caltrans, cities, counties, or other local agencies in California as a prime contractor?**

- 
- No
- Don't Know
- Refused

**B4. Is your company *interested* in working with public agencies as a subcontractor, trucker/hauler, or supplier?**

- 
- No
- Don't Know
- Refused

**B5. Is your company *interested* in working with Caltrans specifically in the future?**

- 
- No
- Don't Know
- Refused



**C3. The next region is the Sacramento-Tahoe Region, extending from Sacramento Valley to Lake Tahoe and up to Chico. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE SACRAMENTO-TAHOE AREA IS CALTRANS DISTRICT 3 WHICH INCLUDES BUTTE, COLUSA, EL DORADO, GLENN, NEVADA, PLACER, SACRAMENTO, SIERRA, SUTTER, YOLO, AND YUBA COUNTIES]*

1

o

DO   T K   O

R    S   D

**C4. The next region is the San Francisco Bay Area, extending from San Jose to Santa Rosa. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE SAN FRANCISCO BAY AREA IS CALTRANS DISTRICT 4 WHICH INCLUDES ALAMEDA, CONTRA COSTA, SONOMA, MARIN, SAN FRANCISCO, SAN MATEO, SANTA CLARA, SOLANO, AND NAPA COUNTIES]*

1

o

DO   T K   O

R    S   D

**C5. The next region is the Central Coast Region, extending from Santa Barbara to Salinas North Coast Region. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL COAST REGION IS CALTRANS DISTRICT 5, WHICH INCLUDES MONTEREY, SAN BENITO, SAN LUIS OBISPO, SANTA BARBARA, AND SANTA CRUZ COUNTIES]*

1

o

DO   T K   O

R    S   D

**C6. The next region is the Central Valley, extending from Bakersfield to Stockton. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL VALLEY IS CALTRANS DISTRICTS 6 AND 10, WHICH INCLUDES ALPINE, AMADOR, CALAVERAS, FRESNO, KERN, KINGS, MADERA, MARIPOSA, MERCED, SAN JOAQUIN, STANISLAUS, TUOLUMNE, AND TULARE COUNTIES]*

1

o

DO   T K   O

R    S   D

**C7. The next region is the Los Angeles Basin. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE LOS ANGELES BASIN IS CALTRANS DISTRICTS 7 AND 12 WHICH INCLUDES LOS ANGELES, VENTURA, AND ORANGE COUNTIES]*

1

o

DO   T K   O

R    S   D

**C8. The next region is the San Bernardino-Riverside Region, including San Bernardino and Riverside and extending east to Arizona. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE SAN BERNARDINO-RIVERSIDE REGION IS CALTRANS DISTRICT 8 WHICH INCLUDES SAN BERNARDINO AND RIVERSIDE COUNTIES]*

1

o

DO   T K   O

R    S   D

**C9. The next region is the Bishop Region, extending from Bishop to Mono Lake along the Nevada border. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE BISHOP AREA IS CALTRANS DISTRICT 9 WHICH INCLUDES INYO AND MONO COUNTIES]*

1

o

DO NOT KNOW

RESID

**C11. The next region is the San Diego Region, extending from San Diego and Oceanside east to the Arizona border. Is your company able to do work in this region?**

*[NOTE TO INTERVIEWER: IF ASKED, THE SAN DIEGO REGION IS CALTRANS DISTRICT 11 WHICH INCLUDES SAN DIEGO AND IMPERIAL COUNTIES]*

1

o

DO NOT KNOW

RESID

**D1. What was the largest prime contract or subcontract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.**

*[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]*

1 or

More than 1 to

More than 1 to

1 More than 1 to

More than to

11 More than 1 to

More than to 1

1 or contractor

More than 1 to

OPER

More than to

DO NOT KNOW

More than to 1

RESID

More than 1 to





**F1. Dun & Bradstreet indicates that your company has about [number] employees working in your company across all locations. Is that an accurate estimate of your company's average employees, both full-time and part-time, over the last three years?**

NOT TO INTERVIEW OR INTERVIEWED PART-TIME EMPLOYEES OR WORK CROSS-TERRITORIES

1000 – SKIP TO Q1

0000

DO NOT KNOW – SKIP TO Q1

REMOVED – SKIP TO Q1

**F2. About how many full-time and part-time employees did you have working in your company across all locations, on average, over the last three years?**

PERIOD INTO TERRITORIES

REDIST IN CROSS-REPLY

1 1000 or 0000

00010000 or 00000000

10100000

000100000000000000000000

101000000000000000000000

100100000000000000000000

000100000000000000000000

100100000000000000000000

000100000000000000000000

1001001 or 0 or 00000000

**F3. Dun & Bradstreet lists the average annual gross revenue of your company to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue, including all locations, over the last three years?**

1000 – SKIP TO Q1

0000

DO NOT KNOW – SKIP TO Q1

REMOVED – SKIP TO Q1



**H2. What is your position at [firm name / new firm name]?**

- 1  Retiree
- Owner
- Manager
- COO
- CFO
- Consultant to Owner
- Supervisor
- Operator
- Product
- 1  Other  R  SP  |
- Retiree

**H3. And at what email address can you be reached?**

1  R  TIM

**Thank you very much for your participation. If you have any questions or concerns, please contact Sharon Beasley from the California Department of Transportation at (916) 657-5206.**

# **APPENDIX F.**

---

## **Disparity Analysis Results Tables**

# APPENDIX F.

## Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of person of color- (POC-) and woman-owned businesses in transit services, professional services, construction, and goods and services prime contracts and subcontracts the California Department of Transportation (Caltrans) and relevant subrecipient local agencies awarded between October 1, 2017 and September 30, 2020 (i.e., the study period) with the percentage of contract dollars those businesses might be expected to receive based on their *availability* for that work.<sup>1,2</sup> Appendix F presents detailed results from the disparity analysis for relevant business groups and various sets of contracts Caltrans and relevant subrecipient agencies awarded during the study period.

### A. Format and Information

Each table in Appendix F presents disparity analysis results for a different set of contracts. For example, Figure F-1 presents disparity analysis results for all contracts BBC examined as part of the study considered together. A review of Figure F-1 introduces the calculations and format of all disparity analysis tables in Appendix F. As shown in Figure F-1, the tables present information about each relevant business group in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all POC- and woman-owned businesses considered together, regardless of whether they were certified as disadvantaged business enterprises (DBEs).
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) presents results for all POC-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (9) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as DBEs.
- Rows (10) through (17) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as DBEs.

---

<sup>1</sup> “Woman-owned businesses” refers to white woman owned businesses. Information and results for businesses owned by women of color are included along with those of their corresponding racial/ethnic groups.

<sup>2</sup> Caltrans may establish a memorandum of understanding (MOU) with subrecipient local agencies that also receive funds directly from FTA to report their disadvantaged business enterprise (DBE) participation in Caltrans-funded contracts directly to FTA. Caltrans has MOUs in place with 23 subrecipient local agencies that report DBE participation directly to FTA. Information about the contracts those 23 subrecipient local agencies awarded were not included in the disparity study, even if they included pass-through funding from Caltrans.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure F-1, BBC analyzed 137 contract elements Caltrans and subrecipient agencies awarded during the study period. The values presented in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (9) of column (a), Subcontinent Asian American-owned businesses participated in one prime contract or subcontract Caltrans and subrecipient agencies awarded during the study period.
- Column (b) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (b) of Figure F-1, BBC examined approximately \$74.5 million that were associated with the 137 contract elements Caltrans and subrecipient agencies awarded during the study period. The value presented in column (b) for each individual business group represents the dollars businesses of that particular group received on the set of contract elements. For example, as shown in row (9) of column (b), Subcontinent Asian American-owned businesses received approximately \$11,000 of the prime contract and subcontract dollars Caltrans and subrecipient agencies awarded during the study period.
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that BBC identified as POC-owned but for which specific race/ethnicity information was not available. Unknown POC-owned businesses were allocated to POC subgroups proportional to the known total dollars of those groups. No Caltrans or subrecipient agencies prime contract and subcontract dollars were awarded to POC-owned businesses with unknown race/ethnicity during the study period.
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Subcontinent Asian American-owned businesses, the study team divided \$11,000 by \$74.5 million and multiplied by 100 for a result of 0.0 percent, as shown in row (9) of column (d).

**2. Availability results.** Column (e) of Figure F-1 presents the availability of each relevant group for all contract elements BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contract elements, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts. For example, as shown in row (9) of column (e), the availability of Subcontinent Asian American-owned businesses for Caltrans and subrecipient agencies work is 6.6 percent. That is, Subcontinent Asian American-owned businesses might be expected to receive 6.6 percent of relevant Caltrans and subrecipient agencies contract dollars based on their availability for that work.



**3. Differences between participation and availability.** Column (f) of Figure F-1 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group for Caltrans and subrecipient agencies work. For example, as presented in row (9) of column (f) of Figure F-1, the participation of Subcontinent Asian American-owned businesses in relevant Caltrans and subrecipient agencies contracts was less than their availability for that work by 6.6 percentage points.

**4. Disparity indices.** BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (g) of Figure F-1 presents the disparity index for each group. For example, as reported in row (9) of column (g), the disparity index for Subcontinent Asian American-owned businesses was 0.2, indicating that they actually received approximately \$0.02 for every dollar they might be expected to receive based on their availability for the relevant prime contracts and subcontracts Caltrans and subrecipient agencies awarded during the study period. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.

## **B. Index and Tables**

The table of contents presents an index of the sets of contracts for which BBC analyzed disparity analysis results. In addition, the heading of each table in Appendix F provides a description of the subset of contracts BBC analyzed for that particular table.

**Table of Contents**

Table	Time period	Contract area	Contract role	Characteristics			Agency
				Size	Goals	Potential DBE	
F-1	10/1/17-9/30/20	All industries	Prime contracts and subcontracts	N/A	Goals and no goals	N/A	Caltrans and non-MOU agencies
F-2	10/1/17-9/30/20	<b>Transit services</b>	Prime contracts and subcontracts	N/A	Goals and no goals	N/A	Caltrans and non-MOU agencies
F-3	10/1/17-9/30/20	<b>Construction</b>	Prime contracts and subcontracts	N/A	Goals and no goals	N/A	Caltrans and non-MOU agencies
F-4	10/1/17-9/30/20	<b>Professional Services</b>	Prime contracts and subcontracts	N/A	Goals and no goals	N/A	Caltrans and non-MOU agencies
F-5	10/1/17-9/30/20	<b>Goods and services</b>	Prime contracts and subcontracts	N/A	Goals and no goals	N/A	Caltrans and non-MOU agencies
F-6	10/1/17-9/30/20	All industries	<b>Prime contracts</b>	N/A	Goals and no goals	N/A	Caltrans and non-MOU agencies
F-7	10/1/17-9/30/20	All industries	<b>Subcontracts</b>	N/A	Goals and no goals	N/A	Caltrans and non-MOU agencies
F-8	10/1/17-9/30/20	All industries	Prime contracts and subcontracts	N/A	<b>Goals</b>	N/A	Caltrans and non-MOU agencies
F-9	10/1/17-9/30/20	All industries	Prime contracts and subcontracts	N/A	<b>No goals</b>	N/A	Caltrans and non-MOU agencies
F-10	10/1/17-9/30/20	All industries	Prime contracts and subcontracts	N/A	Goals and no goals	<b>Potential DBE</b>	Caltrans and non-MOU agencies
F-11	10/1/17-9/30/20	<b>Transit services</b>	Prime contracts and subcontracts	N/A	Goals and no goals	<b>Potential DBE</b>	Caltrans and non-MOU agencies
F-12	10/1/17-9/30/20	<b>Construction</b>	Prime contracts and subcontracts	N/A	Goals and no goals	<b>Potential DBE</b>	<b>Caltrans and non-MOU agencies</b>
F-13	10/1/17-9/30/20	<b>Professional Services</b>	Prime contracts and subcontracts	N/A	Goals and no goals	<b>Potential DBE</b>	<b>Caltrans and non-MOU agencies</b>
F-14	10/1/17-9/30/20	<b>Goods and services</b>	Prime contracts and subcontracts	N/A	Goals and no goals	<b>Potential DBE</b>	<b>Caltrans and non-MOU agencies</b>

Figure F-1.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: All industries

Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	137	\$74,538	\$74,538				
(2) POC- and woman-owned businesses	9	\$331	\$331	0.4	21.7	-21.2	2.0
(3) Non-Hispanic white woman-owned	1	\$0	\$0	0.0	0.1	-0.1	0.4
(4) POC-owned	8	\$330	\$330	0.4	21.6	-21.1	2.1
(5) Asian Pacific American-owned	2	\$285	\$285	0.4	0.1	0.3	200+
(6) Black American-owned	2	\$17	\$17	0.0	12.8	-12.8	0.2
(7) Hispanic American-owned	3	\$19	\$19	0.0	2.0	-2.0	1.2
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	1	\$11	\$11	0.0	6.6	-6.6	0.2
(10) POC- and woman-owned DBE	7	\$323	\$323	0.4			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	7	\$323	\$323	0.4			
(13) Asian Pacific American-owned DBE	2	\$285	\$285	0.4			
(14) Black American-owned DBE	1	\$10	\$10	0.0			
(15) Hispanic American-owned DBE	3	\$19	\$19	0.0			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	1	\$11	\$11	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-2.  
Agency: Caltrans and non-MOU agencies  
Time period: 10/01/2017 - 09/30/2020  
Contract area: Transit services  
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	16	\$73,742	\$73,742				
(2) POC- and woman-owned businesses	1	\$280	\$280	0.4	21.5	-21.1	1.8
(3) Non-Hispanic white woman-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(4) POC-owned	1	\$280	\$280	0.4	21.5	-21.1	1.8
(5) Asian Pacific American-owned	1	\$280	\$280	0.4	0.0	0.4	200+
(6) Black American-owned	0	\$0	\$0	0.0	12.9	-12.9	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	2.0	-2.0	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	6.6	-6.6	0.0
(10) POC- and woman-owned DBE	1	\$280	\$280	0.4			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	1	\$280	\$280	0.4			
(13) Asian Pacific American-owned DBE	1	\$280	\$280	0.4			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.  
 Agency: Caltrans and non-MOU agencies  
 Time period: 10/01/2017 - 09/30/2020  
 Contract area: Construction  
 Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	14	\$9	\$9				
(2) POC- and woman-owned businesses	0	\$0	\$0	0.0	46.6	-46.6	0.0
(3) Non-Hispanic white woman-owned	0	\$0	\$0	0.0	6.7	-6.7	0.0
(4) POC-owned	0	\$0	\$0	0.0	39.9	-39.9	0.0
(5) Asian Pacific American-owned	0	\$0	\$0	0.0	5.2	-5.2	0.0
(6) Black American-owned	0	\$0	\$0	0.0	7.8	-7.8	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	21.7	-21.7	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	5.2	-5.2	0.0
(10) POC- and woman-owned DBE	0	\$0	\$0	0.0			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	0	\$0	\$0	0.0			
(13) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: Professional services

Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	21	\$320	\$320				
(2) POC- and woman-owned businesses	4	\$39	\$39	12.1	46.7	-34.6	25.9
(3) Non-Hispanic white woman-owned	0	\$0	\$0	0.0	16.9	-16.9	0.0
(4) POC-owned	4	\$39	\$39	12.1	29.7	-17.7	40.6
(5) Asian Pacific American-owned	0	\$0	\$0	0.0	12.1	-12.1	0.0
(6) Black American-owned	2	\$17	\$17	5.2	8.4	-3.2	62.0
(7) Hispanic American-owned	1	\$11	\$11	3.5	3.1	0.4	112.6
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	1	\$11	\$11	3.3	6.1	-2.8	54.5
(10) POC- and woman-owned DBE	3	\$31	\$31	9.8			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	3	\$31	\$31	9.8			
(13) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(14) Black American-owned DBE	1	\$10	\$10	3.0			
(15) Hispanic American-owned DBE	1	\$11	\$11	3.5			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	1	\$11	\$11	3.3			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: Goods and services

Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	86	\$467	\$467				
(2) POC- and woman-owned businesses	4	\$12	\$12	2.7	28.9	-26.3	9.2
(3) Non-Hispanic white woman-owned	1	\$0	\$0	0.1	4.0	-3.9	1.6
(4) POC-owned	3	\$12	\$12	2.6	25.0	-22.4	10.5
(5) Asian Pacific American-owned	1	\$5	\$5	1.1	9.3	-8.2	11.5
(6) Black American-owned	0	\$0	\$0	0.0	2.6	-2.6	0.0
(7) Hispanic American-owned	2	\$7	\$7	1.5	11.8	-10.2	13.1
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	1.3	-1.3	0.0
(10) POC- and woman-owned DBE	3	\$12	\$12	2.6			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	3	\$12	\$12	2.6			
(13) Asian Pacific American-owned DBE	1	\$5	\$5	1.1			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Hispanic American-owned DBE	2	\$7	\$7	1.5			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.



**Figure F-6.**  
**Agency: Caltrans and non-MOU agencies**  
**Time period: 10/01/2017 - 09/30/2020**  
**Contract area: All industries**  
**Contract role: Prime contracts**

<b>Business Group</b>	<b>(a) Number of contract elements</b>	<b>(b) Total dollars (thousands)</b>	<b>(c) Estimated total dollars (thousands)</b>	<b>(d) Utilization percentage</b>	<b>(e) Availability percentage</b>	<b>(f) Utilization - Availability</b>	<b>(g) Disparity index</b>
(1) All businesses	31	\$73,322	\$73,322				
(2) POC- and woman-owned businesses	1	\$280	\$280	0.4	21.3	-20.9	1.8
(3) Non-Hispanic white woman-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(4) POC-owned	1	\$280	\$280	0.4	21.2	-20.9	1.8
(5) Asian Pacific American-owned	1	\$280	\$280	0.4	0.1	0.3	200+
(6) Black American-owned	0	\$0	\$0	0.0	12.7	-12.7	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	1.7	-1.7	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	6.7	-6.7	0.0
(10) POC- and woman-owned DBE	1	\$280	\$280	0.4			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	1	\$280	\$280	0.4			
(13) Asian Pacific American-owned DBE	1	\$280	\$280	0.4			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown POC-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-7.**  
**Agency: Caltrans and non-MOU agencies**  
**Time period: 10/01/2017 - 09/30/2020**  
**Contract area: All industries**  
**Contract role: Subcontracts**

<b>Business Group</b>	<b>(a) Number of contract elements</b>	<b>(b) Total dollars (thousands)</b>	<b>(c) Estimated total dollars (thousands)</b>	<b>(d) Utilization percentage</b>	<b>(e) Availability percentage</b>	<b>(f) Utilization - Availability</b>	<b>(g) Disparity index</b>
(1) All businesses	106	\$1,216	\$1,216				
(2) POC- and woman-owned businesses	8	\$51	\$51	4.2	42.8	-38.6	9.8
(3) Non-Hispanic white woman-owned	1	\$0	\$0	0.0	2.0	-2.0	1.2
(4) POC-owned	7	\$51	\$51	4.2	40.8	-36.6	10.2
(5) Asian Pacific American-owned	1	\$5	\$5	0.4	3.1	-2.7	13.3
(6) Black American-owned	2	\$17	\$17	1.4	17.2	-15.8	8.0
(7) Hispanic American-owned	3	\$19	\$19	1.5	20.2	-18.7	7.5
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	1	\$11	\$11	0.9	0.3	0.6	200+
(10) POC- and woman-owned DBE	6	\$44	\$44	3.6			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	6	\$44	\$44	3.6			
(13) Asian Pacific American-owned DBE	1	\$5	\$5	0.4			
(14) Black American-owned DBE	1	\$10	\$10	0.8			
(15) Hispanic American-owned DBE	3	\$19	\$19	1.5			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	1	\$11	\$11	0.9			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: All industries

Contract role: Prime contracts and subcontracts

Goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	5	\$18,513	\$18,513				
(2) POC- and woman-owned businesses	0	\$0	\$0	0.0	30.5	-30.5	0.0
(3) Non-Hispanic white woman-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(4) POC-owned	0	\$0	\$0	0.0	30.5	-30.5	0.0
(5) Asian Pacific American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(6) Black American-owned	0	\$0	\$0	0.0	15.3	-15.3	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	5.5	-5.5	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	9.8	-9.8	0.0
(10) POC- and woman-owned DBE	0	\$0	\$0	0.0			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	0	\$0	\$0	0.0			
(13) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: All industries

Contract role: Prime contracts and subcontracts

No Goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	132	\$56,025	\$56,025				
(2) POC- and woman-owned businesses	9	\$331	\$331	0.6	18.7	-18.1	3.2
(3) Non-Hispanic white woman-owned	1	\$0	\$0	0.0	0.1	-0.1	0.4
(4) POC-owned	8	\$330	\$330	0.6	18.6	-18.0	3.2
(5) Asian Pacific American-owned	2	\$285	\$285	0.5	0.1	0.4	200+
(6) Black American-owned	2	\$17	\$17	0.0	12.0	-12.0	0.2
(7) Hispanic American-owned	3	\$19	\$19	0.0	0.9	-0.9	3.7
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	1	\$11	\$11	0.0	5.6	-5.5	0.3
(10) POC- and woman-owned DBE	7	\$323	\$323	0.6			
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0	0.0			
(12) POC-owned DBE	7	\$323	\$323	0.6			
(13) Asian Pacific American-owned DBE	2	\$285	\$285	0.5			
(14) Black American-owned DBE	1	\$10	\$10	0.0			
(15) Hispanic American-owned DBE	3	\$19	\$19	0.0			
(16) Native American-owned DBE	0	\$0	\$0	0.0			
(17) Subcontinent Asian American-owned DBE	1	\$11	\$11	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: All industries

Contract role: Prime contracts and subcontracts

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	137	\$74,538	\$74,538				
(2) POC- and woman-owned businesses	9	\$331	\$331		21.6		
(3) Non-Hispanic white woman-owned	1	\$0	\$0		0.1		
(4) POC-owned	8	\$330	\$330		21.5		
(5) Asian Pacific American-owned	2	\$285	\$285		0.1		
(6) Black American-owned	2	\$17	\$17		12.8		
(7) Hispanic American-owned	3	\$19	\$19		2.0		
(8) Native American-owned	0	\$0	\$0		0.0		
(9) Subcontinent Asian American-owned	1	\$11	\$11		6.6		
(10) POC- and woman-owned DBE	7	\$323	\$323				
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0				
(12) POC-owned DBE	7	\$323	\$323				
(13) Asian Pacific American-owned DBE	2	\$285	\$285				
(14) Black American-owned DBE	1	\$10	\$10				
(15) Hispanic American-owned DBE	3	\$19	\$19				
(16) Native American-owned DBE	0	\$0	\$0				
(17) Subcontinent Asian American-owned DBE	1	\$11	\$11				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: Transit services

Contract role: Prime contracts and subcontracts

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	16	\$73,742	\$73,742				
(2) POC- and woman-owned businesses	1	\$280	\$280		21.5		
(3) Non-Hispanic white woman-owned	0	\$0	\$0		0.0		
(4) POC-owned	1	\$280	\$280		21.5		
(5) Asian Pacific American-owned	1	\$280	\$280		0.0		
(6) Black American-owned	0	\$0	\$0		12.9		
(7) Hispanic American-owned	0	\$0	\$0		2.0		
(8) Native American-owned	0	\$0	\$0		0.0		
(9) Subcontinent Asian American-owned	0	\$0	\$0		6.6		
(10) POC- and woman-owned DBE	1	\$280	\$280				
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0				
(12) POC-owned DBE	1	\$280	\$280				
(13) Asian Pacific American-owned DBE	1	\$280	\$280				
(14) Black American-owned DBE	0	\$0	\$0				
(15) Hispanic American-owned DBE	0	\$0	\$0				
(16) Native American-owned DBE	0	\$0	\$0				
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: Construction

Contract role: Prime contracts and subcontracts

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	14	\$9	\$9				
(2) POC- and woman-owned businesses	0	\$0	\$0		46.6		
(3) Non-Hispanic white woman-owned	0	\$0	\$0		6.7		
(4) POC-owned	0	\$0	\$0		39.9		
(5) Asian Pacific American-owned	0	\$0	\$0		5.2		
(6) Black American-owned	0	\$0	\$0		7.8		
(7) Hispanic American-owned	0	\$0	\$0		21.7		
(8) Native American-owned	0	\$0	\$0		0.0		
(9) Subcontinent Asian American-owned	0	\$0	\$0		5.2		
(10) POC- and woman-owned DBE	0	\$0	\$0				
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0				
(12) POC-owned DBE	0	\$0	\$0				
(13) Asian Pacific American-owned DBE	0	\$0	\$0				
(14) Black American-owned DBE	0	\$0	\$0				
(15) Hispanic American-owned DBE	0	\$0	\$0				
(16) Native American-owned DBE	0	\$0	\$0				
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.



Figure F-13.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: Professional services

Contract role: Prime contracts and subcontracts

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	21	\$320	\$320				
(2) POC- and woman-owned businesses	4	\$39	\$39		46.0		
(3) Non-Hispanic white woman-owned	0	\$0	\$0		16.9		
(4) POC-owned	4	\$39	\$39		29.1		
(5) Asian Pacific American-owned	0	\$0	\$0		12.1		
(6) Black American-owned	2	\$17	\$17		8.4		
(7) Hispanic American-owned	1	\$11	\$11		2.5		
(8) Native American-owned	0	\$0	\$0		0.0		
(9) Subcontinent Asian American-owned	1	\$11	\$11		6.1		
(10) POC- and woman-owned DBE	3	\$31	\$31				
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0				
(12) POC-owned DBE	3	\$31	\$31				
(13) Asian Pacific American-owned DBE	0	\$0	\$0				
(14) Black American-owned DBE	1	\$10	\$10				
(15) Hispanic American-owned DBE	1	\$11	\$11				
(16) Native American-owned DBE	0	\$0	\$0				
(17) Subcontinent Asian American-owned DBE	1	\$11	\$11				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.

Agency: Caltrans and non-MOU agencies

Time period: 10/01/2017 - 09/30/2020

Contract area: Goods and services

Contract role: Prime contracts and subcontracts

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	86	\$467	\$467				
(2) POC- and woman-owned businesses	4	\$12	\$12		26.9		
(3) Non-Hispanic white woman-owned	1	\$0	\$0		4.0		
(4) POC-owned	3	\$12	\$12		22.9		
(5) Asian Pacific American-owned	1	\$5	\$5		7.6		
(6) Black American-owned	0	\$0	\$0		2.6		
(7) Hispanic American-owned	2	\$7	\$7		11.8		
(8) Native American-owned	0	\$0	\$0		0.0		
(9) Subcontinent Asian American-owned	0	\$0	\$0		0.9		
(10) POC- and woman-owned DBE	3	\$12	\$12				
(11) Non-Hispanic white woman-owned DBE	0	\$0	\$0				
(12) POC-owned DBE	3	\$12	\$12				
(13) Asian Pacific American-owned DBE	1	\$5	\$5				
(14) Black American-owned DBE	0	\$0	\$0				
(15) Hispanic American-owned DBE	2	\$7	\$7				
(16) Native American-owned DBE	0	\$0	\$0				
(17) Subcontinent Asian American-owned DBE	0	\$0	\$0				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.