



2020 Disparity Study

State of Indiana

FINAL REPORT

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2020 State of Indiana Disparity Study

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CHAPTER ES.

Executive Summary

The Indiana Department of Administration (IDOA) operates the State of Indiana’s Minority and Women’s Business Enterprises (M/WBE) Program, which is designed to encourage the participation of minority- and woman-owned businesses in state contracting and create a fair, competitive, and equitable environment for those businesses. The program comprises various measures to encourage the participation of minority- and woman-owned businesses in state contracting. Some of those measures are *race- and gender-neutral*, which are designed to encourage the participation of all businesses in state contracting, and other measures are *race- and gender-conscious*, which are designed to specifically encourage the participation of minority- and woman-owned businesses in state contracting (e.g., using MBE/WBE participation goals to award individual contracts). IDOA also operates the Indiana Veteran-owned Small Business (IVOSB) Program, which is designed to encourage the participation of veteran-owned businesses in state contracting and help ensure that those businesses can build productive relationships throughout relevant contracting industries.

IDOA retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of the M/WBE and IVOSB Programs in encouraging the participation of minority-, woman-, and veteran-owned businesses in state contracts and procurements.^{1, 2} As part of the study, BBC assessed whether there were any disparities between:

- The percentage of contract and procurement dollars—including subcontract dollars—that state agencies and state educational institutions (SEIs) awarded to minority-, woman-, and veteran-owned businesses during the study period, which was defined as July 1, 2013 through June 30, 2018 (i.e., *utilization*); and
- The percentage of contract and procurement dollars that minority-, woman-, and veteran-owned businesses might be expected to receive based on their availability to perform specific types and sizes of state agencies’ and SEIs’ prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding the M/WBE and IVOSB Programs;
- Local marketplace conditions for minorities, women, veterans, and the businesses they own; and
- Contracting practices and business assistance programs that state agencies have in place.

¹ BBC considered a contract or procurement to be a *state contract or procurement* if it only included state and local funds and did not include any federal funds.

² “Woman-owned businesses” refers to non-Hispanic white woman-owned businesses. Information and results for minority woman-owned businesses are included along with their corresponding racial/ethnic groups.

IDOA and the Governor’s Commission on Supplier Diversity (the Commission) could use information from the study to help refine the M/WBE and IVOSB Programs, including setting overall aspirational goals for the participation of minority-, woman-, and veteran-owned businesses in state contracting and procurement and determining which program measures to use to encourage the participation of those businesses.

BBC summarizes key information from the 2020 State of Indiana Disparity Study in five parts:

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

A. Analyses in the Disparity Study

BBC examined extensive information related to outcomes for minority-, woman-, and veteran-owned businesses as well as the M/WBE and IVOSB Programs:

- The study team conducted an analysis of regulations, case law, and other information to guide methodology for the disparity study, which included a review of legal requirements related to minority- and woman-owned business programs and specifically the M/WBE and IVOSB Programs (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities, women, veterans, and the businesses they own throughout the *relevant geographic market area (RGMA)*.³ In addition, the study team collected anecdotal evidence about potential barriers that individuals and businesses face in the local marketplace through in-depth interviews, surveys, public meetings, and focus groups (see Chapter 3, Appendix C, and Appendix D).
- BBC estimated the percentage of relevant IDOA, Indiana Department of Transportation (INDOT), and SEI contract and procurement dollars that minority-, woman-, and veteran-owned businesses are available to perform.⁴ That analysis was based on surveys that the study team completed with businesses that work in industries related to the specific types of construction, professional services, and goods and other services contracts and procurements that IDOA, INDOT, and SEIs award (see Chapter 5 and Appendix E).
- BBC analyzed the dollars that IDOA, INDOT, and SEIs awarded to minority-, woman-, and veteran-owned businesses on relevant construction, professional services, and goods and other services contracts and procurements during the study period (see Chapters 4 and 6).
- BBC examined whether there were any disparities between the participation and availability of minority-, woman-, and veteran-owned businesses on construction,

³ BBC identified the RGMA as the entire state of Indiana.

⁴ Analyses for IDOA include contracts and procurements that any executive branch agency awarded during the study period except INDOT.

professional services, and goods and other services contracts and procurements that the IDOA, INDOT, and SEIs awarded during the study period (see Chapter 7 and Appendix F).

- BBC reviewed the measures that IDOA uses to encourage the participation of minority-, woman-, and veteran-owned businesses in state contracts and procurements as well as measures that other organizations in the region use (see Chapter 8).
- BBC provided guidance related to additional program options and potential changes to current contracting practices for IDOA and the Commission’s consideration (see Chapter 9).

B. Availability Analysis Results

BBC used a *custom census* approach to analyze the availability of minority-, woman-, and veteran-owned businesses for IDOA, INDOT, and SEI prime contracts and subcontracts, which relied on information from surveys that the study team conducted with thousands of potentially available businesses located in the RGMA and information about the contracts and procurements that IDOA, INDOT, and SEIs awarded during the study period. That approach allowed BBC to develop a representative, unbiased, and statistically-valid database of relevant Indiana businesses to estimate the availability of minority-, woman-, and veteran-owned businesses for IDOA, INDOT, and SEI work. BBC presents availability analysis results for IDOA, INDOT, and SEI work overall and, specifically for IDOA, different subsets of contracts and procurements.

1. All contracts and procurements. Figure ES-1 presents dollar-weighted availability estimates by relevant business group for IDOA contracts and procurements. Overall, the availability of minority- and woman-owned businesses for IDOA work is 18.2 percent, indicating that minority- and woman-owned businesses might be expected to receive 18.2 percent of the contract and procurement dollars that state agencies award in construction, professional services, and goods and other services.

Figure ES-1.
Overall availability estimates by racial/ethnic and gender group for IDOA 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-2 in Appendix F.

Source:
 BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	10.4 %
Asian American-owned	0.7
Black American-owned	3.4
Hispanic American-owned	0.5
Native American-owned	3.3
Total Minority-owned	7.9 %
Total Minority- and Woman-owned	18.2 %

BBC also estimated overall availability for minority- and woman-owned businesses for INDOT and SEI contracts and procurements. Overall availability of minority- and woman-owned businesses for each organization’s work is as follows:

- INDOT: 13.7 percent;
- Ball State University: 19.9 percent;
- Indiana State University: 15.9 percent;

- Indiana University: 18.2 percent;
- Ivy Tech Community College: 17.1 percent;
- Purdue University: 21.7 percent;
- University of Southern Indiana: 19.4 percent; and
- Vincennes University: 15.6 percent.

2. Public Works. IDOA used MBE/WBE contract goals—a *race- and gender-conscious* measure—to award many contracts and procurements during the study period. Prime contractors could meet those goals by either making subcontracting commitments with certified MBE/WBE subcontractors at the time of bid or by submitting waivers showing that they made all reasonable *good faith efforts* to fulfill the goals but could not do so. Importantly, during the study period, the Public Works Division did not use MBE/WBE contract goals to award any of its contracts (i.e., construction and construction-related professional services contracts). In other words, those contracts were awarded in a *race- and gender-neutral* manner. BBC examined availability separately for Public Works and non-Public Works contracts and procurements, because that information is particularly instructive as part of the disparity analysis. As shown in Figure ES-2, the availability of minority- and woman-owned businesses is higher for Public Works contracts and procurements (19.4%) than for non-Public Works contracts and procurements (18.1%).

Figure ES-2.
Availability estimates for Public Works and non-Public Works contracts and procurements

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

Source:
BBC Research & Consulting availability analysis.

Business group	Department	
	Public Works	Non-Public Works
Non-Hispanic white woman-owned	9.9 %	10.5 %
Asian American-owned	3.2	0.3
Black American-owned	3.9	3.3
Hispanic American-owned	1.3	0.4
Native American-owned	1.0	3.6
Total Minority-owned	9.5 %	7.6 %
Total Minority- and Woman-owned	19.4 %	18.1 %

3. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for IDOA prime contracts and subcontracts.⁵ As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is lower for IDOA prime contracts (15.4%) than for subcontracts (40.9%). That result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are thus, often, more accessible to minority- and woman-owned businesses.

⁵ IDOA and most SEIs do not collect comprehensive data on subcontracts, and despite BBC maximizing efforts to collect that information directly from prime contractors, the study team did not have access to data on all subcontracts.

Figure ES-3.
Availability estimates by contract role for IDOA work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	9.8 %	15.1 %
Asian American-owned	0.6	1.5
Black American-owned	1.3	19.5
Hispanic American-owned	0.5	0.6
Native American-owned	3.2	4.1
Total Minority-owned	5.6 %	25.7 %
Total Minority- and Woman-owned	15.4 %	40.9 %

4. Industry. BBC also examined availability analysis results separately for IDOA construction, professional services, and goods and other services contracts and procurements. As shown in Figure ES-4, the availability of minority- and woman-owned businesses considered together is highest for IDOA’s construction contracts (20.6%) and lowest for goods and other services contracts and procurements (16.1%).

Figure ES-4.
Availability estimates by industry for IDOA 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-7, F-8, and F-9 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	10.8 %	10.6 %	7.1 %
Asian American-owned	3.4	0.1	1.7
Black American-owned	3.4	3.5	2.3
Hispanic American-owned	1.5	0.1	3.4
Native American-owned	1.6	3.8	1.6
Total Minority-owned	9.9 %	7.4 %	9.0 %
Total Minority- and Woman-owned	20.6 %	18.0 %	16.1 %

5. Veteran-owned businesses. BBC also examined the overall availability of veteran-owned businesses for IDOA, INDOT, and SEI work. The availability analysis indicated that the availability of veteran-owned businesses for each organization’s work is as follows:

- IDOA: 3.5 percent;
- INDOT: 10.9 percent;
- Ball State University: 3.6 percent;
- Indiana State University: 4.2 percent;
- Indiana University: 4.4 percent;
- Ivy Tech Community College: 5.4 percent;
- Purdue University: 5.4 percent;

- University of Southern Indiana: 5.5 percent; and
- Vincennes University: 5.7 percent.

C. Utilization Analysis Results

BBC measured the participation of minority-, woman-, and veteran-owned businesses in IDOA, INDOT, and SEI work in terms of *utilization*—the percentage of dollars those businesses were awarded on relevant prime contracts and subcontracts during the study period. BBC measured the participation of minority-, woman-, and veteran-owned businesses in IDOA, INDOT, and SEI work regardless of whether they were certified as MBEs, WBEs, or IVOSBs by IDOA.

1. All contracts and procurements. Figure ES-5 presents the percentage of total dollars that minority- and woman-owned businesses received on relevant construction, professional services, and goods and other services prime contracts and subcontracts that IDOA awarded during the study period. As shown in Figure ES-5, minority- and woman-owned businesses considered together received 12.9 percent of the relevant contract and procurement dollars that IDOA awarded during the study period, and 9.1 percent of those dollars went to certified MBE/WBEs. Note that IDOA used MBE/WBE contract goals to award many of its contracts and procurements during the study period.

Figure ES-5.
Utilization results
for IDOA contracts and procurements

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

Source:
 BBC Research & Consulting utilization analysis.

Business group	Utilization %
Minority- and Woman-owned	
Non-Hispanic white woman-owned	7.9 %
Asian American-owned	1.5
Black American-owned	3.3
Hispanic American-owned	0.1
Native American-owned	0.1
<hr/>	
Total Minority-owned	5.0 %
Total Minority- and Woman-owned	12.9 %
MBE/WBE-certified	
Non-Hispanic white woman-owned	4.4 %
Asian American-owned	1.4
Black American-owned	3.1
Hispanic American-owned	0.1
Native American-owned	0.1
<hr/>	
Total certified minority-owned	4.7 %
Total Certified Minority- and Woman-owned	9.1 %

BBC also calculated the participation of minority- and woman-owned businesses in contracts and procurements that INDOT and SEIs awarded during the study period. The participation of minority- and woman-owned businesses in each organization’s work during the study period was as follows:

- INDOT: 19.4 percent;
- Ball State University: 11.0 percent;
- Indiana State University: 7.5 percent;
- Indiana University: 13.6 percent;
- Ivy Tech Community College: 15.7 percent;
- Purdue University: 12.2 percent;
- University of Southern Indiana: 14.5 percent; and
- Vincennes University: 9.1 percent.

Note that whereas INDOT used MBE/WBE goals to award most of its contracts and procurements during the study period, SEIs did not.

2. Public Works. IDOA used MBE/WBE contract goals to award non-Public Works contracts and procurements during the study period the Public Works Division did not use goals to award construction and construction-related professional services contracts. BBC examined utilization analysis results separately for Public Works and non-Public Works contracts and procurements, because that comparison provides information about the efficacy of MBE/WBE contract goals in encouraging the participation of minority- and woman-owned businesses in agency work. As shown in Figure ES-6, the participation of minority- and woman-owned businesses in non-Public Works contracts and procurements (14.2%) was higher than in Public Works contracts and procurements (4.5%), suggesting that IDOA’s use of MBE/WBE goals may have been effective to some degree in encouraging the participation of minority- and woman-owned businesses.

Figure ES-6.
Utilization results for Public Works and non-Public Works contracts and procurements

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

Source:
BBC Research & Consulting utilization analysis.

Business group	Department	
	Public Works	Non-Public Works
Non-Hispanic white woman-owned	1.6 %	8.8 %
Asian American-owned	1.3	1.5
Black American-owned	0.5	3.8
Hispanic American-owned	0.3	0.1
Native American-owned	0.7	0.1
Total Minority-owned	2.9 %	5.4 %
Total Minority- and Woman-owned	4.5 %	14.2 %

3. Contract role. Figure ES-7 presents utilization analysis results separately for prime contracts and subcontracts that IDOA awarded during the study period. As shown in Figure ES-7, the participation of minority- and woman-owned businesses considered together was in fact higher in subcontracts (79.7%) that IDOA awarded during the study period than prime contracts (4.5%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts, and thus may be more accessible to minority- and woman-owned businesses. In addition, it could be due to IDOA’s use of MBE/WBE contract goals to award many of its contracts during the study period.

Figure ES-7.
Utilization analysis results by contract role

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	3.2 %	45.1 %
Asian American-owned	1.2	3.9
Black American-owned	0.0	29.5
Hispanic American-owned	0.1	0.5
Native American-owned	0.1	0.7
Total Minority-owned	1.3 %	34.6 %
Total Minority- and Woman-owned	4.5 %	79.7 %

4. Industry. BBC also examined utilization analysis results separately for IDOA’s construction, professional services, and goods and other services contracts and procurements to determine whether the participation of minority- and woman-owned businesses in agency work differs by industry. As shown in Figure ES-8, the participation of minority- and woman-owned businesses considered together was highest in IDOA’s goods and other services procurements (34.8%) and lowest in construction contracts (3.4%).

Figure ES-8.
Utilization analysis results by industry

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	1.1 %	8.2 %	20.1 %
Asian American-owned	1.0	0.5	13.5
Black American-owned	0.1	4.2	0.4
Hispanic American-owned	0.4	0.0	0.7
Native American-owned	0.8	0.0	0.0
Total Minority-owned	2.3 %	4.7 %	14.6 %
Total Minority- and Woman-owned	3.4 %	12.9 %	34.8 %

5. Veteran-owned businesses. BBC examined the participation of veteran-owned businesses in IDOA, INDOT, and SEI contracts and procurements. The participation of veteran-owned businesses in each organization’s work during the study period was as follows:

- IDOA: 2.4 percent;
- INDOT: 2.2 percent;
- Ball State University: 9.2 percent;
- Indiana State University: 3.0 percent;
- Indiana University: 4.1 percent;
- Ivy Tech Community College: 6.3 percent;
- Purdue University: 1.6 percent;

- University of Southern Indiana: 6.2 percent; and
- Vincennes University: 3.9 percent.

D. Disparity Analysis Results

Although information about the participation of minority-, woman-, and veteran-owned businesses in IDOA, INDOT, and SEI contracts and procurements is useful on its own, it is even more useful when it is compared with the level of participation one might expect based on their availability for that work. As part of the disparity analysis, BBC compared the participation of minority-, woman-, and veteran-owned businesses in IDOA, INDOT, and SEI prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work. To do so, BBC calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent utilization by percent availability and multiplying by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular contract set (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of less than 80 indicates a *substantial* disparity between participation and availability and is often taken by courts as *inferences of discrimination* against particular business groups.

1. All contracts and procurements. Figure ES-9 presents disparity indices for all relevant prime contracts and subcontracts that IDOA awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. A line is also drawn at a disparity index level of 80, which indicates a substantial disparity. As shown in Figure ES-9, minority- and woman-owned businesses considered together exhibited a substantial disparity for IDOA contracts and procurements (disparity index of 71), indicating that those businesses only received \$0.71 for every dollar one would expect them to receive based on their availability for that work. Disparity analysis results differed across individual business groups:

- Hispanic American- (disparity index of 20), Native American- (disparity index of 4), and white woman-owned businesses (disparity index of 77) exhibited substantial disparities for all IDOA contracts and procurements.
- Asian American- (disparity index of 200+) and Black American-owned businesses did not exhibit disparities for that work.

Note that IDOA used MBE/WBE contract goals to award many of those contracts and procurements, which likely affected outcomes for minority- and woman-owned businesses.

BBC also assessed disparities between participation and availability for minority- and woman-owned businesses for INDOT and SEI work. Disparity indices for all minority- and woman-owned businesses considered together for each organization were as follows:

- INDOT: disparity index of 141;
- Ball State University: disparity index of 56;
- Indiana State University: disparity index of 47;

- Indiana University: disparity index of 75;
- Ivy Tech Community College: disparity index of 92;
- Purdue University: disparity index of 56;
- University of Southern Indiana: disparity index of 75; and
- Vincennes University: disparity index of 58.

Note that whereas INDOT used MBE/WBE goals to award most of its contracts and procurements during the study period, SEIs did not, which might help explain the larger disparities for minority- and woman-owned businesses on SEI work.

Figure ES-9.
Disparity analysis
results for all IDOA
contracts and
procurements

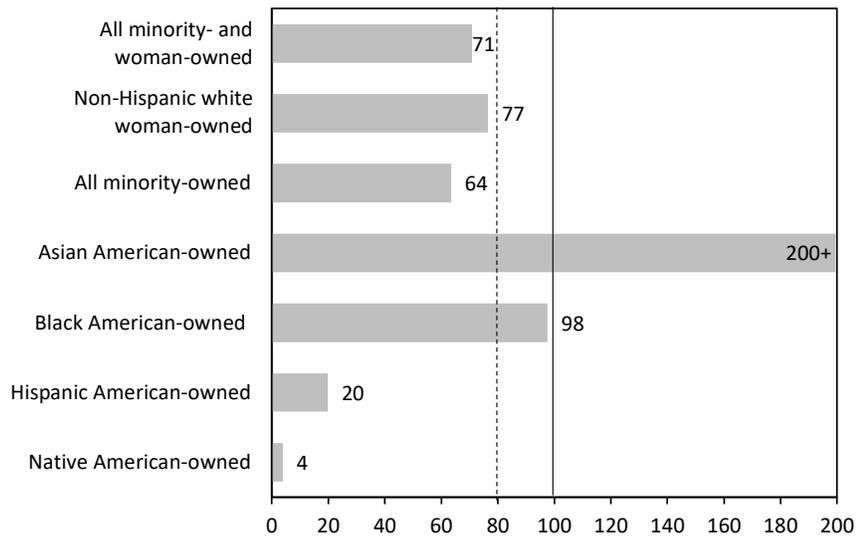
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



2. Public Works. Although IDOA used MBE/WBE contract goals to award many contracts and procurements during the study period, importantly, during the study period, the Public Works Division did not use such goals to award any of its contracts. BBC examined disparities between participation and availability separately for Public Works and non-Public Works contracts and procurements, because that comparison provides important information about the efficacy of MBE/WBE contract goals to address barriers for minority- and woman-owned businesses in IDOA work. As shown in Figure ES-10, minority- and woman-owned businesses considered together showed substantial disparities for both Public Works contracts (disparity index of 23) and non-Public Works contracts and procurements (disparity index of 78). Disparity analysis results differed for individual business groups across those contract sets:

- All relevant business groups exhibited substantial disparities on Public Works contracts.
- Only Hispanic American-owned (disparity index of 17) and Native American-owned businesses (disparity index of 1) exhibited substantial disparities on non-Public Works contracts and procurements.

Figure ES-10.
Disparity analysis
results for Public
Works and non-Public
Works contracts and
procurements

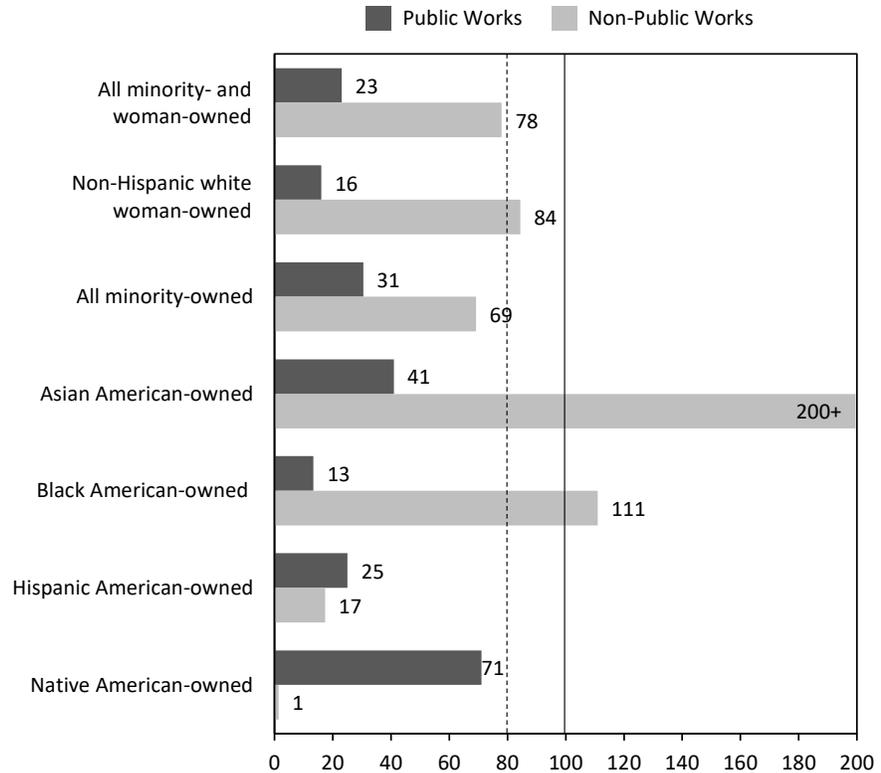
Note:

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 Figures F-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



3. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine disparity analysis results separately for prime contracts and subcontracts. In addition, IDOA’s use of MBE/WBE goals applies specifically to subcontracts, so prime contracts are awarded in a race- and gender-neutral manner. As shown in Figure 7-6, minority- and woman-owned businesses considered together showed a substantial disparity on prime contracts that IDOA awarded during the study period (disparity index of 29) but not on subcontracts (disparity index of 195). Disparity analysis results differed for individual business groups across those contract sets:

- All relevant business groups exhibited substantial disparities on prime contracts except Asian American-owned businesses (disparity index of 200+).
- Only Native American-owned businesses (disparity index of 17) exhibited substantial disparities on subcontracts, but Hispanic American-owned businesses exhibited a disparity that was close to the threshold of being considered substantial (disparity index of 81).

Figure 7-6.
Disparity analysis
results by contract
role

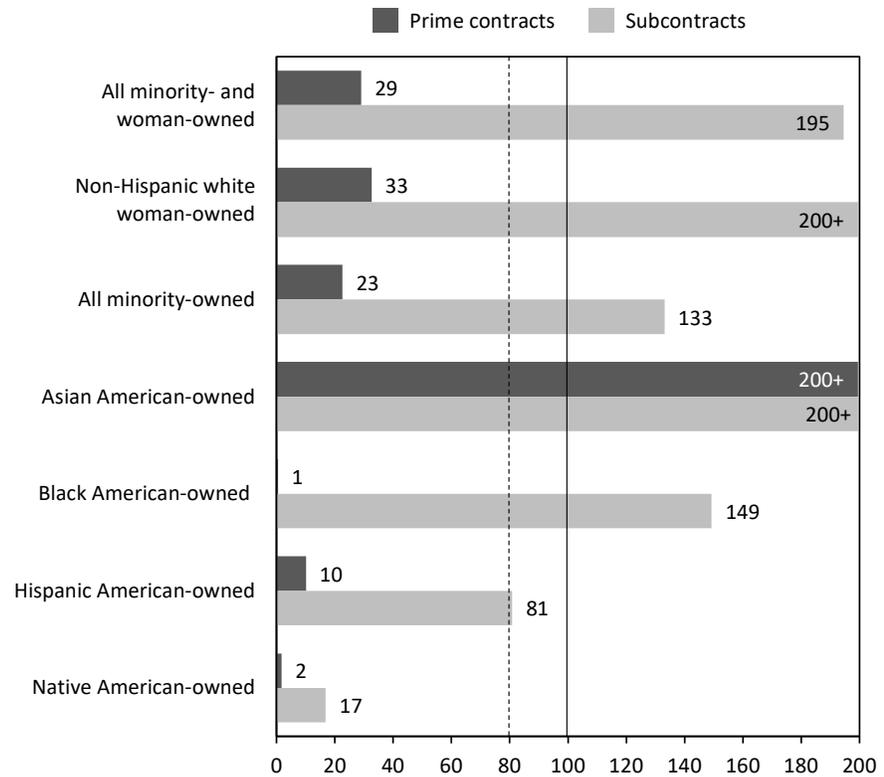
Note:

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

For more detail and results by group, see Figure F-12 and F-13 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



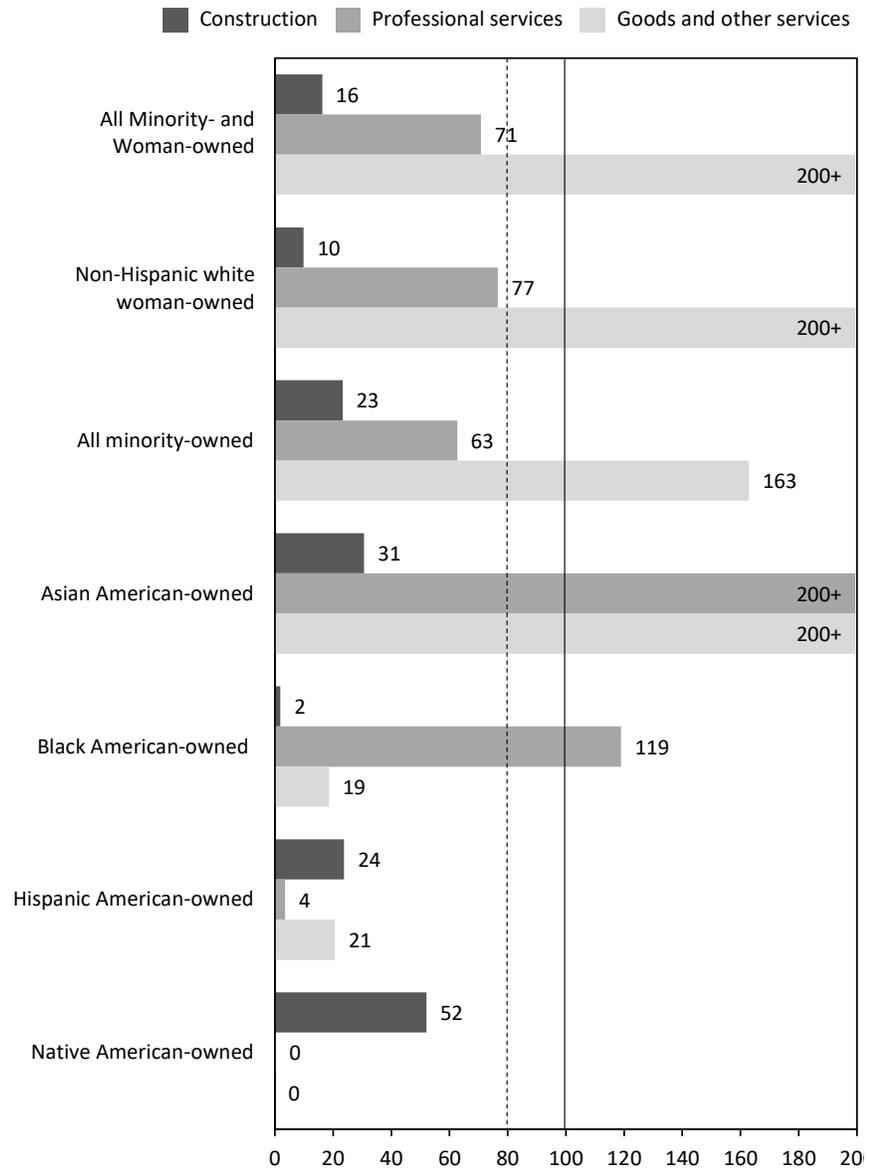
4. Industry. BBC also examined disparity analysis results separately for IDOA’s construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by work type. As shown in Figure ES-11, minority- and woman-owned businesses considered together exhibited substantial disparities for IDOA’s construction (disparity index of 16) and professional services contracts (disparity index of 71) but not for goods and other services contracts and procurements (disparity index of 200+). Disparity analysis results differed for individual business groups across those contract sets:

- All relevant business groups exhibited substantial disparities on construction contracts.
- Hispanic American- (disparity index of 4), Native American- (disparity index of 0), and white woman-owned businesses (disparity index of 77) exhibited substantial disparities on professional services contracts.
- Black American- (disparity index of 19), Hispanic American- (disparity index of 21), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on goods and other services contracts and procurements.

Figure ES-11.
Disparity analysis
results by industry

Note:
 Numbers rounded to nearest
 tenth of 1 percent and thus
 may not sum exactly to totals.
 For more detail and results by
 group, see Figure F-7, F-8, and
 F-9 in Appendix F.

Source:
 BBC Research & Consulting
 disparity analysis.



5. Veteran-owned businesses. BBC examined disparities between the participation and availability of veteran-owned businesses for IDOA, INDOT, and SEI contracts and procurements. Disparity analysis results for veteran-owned businesses by organization were as follows:

- IDOA: disparity index of 68;
- INDOT: disparity index of 20;
- Ball State University: disparity index of 200+;
- Indiana State University: disparity index of 71;
- Indiana University: disparity index of 94;
- Ivy Tech Community College: disparity index of 117;
- Purdue University: disparity index of 30;

- University of Southern Indiana: disparity index of 112; and
- Vincennes University: disparity index of 70.

E. Program Considerations

IDOA and the Commission should review study results and other relevant information in connection with making decisions concerning the M/WBE and IVOSB Programs. Key considerations in making any refinements are discussed below. When making those considerations, IDOA and the Commission should assess whether additional resources, changes in internal policy, or changes in state law might be required.

1. Data collection. IDOA uses the Pay Audit system to collect data on subcontracts that are associated with the prime contracts that it awards. However, the agency only collects data on subcontracts that certified MBE/WBEs perform. Furthermore, IDOA relies on prime contractors to enter that information into the Pay Audit system on a voluntary basis, and prime contractors do not always comply. IDOA should consider collecting data on *all* subcontracts, regardless of subcontractors' characteristics or whether they are certified as MBEs, WBEs, or IVOSBs)and making it a requirement for prime contractors to submit that information. Collecting data on all subcontracts will help ensure that IDOA monitors the participation of minority- and woman-owned businesses in its work accurately, assesses what subcontract opportunities exist for those businesses, and is able to identify additional businesses that could become certified.

2. Overall aspirational goal. Each year, the Commission sets overall aspirational goals for the participation of minority- and woman-owned businesses in state contracts and procurements. Currently, the Commission sets separate goals for minority- and woman-owned businesses for construction, professional services, and goods and other services. The Commission could instead consider setting a single goal for minority- and woman-owned businesses, considered together, across all procurement areas, which is more typical of how organizations set overall aspirational goals as part of minority- and woman-owned business programs. Having a single goal rather than six goals might help reduce the administrative burden of operating the M/WBE Program and better focus IDOA's efforts in achieving the goals each year.

Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the Commission and IDOA in establishing an overall aspirational goal for the participation of minority- and woman-owned business in its contracting and procurement. The availability analysis indicated that minority- and woman-owned businesses might be expected to receive 18.2 percent of state contract and procurement dollars, which the Commission and IDOA could consider as the *base figure* of its overall aspirational goal. In addition, the disparity study provides information about factors that the Commission and IDOA should review in considering whether an adjustment to its base figure is warranted, particularly information about the volume of state work in which minority- and woman-owned businesses have participated in the past; barriers in Indiana related to employment, self-employment, education, training, and unions; barriers in Indiana related to financing, bonding, and insurance; and other relevant information.

3. Contract-specific goals. Disparity analysis results indicated that most relevant business groups showed better outcomes on contracts and procurements that IDOA awarded with the use

of MBE/WBE goals than on contracts and procurements that the agency awarded without the use of such measures. Based on those results and the fact that the myriad race- and gender-neutral measures that IDOA uses to encourage the participation of minority- and woman-owned businesses in state contracting have not sufficiently addressed disparities for those businesses, the agency should consider continuing its use of MBE/WBE contract goals in the future.

In using MBE/WBE contract goals, IDOA currently sets the same goal on each contract or procurement it awards within a particular procurement area equal to the overall aspirational goal for the procurement area. To use contract-specific goals more effectively, IDOA could consider setting goals on individual contracts in a more tailored manner based on the availability of minority- and woman-owned businesses for the types of work involved with the project and other factors. Because the use of such goals is a race- and gender-conscious measure, IDOA must ensure that their use meets the *strict scrutiny standard* of constitutional review.

4. Public Works contracts. Although IDOA used MBE/WBE contract goals to award many contracts and procurements during the study period, the Public Works Division did not use such goals to award any of its contracts. Disparity analysis results indicated substantial disparities for all racial/ethnic and gender groups on contracts that the Public Works Division awarded during the study period. IDOA should work with the Public Works Division to consider using MBE/WBE contract goals in awarding construction and construction-related professional services contracts to better encourage the participation of minority- and woman-owned businesses in that work. As stated above, because the use of such goals would be considered a race- and gender-conscious measure, IDOA would have to ensure that the Public Works Division's use of goals meets the strict scrutiny standard of constitutional review.

5. Utilization of different businesses. According to the information to which the study team had access, during the study period, state agencies awarded \$177 million worth of contracts and procurements to minority- and woman-owned businesses, but those dollars went to only 97 different businesses, only 34 of which were minority-owned. IDOA could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked, which might help encourage the participation of a larger number of minority- and woman-owned businesses in IDOA work. For example, as part of bids and proposals, IDOA might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked in the past. IDOA could award evaluation points or price preferences based on the degree to which prime contractors partner with subcontractors with which they have not previously worked.

6. Growth monitoring. IDOA might consider collecting data on the impact that the M/WBE Program has on the growth of minority- and woman-owned businesses over time. Doing so would require it to collect baseline information on MBE/WBE-certified businesses—such as revenue, number of locations, number of employees, and employee demographics—and then continue to collect that information from each business on an annual or semiannual basis. IDOA could consider collecting those data from businesses as part of certification and renewal processes. Such metrics would allow it to assess whether the program is helping businesses grow and tailor the measures it uses as part of the M/WBE Program to the specific needs of minority- and woman-owned businesses.

CHAPTER 1.

Introduction

The Indiana Department of Administration (IDOA) provides support and other services to state agencies throughout Indiana. One of IDOA's functions is to operate the State of Indiana's Minority and Women's Business Enterprises (M/WBE) Program, which is designed to encourage the participation of minority- and woman-owned businesses in state contracting and to create a fair, competitive, and equitable environment for those businesses. The program comprises various measures to encourage the participation of minority- and woman-owned businesses in state contracting. Some of those measures are *race- and gender-neutral*, which are measures designed to encourage the participation of all businesses—or all small businesses—in an organization's contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified MBEs or WBEs. Other measures are *race- and gender-conscious*, which are measures designed to specifically encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., using M/WBE participation goals on individual contracts). IDOA also operates the Indiana Veteran-owned Small Business (IVOSB) Program, which is designed to encourage the participation of veteran-owned businesses in state contracting and help ensure that those businesses can build productive relationships throughout relevant contracting industries.

IDOA retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of the M/WBE and IVOSB Programs in encouraging the participation of minority-, woman-, and veteran-owned businesses in state contracts and procurements.¹ As part of the disparity study, BBC examined whether there are any disparities, or differences, between:

- The percentage of contract and procurement dollars—including subcontract dollars—that state agencies awarded to minority-, woman-, and veteran-owned businesses during the study period, which was defined as July 1, 2013 through June 30, 2018 (i.e., *utilization*); and
- The percentage of contract and procurement dollars that minority-, woman-, and veteran-owned businesses might be expected to receive based on their availability to perform specific types and sizes of state agencies' prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding the M/WBE and IVOSB Programs;
- Local marketplace conditions for minorities, women, veterans, and the businesses they own; and
- Contracting practices and business assistance programs that state agencies have in place.

¹ BBC considered a contract or procurement to be a *state contract or procurement* if it only included state and local funds and did not include any federal funds.

There are several reasons why a disparity study is useful to IDOA:

- The types of research that BBC conducted as part of the disparity study provide information that is useful to IDOA’s implementation of the M/WBE and IVOSB Programs (e.g., setting overall aspirational goals).
- The disparity study provides insights into how to improve contracting opportunities for local small businesses, including many minority-, woman-, and veteran-owned businesses.
- An independent, objective review of the participation of minority-, woman-, and veteran-owned businesses is valuable to IDOA leadership and to external groups that may be monitoring the state’s contracting practices.
- Government organizations that have successfully defended such programs in court have typically relied on information from disparity studies.

BBC introduces the 2020 IDOA Disparity Study in three parts:

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

A. Background

In 1983 the State of Indiana established the Governor’s Commission on Minority and Women’s Business Enterprises (the Commission) to encourage the participation of minority- and woman-owned businesses in state contracting. Although IDOA is responsible for operating the M/WBE Program, the Commission is responsible for overseeing it.² The state’s legislature recently passed a bill to change the name of the Commission to the Governor’s Commission on Supplier Diversity, so that oversight of the state’s IVOSB Program and any future disadvantaged business programs would more clearly fall under the Commission’s purview.³

1. Setting overall annual goals. Each year, the Commission establishes overall annual goals for the participation of minority- and woman-owned businesses—and in the future, veteran-owned business goals—in state contracts and procurements. The goals apply to the participation of minority- and woman-owned businesses in both prime contracts and subcontracts. The Commission sets separate goals for construction, professional services, and goods and other services based on appropriate research. The Commission may also establish separate subgoals for specific racial/ethnic and gender groups.⁴ Figure 1-1 presents the state’s current overall annual goals for minority-, woman-, and veteran-owned businesses in construction, professional services, and goods and other services. The goals are aspirational—there is no requirement that

² The Commission’s primary responsibilities as well as elements and provisions of the M/WBE Program are described in IC 4-13-16.5, IC 5-16-1-7 and Title 25 of Indiana Administrative Code, Article 5 (25 IAC 5).

³ IN HB1081.

⁴ 25 IAC 5-7-3.

individual state agencies meet them. Failure to meet the goals does not automatically cause changes to how a particular agency implements the M/WBE or IVOSB Programs.

Figure 1-1.
Overall annual goals for minority-, woman-, and veteran-owned businesses

Business group	Procurement area			
	Construction	Professional services	Goods and other services	All areas
Minority-owned businesses	7%	8%	4%	6%
Woman-owned businesses	5%	8%	9%	7%
Veteran-owned businesses	3%	3%	3%	3%

Source: <https://www.in.gov/idoa/mwbe/2494.htm>

2. Prime contract participation. The M/WBE Program calls for agencies to encourage the participation of minority- and woman-owned businesses in their contracting and procurement as prime contractors.⁵ Specific measures related to prime contract participation include:

- Outreach;
- Small business programs;
- Bonding training and assistance;
- Development of a bidders list;
- Coordination with small business assistance organizations; and
- Feedback to unsuccessful bidders.

There are no provisions in the M/WBE Program that give explicit preferences to minority- and woman-owned businesses over businesses owned by non-Hispanic white men when bidding as prime contractors on state contracts or procurements. As a result, such measures apply equally well to veteran-owned businesses.

3. Subcontract participation. As part of the M/WBE and IVOSB Programs, state agencies may set goals for the participation of minority-, woman-, and veteran-owned businesses as subcontractors on individual contracts (i.e., contract goals). Prime contractors bidding on contracts that include such goals must either meet them by making subcontracting commitments to certified MBEs, WBEs, and IVOSBs or by requesting *good faith efforts* waivers. IDOA reviews waiver requests and will grant waivers if prime contractors demonstrate genuine efforts towards compliance with the goals.⁶ If prime contractors do not meet the goals through subcontracting commitments or approved waivers, then IDOA may reject prime contractors' bids.⁷

⁵ 25 IAC 5-5.

⁶ 25 IAC 5-7-5.

⁷ 25 IAC 5-7-6.

B. Study Scope

BBC conducted a disparity study based on contracts and procurements that Indiana executive branch agencies and state educational institutions (SEIs) awarded between July 1, 2013 and June 30, 2018. Figure 1-2 presents a list of all the agencies whose contract and procurement data were included as part of the study. IDOA has varying degrees of contracting and procurement authority for all the agencies listed in Figure 1-2. Information from the disparity study will help IDOA continue to encourage the participation of minority-, woman-, and veteran-owned businesses in state contracting and procurement and create a fair, competitive, and equitable environment for those businesses. In addition, information from the study will help IDOA implement the M/WBE and IVOSB Programs in a legally defensible manner.

1. Definitions of minority- and woman-owned businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how BBC treats minority-, woman-, and veteran-owned businesses and businesses that are certified as M/WBEs or as IVOSBs with IDOA in its analyses.

a. Minority-owned businesses. BBC focused its analyses on the minority-owned business groups that are presumed to be disadvantaged in the M/WBE Program: Asian American-, Black American-, Hispanic American-, and Native American-owned businesses. BBC's definition of minority-owned businesses included businesses owned by both minority men and minority women. For example, BBC grouped Black American woman-owned businesses along with businesses owned by Black American men.

b. Woman-owned businesses. Because BBC classified minority woman-owned businesses according to their corresponding racial/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to non-Hispanic white woman-owned businesses.

c. Veteran-owned businesses. BBC analyzed business outcomes for veteran-owned businesses, which were defined as businesses owned and controlled by veterans of the United States military, the United States National Guard, or the Indiana National Guard who received honorable discharges from service.

d. MBEs/WBEs/IVOSBs. MBE, WBEs, and IVOSBs are minority-, woman-, and veteran-owned businesses, respectively, that are specifically certified as such through IDOA. Businesses seeking MBE/WBE/IVOSB certification with IDOA are required to submit an application to the Division of Supplier Diversity (DSD). The application is available online and requires businesses to submit various information, including business name, contact information, tax information, work specialization, race/ethnicity and gender of the owners, and veteran status of the owners. DSD reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

Figure 1-2.
Agencies participating in the disparity study

Agency			
State Educational Institutions			
Ball State University			
Indiana State University			
Indiana University			
Ivy Tech Community College			
Purdue University			
University of Southern Indiana			
Vincennes University			
Executive Branch Agencies			
Archives & Records Administration	Department of Labor	Historical Bureau	Plainfield Correctional Facility
Arts Commission	Department of Local Government Finance	Horse Racing Commission	Professional Licensing Agency
Board of Accounts	Department of Natural Resources	Indiana Works Council	Protection Advocacy Services Commission
Board of Animal Health	Department of Personnel	Indianapolis Re-entry Educational Facility	Public Access Counselor
Board of Education	Department of Revenue	Integrated Public Safety Commission	Putnamville Correctional Facility
Board of Tax Review	Department of Toxicology	Intergovernmental Organization	Reception Diagnostic Center
Branchville Correctional Facility	Department of Transportation	Larue Carter Hospital	Richmond State Hospital
Budget Agency	Department of Veterans Affairs	Law Enforcement Academy	Rockville Correctional Facility
Bureau of Motor Vehicles	Department of Workforce Development	Law Enforcement Training Board	School for the Blind & Visually Impaired
Camp Summit Correctional Facility	Department of Insurance	Lieutenant Governor's Office	School for the Deaf
Career Council	Edinburgh Correctional Facility	Logansport Juvenile Correctional Facility	School Lunch Division
Chain O' Lakes Correctional Facility	Education Employment Relations Board	Logansport State Hospital	Serve Indiana
Charter School Board	Education Roundtable	Madison Correctional Facility	State Employees Appeals Commission
Civil Rights Commission	Election Division	Madison Juvenile Correctional Facility	State Library
Coroner's Training Board	Evansville Psychiatric Children's Center	Madison State Hospital	State Police
Correctional Industrial Facility	Evansville State Hospital	Miami Correctional Facility	State Prison
Correctional Industries	Family & Social Services Administration (FSSA)	New Castle Correctional Facility	Utility Consumer Counselor
Criminal Justice Institute	FSSA: Aging	Office of Energy Development	Utility Regulatory Commission
Department of Administration	FSSA: Disability & Rehab Services	Office of Environmental Adjudication	Veterans' Home
Department of Agriculture	FSSA: Family Resources	Office of Inspector General	Wabash Valley Correctional Facility
Department of Child Services	FSSA: Medicaid Policy & Plan	Office of Management & Budget	War Memorials Commission
Department of Corrections	FSSA: Mental Health & Addiction	Office of State Based Initiatives	Westville Correctional Facility
Department of Education	Gaming Commission	Office of Technology	Women's Prison
Department of Environmental Management	Governor's Council for People with Disabilities	Office of the Attorney General	Worker's Comp Board
Department of Health	Governor's Office	Pendleton Correctional Facility	
Department of Homeland Security	Henryville Correctional Center	Pendleton Juvenile Correctional Facility	

BBC analyzed the possibility that race-, gender-, or veteran-based barriers affected the participation of minority-, woman-, and veteran-owned businesses in state contracts and procurements, based specifically on the race/ethnicity and gender of business owners and their status as veterans. Therefore, the study team counted businesses as minority-, woman-, or veteran-owned regardless of whether they were, or could be, certified as MBEs/WBEs/IVOSBs through IDOA. Analyzing the participation and availability of minority-, woman-, and veteran-owned businesses regardless of certification allowed the study team to assess whether there are disparities affecting all minority-, woman-, and veteran-owned businesses and not just those businesses that decided to become certified. However, because IDOA tracks the participation of certified MBEs/WBEs/IVOSBs, BBC reports utilization analysis results for all minority-, woman-, and veteran-owned businesses and separately for those minority-, woman-, and veteran-owned businesses that are certified as MBEs/WBEs/IVOSBs. BBC does not report availability or disparity analysis results separately for certified MBEs/WBEs/IVOSBs.

e. Majority-owned businesses. Majority-owned businesses are businesses owned by non-Hispanic white men who are not veterans. In certain analyses, the study team coded each business as minority-, woman-, veteran-, or majority-owned.

2. Analyses in the disparity study. The disparity study examined whether there are any disparities between the participation and availability of minority-, woman-, and veteran-owned businesses on state contracts and procurements. The study focused on construction, professional services, and goods and other services contracts that state agencies and SEIs awarded between July 1, 2013 and June 30, 2018 (i.e., the *study period*). During the study period, state agencies applied MBE/WBE/IVOSB contract goals to most of those contracts. However, the state did not enforce the use of contract goals on contracts that it awarded through the Division of Public Works (i.e., construction and construction-related professional services contracts). In addition, SEIs did not use contract goals to award any contracts or procurements.

In addition to the core utilization, availability, and disparity analyses, the disparity study also includes myriad analyses and information related to the M/WBE and IVOSB Programs. That information is presented 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. The analysis included a review of federal and state requirements concerning the M/WBE and IVOSB Programs. 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 conditions and potential barriers in the local marketplace for minorities, women, veterans, and the businesses they own. In addition, the study team collected anecdotal evidence about potential barriers that small businesses and minority-, woman-, and veteran-owned businesses face in Indiana through in-depth interviews and public meetings. Information about marketplace conditions is presented in **Chapter 3**, **Appendix D**, and **Appendix E**.

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

d. Availability analysis. BBC analyzed the percentage of contract and procurement dollars that minority-, woman-, and veteran-owned businesses might be expected to receive based on their availability to perform specific types and sizes of state prime contracts and subcontracts. That analysis was based on state agency data and surveys that the study team conducted with thousands of Indiana businesses that work in industries related to the types of contracting dollars that the state awards. Results from the availability analysis are presented in **Chapter 5** and **Appendix C**.

e. Utilization analysis. BBC analyzed contract and procurement dollars that the state awarded to minority-, woman-, and veteran-owned businesses during the study period. Those data included information about associated subcontracts.⁸ Results from the utilization analysis are presented in **Chapter 6**.

f. Disparity analysis. BBC examined whether there were any disparities between the participation and availability of minority-, woman-, and veteran-owned businesses on contracts and procurements that state agencies awarded during the study period and the availability of those businesses for that work. The study team also assessed whether any observed disparities were statistically significant and potential explanations for those disparities. Results from the disparity analysis are presented in **Chapter 7** and **Appendix F**.

g. Program measures. BBC reviewed the measures that the state and other organizations use to encourage the participation of small businesses as well as minority-, woman-, and veteran-owned businesses in their contracting and procurement. That information is presented in **Chapter 9**.

h. Program implementation. BBC provided guidance related to additional program options and changes to current contracting practices that IDOA could consider, including setting new overall aspirational goals for the participation of minority-, woman-, and veteran-owned businesses in state contracts and procurements. The study team’s review and guidance is presented in **Chapter 10**.

C. Study Team Members

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

⁸ Prime contractors—not the state—*award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to the state as *awarding* subcontracts.

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

2. Bingle Research Group (BRG). BRG is a veteran-owned professional services firm based in Indianapolis, Indiana. BRG conducted in-depth interviews with Indiana businesses as part of the study team’s qualitative analyses of marketplace conditions.

3. Briljent. Briljent is a woman-owned professional services firm based in Indianapolis, Indiana. Briljent conducted in-depth interviews with Indiana businesses as part of the study team’s qualitative analyses of marketplace conditions.

4. Engaging Solutions. Engaging Solutions is a Black American woman-owned survey firm based in Indianapolis, Indiana. Engaging Solutions conducted telephone surveys with thousands of Indiana businesses to gather information for the utilization and availability analyses.

5. Davis Research. Davis Research is a small survey firm based in Calabasas, California. Davis Research conducted telephone and online surveys with thousands of Indiana businesses to gather information for the utilization and availability analyses.

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

CHAPTER 2.

Legal Analysis

The Indiana Department of Administration (IDOA) uses various efforts to encourage the participation of minority-, woman-, and veteran-owned businesses in state contracts and procurements as part of the Minority and Women’s Business Enterprises (M/WBE) and Indiana Veteran-owned Small Business (IVOSB) Programs. To try to meet the objectives of those programs, IDOA uses various *race- and gender-neutral* and *race- and gender-conscious* program measures. Race- and gender-neutral measures are measures designed to encourage the participation of small businesses in an organization’s contracting regardless of the race/ethnicity or gender of businesses’ owners. In contrast, race- and gender-conscious measures are measures designed to specifically encourage the participation of minority- and woman-owned businesses in an organization’s contracting (e.g., participation goals for minority- and woman-owned businesses on individual contracts).

IDOA uses MBE/WBE and IVOSB goals to award individual contracts, although the use of those goals is not enforced in the award of public works contracts (i.e., construction and construction-related professional services contracts). Prime contractors can meet contract goals by either making subcontracting commitments with certified MBE/WBE/ISOVB businesses at the time of bid or by submitting waivers showing they made reasonable *good faith efforts* to fulfill the goals but could not do so. IDOA’s use of M/WBE contract goals, in particular, is a race- and gender-conscious measure. It is instructive to review legal standards surrounding the use of such measures in case IDOA decides that the continued use of race- and gender-conscious measures is appropriate in the future.

Any use of race- and gender-conscious measures in the context of contracting and procurement must meet the *strict scrutiny* standard of constitutional review, because they potentially impinge on the civil rights of businesses that are not minority- or woman-owned.¹ The strict scrutiny standard presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, a government organization must:

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

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

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

BBC Research & Consulting (BBC) summarizes the elements of the M/WBE and IVOSB Programs as well as the legal standards to which the State of Indiana must adhere in implementing the programs. BBC presents that information in two parts:

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

A. Program Overview

The M/WBE and IVOSB Programs are designed to encourage the participation of minority- and woman-owned businesses and veteran-owned businesses, respectively, in state contracting and procurement and create a fair, competitive, and equitable environment for those businesses.

1. M/WBE Program. Each year, the Governor's Commission on Supplier Diversity (the Commission) establishes overall annual goals for the participation of minority- and woman-owned businesses in state prime contracts and subcontracts.² The Commission sets separate goals for construction, professional services, and goods and other services contracts and procurements based on appropriate research, which the state is required to conduct every five years.³

a. Definitions of MBE and WBE. According to 25 IAC 5, an *MBE* is defined as a business that is owned and controlled by United States citizens who identify with one of the following minority groups: Asian Americans, Black Americans, Hispanic Americans, or Native Americans. A *WBE* is a business that is owned and controlled by United States citizens who are women. Businesses that meet those requirements are eligible to become certified M/WBEs through IDOA.

b. Certification requirements. Businesses seeking M/WBE certification with the State of Indiana are required to submit applications to IDOA's Division of Supplier Diversity (DSD). 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. DSD reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information. Note that unlike many other minority- and woman-owned business programs, no revenue or net worth assessments are associated with IDOA's M/WBE certification process.

IDOA has certification reciprocity agreements with other certifying organizations in the State of Indiana. If a minority- or woman-owned business is certified through one of those other agencies

² BBC considered a contract or procurement to be a *state contract or procurement* if it only included state and local funds and did not include any federal funds.

³ The Commission's primary responsibilities as well as elements and provisions of the M/WBE Program are described in IC 4-13-16.5, IC 5-16-1-7, and 25 IAC 5.

and has submitted required reciprocity forms, IDOA will recognize it as being M/WBE certified. However, DSD still has the authority to deny M/WBE certification to businesses even if they are certified with other organizations. Organizations with which IDOA has reciprocity agreements include:

- Indiana Department of Transportation, which is the only organization in Indiana that certifies Disadvantaged Business Enterprises;
- City of Indianapolis, which certifies MBEs and WBEs; and
- Great Lakes Women's Business Council, which certifies WBEs.

c. Program measures. As part of the M/WBE Program, state agencies are required to implement measures to encourage the participation of minority- and woman-owned businesses in state contracting and procurement. Those measures include:

- Outreach, promotion, and assessment;
- Monitoring and reporting of M/WBE participation; and
- M/WBE contract goals.

i. Outreach, promotion, and assessment. Administrative code requires state agencies to engage in outreach activities with minority- and woman-owned businesses and assess where and when those programs would be most useful. In addition, state agencies are expected to provide and promote opportunities for certified M/WBEs to participate in contracting opportunities as prime contractors and subcontractors.

ii. Monitoring and reporting. State agencies are required to monitor and report the participation of certified M/WBEs in state prime contracts and subcontracts.

Monitoring. Monitoring M/WBE participation requires state agencies to engage in various activities, such as:

- Keeping track of certified M/WBEs that bid on state contracts and procurements as prime contractors and develop strategies to increase the number of certified M/WBE bidders;
- Developing standardized methods of debriefing bidders who do not win state contracts or procurements and counsel unsuccessful bidders on how to make future bids or proposals more competitive; and
- Hosting pre-project meetings with prime contractors and subcontractors during which subcontractors can learn when their services are likely to be needed and understand state law related to the prime contractor-subcontractor relationship.

Reporting. State law requires state agencies to submit quarterly reports to DSD regarding the participation of certified M/WBEs in state prime contracts and subcontracts. In addition to total prime contract and subcontract dollars, state agencies are required to report contact information for certified M/WBE subcontractors.

iii. M/WBE contract goals. With approval from the Commission, state agencies may—but are not necessarily required to—use M/WBE contract goals to award individual contracts to encourage the participation of minority- and woman-owned businesses as subcontractors. M/WBE contract goals may vary from contract to contract. However, across all contracts in a particular year, their use is intended to help state agencies meet the overall annual goals that the Commission sets.

Use of goals. IDOA currently uses M/WBE contract goals in awarding most state-funded professional services and goods and other services contracts. IDOA applies the same goals to each of its contracts in a particular industry, and those goals are the same as the overall annual goals that the Commission has set for relevant contracting areas (see Figure 1-1 in Chapter 1). IDOA does not enforce the use of M/WBE contract goals on contracts that it awards through its Public Works Division, which account for most of the agency’s construction and construction-related professional services contracts.

Meeting M/WBE contract goals. Prime contractors can meet M/WBE contract goals by either making subcontracting commitments with certified M/WBE subcontractors at the time of bid or by submitting a waiver showing that they made all reasonable *good faith efforts* to fulfill the goals but could not do so. Good faith efforts may include:

- Direct contact or negotiations with certified M/WBE subcontractors;
- Advertising subcontracting opportunities for certified M/WBE subcontractors; and
- Sending notifications or solicitations to certified M/WBE subcontractors regarding subcontracting opportunities.

If prime contractors fail to meet M/WBE contract goals through subcontracting commitments or fail to fulfill good faith efforts, DSD may deem their bids unresponsive and may reject them.

2. IVOSB Program. The IVOSB program is similar in many respects to the M/WBE Program, but its focus is specifically on helping veteran-owned businesses attempting to perform work on state contracts and procurements. As with the M/WBE Program, each year the Commission establishes overall annual goals for the participation of veteran-owned businesses in state prime contracts and subcontracts.⁴

a. Definition IVOSB. The state’s definition of *IVOSB* is defined as a business that is owned and controlled by a veteran of the United States military, the United States National Guard, or the Indiana National Guard who received an honorable discharge from service.

b. Certification requirements. Businesses seeking IVOSB certification with the State of Indiana are required to submit applications to DSD and must meet the following criteria:

⁴ The Indiana legislature recently passed a bill to change the name of the Commission to the Governor’s Commission for Supplier Diversity, so that oversight of the states IVOSB Program and any future disadvantaged business programs would more clearly fall under the Commission’s purview.

- The majority of their payrolls must be accounted for by Indiana residents.
- The majority of their staffs must comprise Indiana residents.
- They must make substantial capital investments in Indiana.
- They must be headquartered in Indiana.

The application is available online and requires businesses to submit various information, including business name, contact information, tax information, and work specializations. DSD reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information. There are no revenue or net worth assessments associated with IDOA's IVOSB certification process.

c. Program measures. Many of the program measures that state agencies use as part of the IVOSB Program are similar to those of the M/WBE Program, including outreach, promotion, and assessment; monitoring and reporting of IVOSB participation; and using IVOSB contract goals on contracts and procurements worth more than \$75,000, which are *race- and gender-neutral* by definition. In addition, IVOSB prime contractors can claim a price evaluation preference of 15 percent on contracts and procurements worth less than \$75,000. That is, for evaluation purposes, IVOSB prime contractors can be considered the lowest bidder if their bids are within 15 percent of the lowest, non-IVOSB bidder.

B. Legal Standards

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

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

2. Programs that include race- and gender-conscious measures. The United States Supreme Court has established that contracting programs that include both race- and gender-neutral and race- and gender-conscious measures—like the M/WBE Program—must meet the *strict scrutiny* standard of constitutional review.⁵ In contrast to a rational basis, the strict scrutiny standard presents the highest threshold for evaluating the legality of government programs that could impinge on the rights of others short of prohibiting them altogether. The

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

two key United States Supreme Court cases that established the strict scrutiny standard for such programs are:

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

Under the strict scrutiny standard, a government organization must show a *compelling governmental interest* to use race- and gender-conscious measures and ensure that its use of such measures is *narrowly tailored*.

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

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

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

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

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

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

- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.⁹

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

Many programs have failed to meet the strict scrutiny standard, because they have failed to meet the compelling governmental interest requirement, the narrow tailoring requirement, or both. However, many other programs have met the strict scrutiny standard and courts have deemed them to be constitutional. Appendix B provides detailed discussions of the case law related to those programs.

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

CHAPTER 3.

Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.^{1, 2, 3, 4} Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.⁵ Minorities and women in Indiana faced similar barriers. In the 19th and early 20th centuries, Indiana had 18 counties in which it was illegal for Black Americans to appear after dark.⁶ In addition, during that time period, the Indiana Ku Klux Klan had a chapter in each county and had more than 150,000 members.⁷ Disparate treatment of minorities and women also extended into the labor market. For example, data from the 1930 United States Census indicate that only 14 percent of Indiana women were in the state's labor market.

In the middle of the 20th century, many reforms opened up new opportunities for minorities and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.⁸ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women^{9, 10, 11, 12} However, despite those improvements, minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.^{13, 14, 15, 16}

Federal Courts and the United States Congress have considered barriers that minorities, women, and minority- and woman-owned businesses face in a local marketplace as evidence for the existence of race- and gender-based discrimination in that marketplace.^{17, 18, 19} The United States Supreme Court and other federal courts have held that analyses of conditions in a local marketplace for minorities, women, and minority- and woman-owned businesses are instructive in determining whether agencies' implementations of minority- and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for government contracts. Passive participation in discrimination means that agencies unintentionally perpetuate race- or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race- or gender-based discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{20, 21, 22}

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the Indiana construction, professional services, and goods and other services industries. In addition, where data were available, the study team conducted analogous analyses for veteran-owned businesses, because they also fall under the purview of the Governor’s Commission for Supplier Diversity. The study team also examined the potential effects that any such barriers have on the formation and success of businesses and on their participation in, and availability for, contracts that the Indiana Department of Administration and other state agencies award. The study team examined local marketplace conditions in four primary areas:

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

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

A. Human Capital

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

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

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

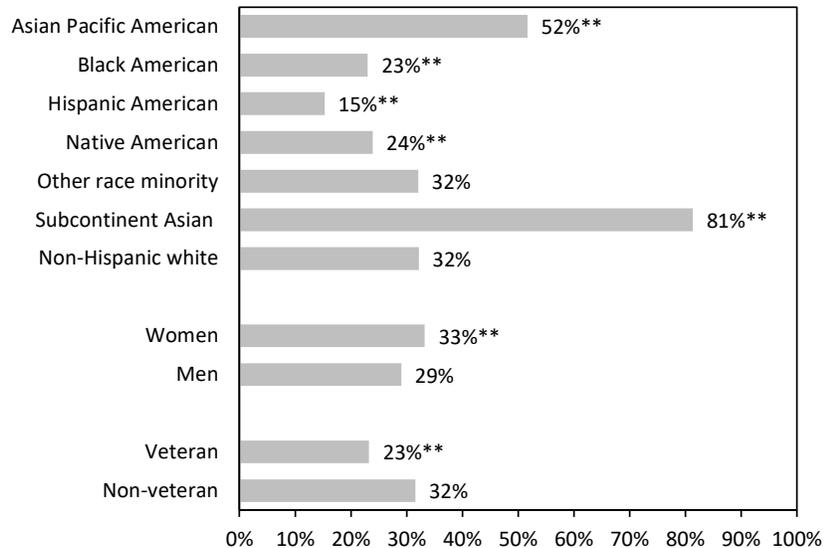
Figure 3-1.
Percentage of Indiana workers 25 and older with at least a four-year college degree

Note:

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

Source:

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

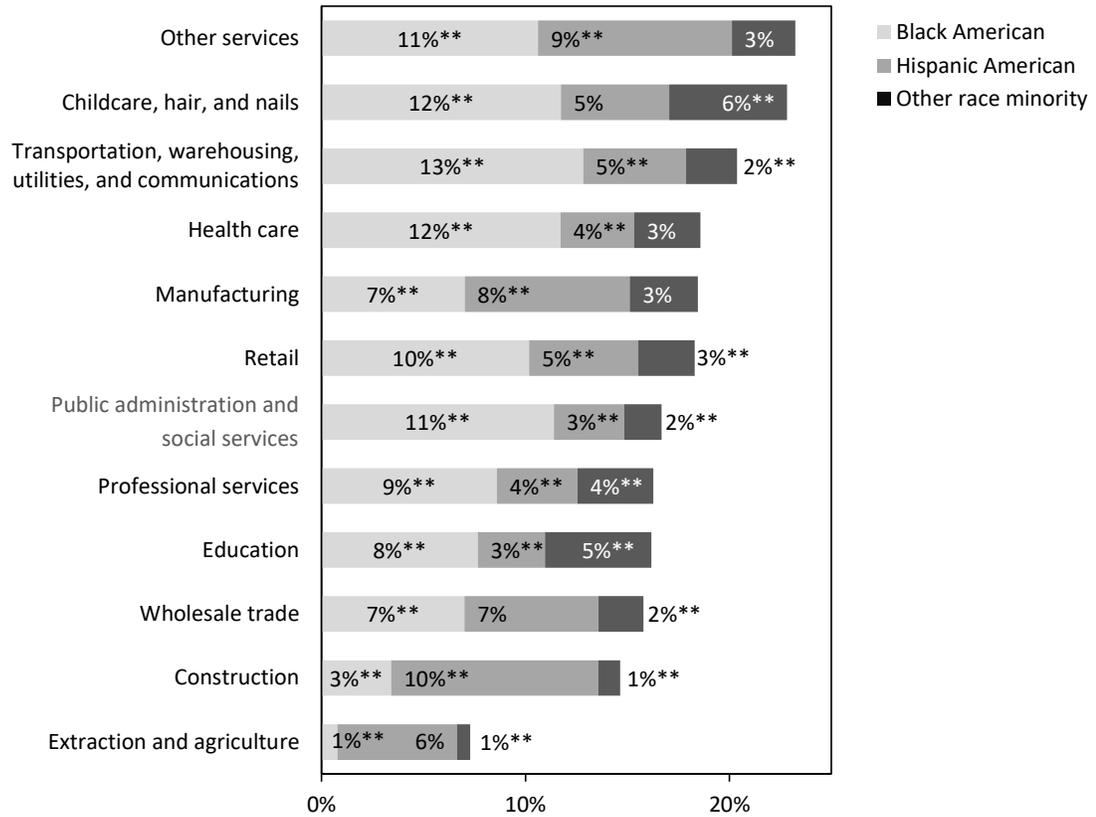


2. Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit minorities, women, and veterans from acquiring that experience could prevent them from starting and operating related businesses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

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

The study team’s analyses of the labor force in Indiana are largely consistent with nationwide findings. Figures 3-2 presents the representation of minority workers in various Indiana industries. As shown in Figure 3-2, the industries with the highest representations of minority workers are other services; childcare, hair, and nails; and transportation, warehousing, utilities, and communications. The Indiana industries with the lowest representations of minority workers are wholesale trade, construction, and extraction and agriculture.

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



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

The representation of minorities among all Indiana workers is 9% for Black Americans, 6% for Hispanic Americans, and 3% for other race minorities.

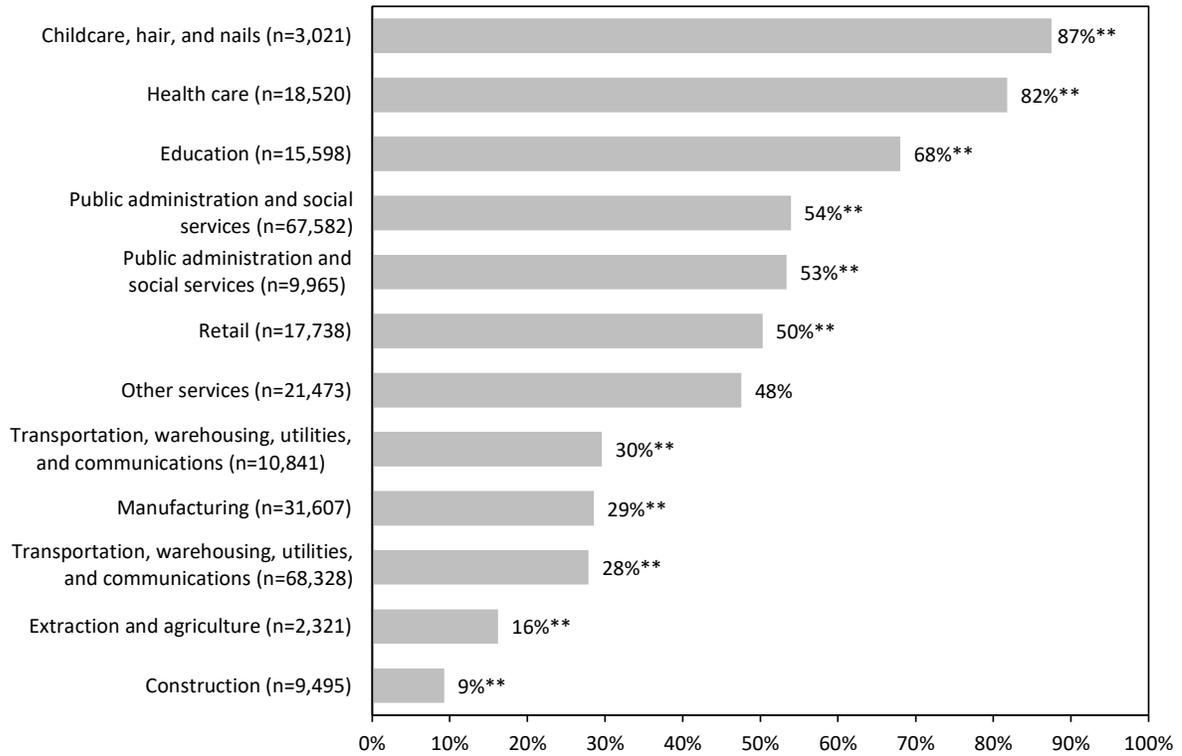
Other race minorities include Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and minorities of other races and ethnicities.

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

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

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

Figure 3-3.
Percent representation of women in various Indiana industries



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

The representation of women among all Indiana workers is 47%.

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

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

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

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

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

- A smaller percentage of Black Americans work as managers in the goods and other services industry than non-Hispanic whites. In addition, a smaller percentage of women than men work as managers in the goods and other services industries. Finally, a smaller percentage of veterans than non-veterans work as managers in the goods and other services industry.

Figure 3-4
Percentage of workers who worked as a manager in study-related industries in Indiana

Note:

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

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

Source:

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

	Construction	Professional Services	Goods and Other Services
Race/ethnicity			
Asian Pacific American	14.3 %	1.5 % **	3.3 %
Black American	3.4 % **	3.6 %	0.9 % **
Hispanic American	2.7 % **	1.0 % **	1.7 %
Native American	3.5 % *	1.1 % **	2.8 %
Other race minority	0.0 % †	14.4 % †	0.0 % †
Subcontinent Asian	20.8 % †	8.8 %	0.0 %
Non-Hispanic white	7.8 %	4.6 %	2.5 %
Gender			
Women	4.5 % **	3.8 % **	1.3 % **
Men	7.4 %	5.0 %	2.8 %
Veteran Status			
Veteran	8.6 %	3.9 %	1.3 % **
Non-veteran	7.0 %	4.5 %	2.3 %
All individuals	7.1 %	4.4 %	2.2 %

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

B. Financial Capital

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

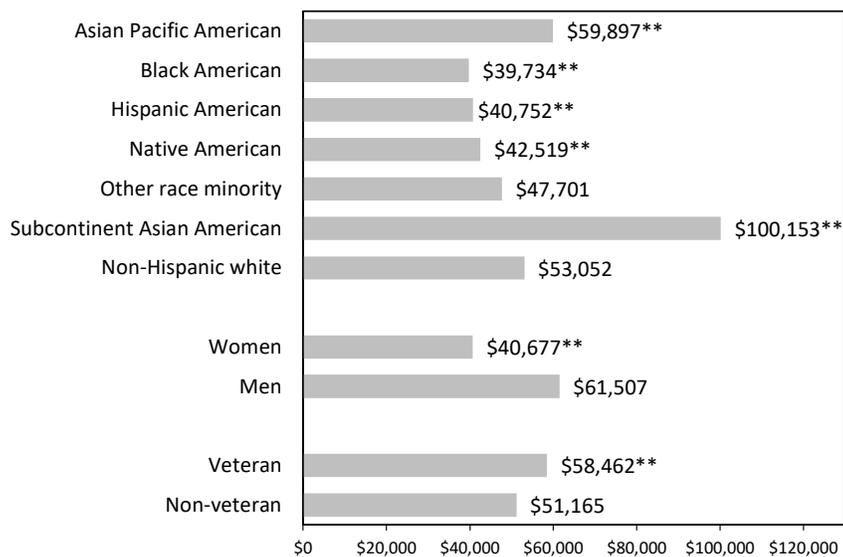
1. Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various personal factors that are ostensibly unrelated to race and gender.^{56, 57, 58} For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds

those of non-Hispanic whites.^{59, 60} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.⁶¹ Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

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

- Black Americans, Hispanic Americans, Native Americans, and other race minorities in Indiana earn substantially less than non-Hispanic whites; and
- Women earn substantially less than men.

Figure 3-5.
Mean annual wages in Indiana



Note: The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.
 ** Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), or from non-veterans (for veterans) at the 95% confidence level.

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

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

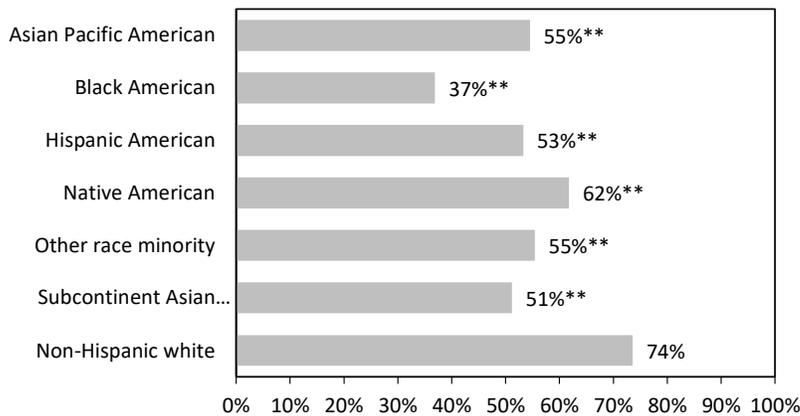
2. Personal wealth. Another potentially important source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.^{62, 63} For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household

net worth that was 5 percent and 1 percent that of non-Hispanic whites, respectively. In addition, approximately one-out-of-five Black Americans and Hispanic Americans in the United States are living in poverty, about double the comparable rate for non-Hispanic whites.⁶⁴ Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁶⁵

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

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

Figure 3-6.
Home ownership rates in Indiana



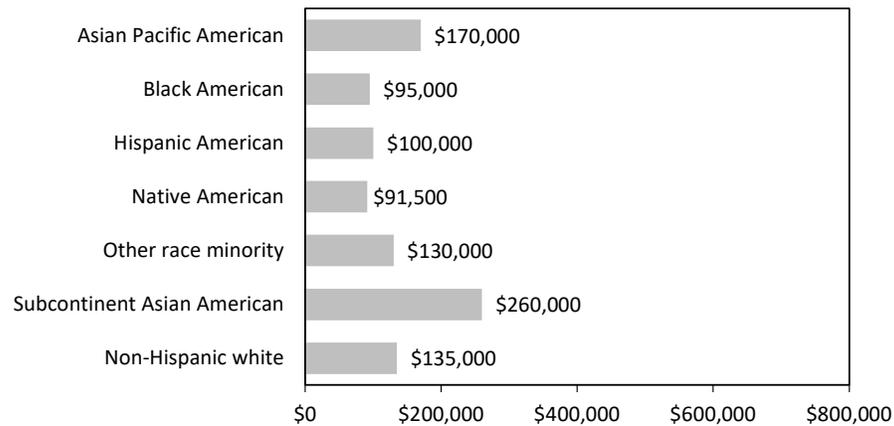
Note: The sample universe is all households.

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

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

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

Figure 3-7.
Median home values in Indiana



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

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

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

a. Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.^{81, 82, 83, 84, 85} Race- and gender-based barriers in home credit markets, as well as the foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{86, 87, 88, 89} To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for Indiana and the United States as a whole. As shown in Figure 3-8, Black Americans, Hispanic Americans, and Native Americans or Other Pacific Islanders in Indiana were denied home loans at higher rates than non-Hispanic whites. In addition, the study team's analyses indicate that certain minority groups in Indiana are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

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

woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.^{96, 97, 98, 99}

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

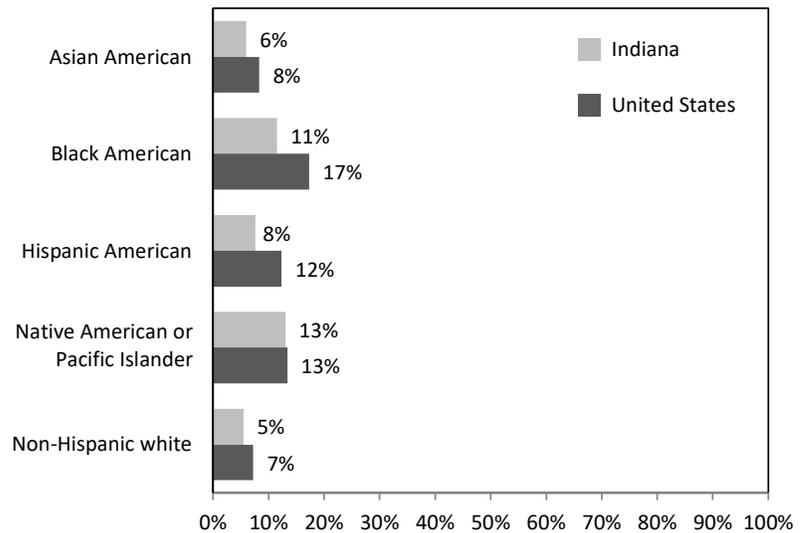
Note:

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

Native Americans are combined with Pacific Islanders due to small samples.

Source:

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



C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, Black American-owned businesses increased by 35 percent, and Hispanic American-owned businesses increased by 46 percent.¹⁰⁰ Despite the progress that minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.^{101, 102, 103, 104} In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and already include large concentrations of individuals from disadvantaged groups.^{105, 106, 107}

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

- Women own construction businesses at a lower rate than men;
- Asian Pacific Americans, Black Americans, Hispanic Americans, and Subcontinent Asian Americans own professional services businesses at lower rates than non-Hispanic whites and women own professional services own businesses at a lower rate than men; and
- Black Americans own goods and other services businesses at a lower rate than non-Hispanic whites.

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

	Construction	Professional Services	Goods & Other Services
Race/ethnicity			
Asian Pacific American	15.3 %	7.3 % **	11.0 %
Black American	17.5 %	5.8 % **	5.5 % **
Hispanic American	24.4 %	7.1 % **	10.9 % *
Native American	38.3 % *	9.5 %	5.7 %
Other minority group	9.1 % †	11.4 % †	0.0 % †
Subcontinent Asian American	28.3 % †	6.4 % **	16.3 %
Non-Hispanic white	22.4 %	13.6 %	7.4 %
Gender			
Women	18.1 % **	10.6 % **	8.1 %
Men	22.9 %	13.7 %	7.1 %
Veteran Status			
Veteran	24.5 %	19.4 % **	9.1 %
Non-veteran	22.3 %	11.8 %	7.4 %
All individuals	22.4 %	12.2 %	7.5 %

Note: For each industry and group, business ownership rates were calculated by determining the proportion of total workers in the labor force and the number that are self-employed as either an incorporated or non-incorporated business. As shown in the figure, the business ownership rate for Black Americans in the professional services industry is 5.8%, meaning that of all the Black Americans in the labor force in the professional services industry in Indiana, 5.8% own their businesses.

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

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

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

BBC also conducted regression analyses to determine whether differences in business ownership rates based on race/ethnicity, gender, and veteran status exist even after statistically controlling for various personal factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. Figure 3-10 presents the racial/ethnic-, gender-, and veteran-related 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 a woman is associated with a lower likelihood of owning a construction business compared to being a man.
- Being Asian Pacific American, Black American, or Subcontinent Asian American is associated with a lower likelihood of owning a professional services business compared to being non-Hispanic white. In addition, being a woman is associated with a lower likelihood of owning a professional services business compared to being a man.

Figure 3-10.
Predictors of business ownership in relevant industries in Indiana (probit regression)

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, men for the gender variable, and non-veteran for the veteran variable.

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

Industry and Group	Coefficient
Construction	
Native American	0.5765
Women	-0.2350
Professional Services	
Asian Pacific American	-0.3908
Black American	-0.3074
Subcontinent Asian American	-0.5180
Women	-0.1326
Goods and Other Services	
Asian Pacific American	0.5869
Hispanic American	0.4707
Women	0.1041

D. Business Success

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

Business closure. The study team examined the rates of closure among Indiana businesses by the race/ethnicity and gender of the owners. Figure 3-11 presents those results. As shown in Figure 3-11, Asian American-, Black American-, and Hispanic American-owned businesses in Indiana 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.

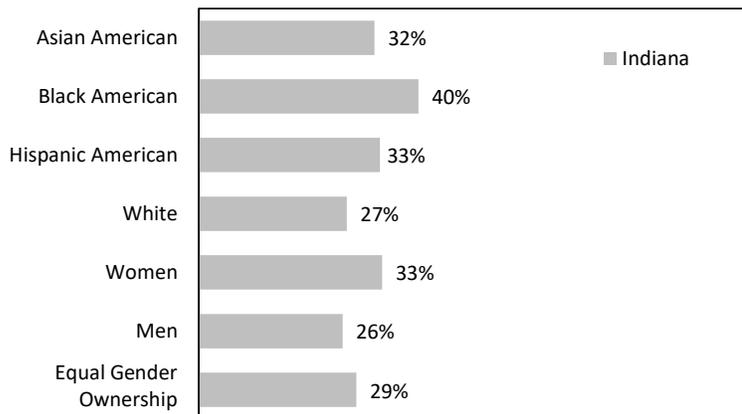
Figure 3-11.
Rates of business closure in Indiana

Note:
 Data include only to non-publicly held businesses.
 Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

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

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

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



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

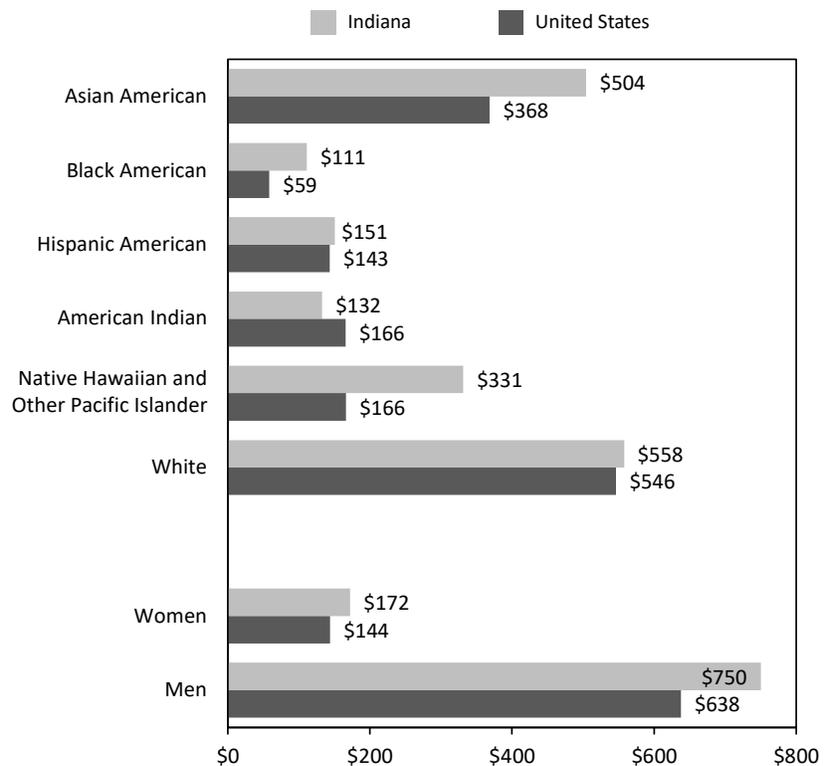
Figure 3-12.
Mean annual business receipts (in thousands) in Indiana

Note:

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

Source:

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



Business owner earnings. The study team analyzed business owner earnings to assess whether minorities, women, and veterans in Indiana earn as much from the businesses they own as non-Hispanic whites, men, and non-veterans do. As shown in Figure 3-13:

- Black Americans, Hispanic Americans, Native Americans, and other race minorities earned less on average from their businesses than non-Hispanic whites earned from their businesses; and
- Women earned less from their businesses than men earned from their businesses.

BBC also conducted regression analyses to determine whether differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being non-Hispanic white, being Black American or Native American was associated with substantially lower business owner earnings. Similarly, being a woman was associated with substantially lower business owner earnings than being a man (for details, see Figure C-26 in Appendix C).

Figure 3-13.
Mean annual business
owner earnings in
Indiana

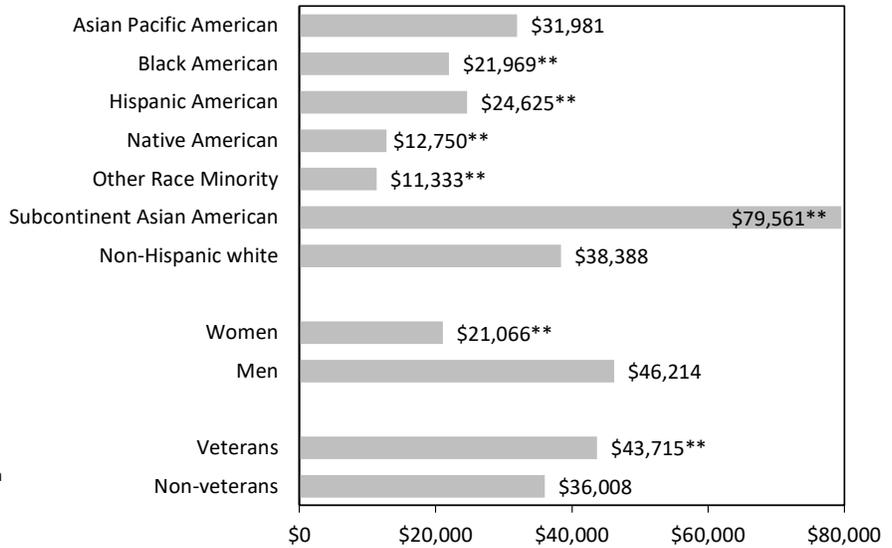
Note:

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

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

Source:

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



E. Summary

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

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

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¹⁰⁸ 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.

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CHAPTER 4.

Collection and Analysis of Contract Data

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

- A. Overview of state contracting policies;
- B. Collection and analysis of contract data;
- C. Collection of vendor data;
- D. Relevant geographic market area (RGMA);
- E. Relevant types of work; and
- F. Agency review process.

A. Overview of State Contracting Policies

The Indiana Department of Administration (IDOA) provides support and other services to state agencies throughout Indiana and is responsible for managing the award of construction, professional services, and goods and other services contracts and procurements for almost all state agencies.¹

1. Procurement Division. IDOA's Procurement Division is responsible for managing professional services and goods and other services contracts and procurements. It has purchasing authority for all state agency procurements worth \$75,000 or more, but in most cases, delegates authority to individual state agencies for small purchases. Its procurement policies are governed by Indiana Code Title 5, Article 22 (IC 5-22) and can be categorized into five types:

- Purchases worth less than \$500 (non-competitive purchases);
- Purchases worth less than \$75,000 (small purchases);
- Purchases worth \$75,000 or more;
- Quantity purchase agreements (QPAs); and
- Special procurements.

¹ IDOA does not manage contracts or procurements for the Indiana Department of Transportation, courts under the judicial branch, or agencies under jurisdiction of legislative council unless those agencies request that IDOA does so.

a. Non-competitive purchases. If a contract is worth less than \$500, and if the price is deemed fair and reasonable, state agencies may make a purchase without using competitive procurement processes. State agencies are encouraged to purchase goods or services from Indiana Correctional Industries or Ability Indiana if the value of the contract is less than \$500.² Purchasing from minority- and woman-owned businesses to the greatest extent possible is also encouraged.

b. Small purchases. For procurements worth more than \$500 but less than \$75,000, state agencies issue Requests for Quotation (RFQs). Agencies must solicit at least three bidders for quotations, and if the good or service is available from Indiana Correctional Industries or Ability Indiana their prices must be included in the solicitation and compared to three other quotes. Agencies review the quotations that they receive and make awards to the lowest responsible and responsive bidders. For procurements worth more than \$2,500, IDOA requests that agencies leave solicitations open for at least seven days. Purchases worth more than \$5,000 that fall under United Nations Standard Product and Services Codes (UNSPSC) are set aside for small businesses and require three formal quotes from small businesses.^{3,4} For small purchases worth \$5,000 or less, informal RFQs acceptable. For procurements worth more than \$5,000 but less than \$75,000, formal RFQs are required.

c. Purchases worth \$75,000 or more. IDOA manages the award of all state agency contracts and procurements worth \$75,000 or more. For contracts and procurements of that size, IDOA usually follows one of three procurement methods if the goods or services are not available from Indiana Correctional Industries, Ability Indiana, or QPAs:

- Invitations to Bid (IFBs);
- Negotiated Bidding; or
- Requests for Proposal (RFPs).

i. IFBs. IFBs differ from RFQs in terms of minor procedural requirements. IFBs must be open and advertised for 14 consecutive days, and bids must be read publicly on bid closing dates and specified times. IDOA reviews bids that it receives and makes awards to the lowest responsible and responsive bidders.⁵ IDOA uses IFBs to award contracts where cost is the primary consideration.

² IC 5-22-11 through IC 5-22-12.

³ Small business set-asides were established by IC 5-22-14 and are applicable to purchases between \$5,000 and \$75,000.

⁴ Examples of UNSPSC Categories are: first aid/safety equipment, hardware, badges/emblems, hand tools, personal computer hardware/peripherals, personal computer software, police equipment, plumbing equipment, and building maintenance materials.

⁵ IC 5-22-7.

ii. Negotiated Bidding. Negotiated bids are only for purchasing agencies in the executive branch.⁶ They differ from IFBs in that IDOA does not open them publicly. Negotiated bids allow purchasing agencies to discuss the procurements with bidders before awarding contracts. Discussions must be consistent across all bidders to ensure fair competition. IDOA reviews received bids and makes awards to the lowest responsible and responsive bidders.⁷ IDOA uses negotiated bidding to award contracts where cost is the primary consideration. Negotiated bids with a value greater than \$200,000 must be published with the bid register no less than seven days before alerting the successful bidder of the award of contract.

iii. RFPs. For contract awards where cost is not the only factor that IDOA considers, the agency is required to publicly advertise the bidding opportunities through formal RFP processes. The RFP process requires advertisement of procurement opportunities, pre-proposal conferences, issuance of addenda, and final selection by appointed selection committees based on pre-determined selection criteria.⁸

d. QPAs. QPAs are agreements made between the state and selected vendors in which the vendors provide stated unit prices for quantities of goods and services that are guaranteed for specific timeframes (typically one year). State agencies are required to purchase certain goods and services from QPAs unless there is substantial cost savings associated with procuring those them from other sources. In addition, if agencies cannot meet their functional requirements using a QPA vendor, they may procure goods or services from different vendors. State agencies must provide written justifications if they determine that it is appropriate to not use available QPAs.

e. Special procurements. IDOA can use special and emergency purchasing methods in situations provided in IC 5-22-10. The need for special procurements must qualify under one of the following criteria:

- Purchases made under emergency conditions;
- Purchases that involve substantial savings to the governmental body;
- Purchases for printing, mail, and copy services;
- Purchases made at auctions;
- Software purchases;
- Purchases of specialty equipment;
- Purchases of copyrighted material;
- Purchases where there is a single source for supply;

⁶ Purchasing agencies in the Indiana Executive Branch are the offices of the Governor, Lieutenant Governor, Auditor of State, Attorney General, and Treasurer of State.

⁷ IC 5-22-7.3.

⁸ IC 5-22-9.

- Purchases of supplies transferred from the federal government; and
- Purchases where there is no offer under another purchasing method.

In addition, IDOA must provide written justification for why a special procurement method is necessary.

2. Public works. The Public Works Division awards construction and construction-related professional services contracts associated with public works projects.⁹ Its contracting policies are governed by IC 4-13.6 and IC 5-22 and can be categorized into three types:

- Construction purchases worth less than \$150,000;
- Construction purchases worth \$150,000 or more; and
- Professional services.

a. Construction purchases worth less than \$150,000. The Public Works Division awards construction contracts worth less than \$150,000 by soliciting at least three qualified contractors for quotations. If less than three qualified contractors are known to the division, then it is required to solicit quotations from all qualified vendors. The Public Works Division then awards the contract to the lowest responsive and responsible bidder.¹⁰ If a contract is worth less than \$30,000, a division or department can award the contract without going through the Public Works Division.

b. Construction purchases worth \$150,000 or more. The Public Works Division awards construction contracts worth \$150,000 or more through a competitive bidding process. It is required to post the bid opportunity on its website and advertise bid opportunities in one or more local newspapers at least once per week for the two successive weeks before bids are due. The Public Works Division is required to award such contracts to the lowest responsive and responsible bidder.¹¹ When the expected value of a contract is greater than \$500,000, the winning contractor must provide a performance bond worth an amount equal to the total contract price. In addition, as of April 2019, all public-private partnerships projects require a 100 percent payment bond and a 50 percent performance bond.

For all contractors and consultants bidding on public work projects valued greater than \$150,000, excluding the construction or repair of a highway or street, an application for prequalification must be submitted to the Certification Board for approval. Local unit projects valued at less than \$300,000 are exempt. Certifications of prequalification are valid for 27 months. To be considered prequalified, contractors' bonding capacities must be greater than \$150,000 and their past experience must be considered satisfactory. If the value of a subcontract

⁹ Excluding public works contracts performed by state educational institutions, IC 4-13.6-2-3(b)(2).

¹⁰ IC-4-13.6-5-3.

¹¹ IC-4-13.6-5-2.

on a public works project exceeds \$150,000, the subcontractor must also be prequalified to perform the work.

c. Construction-related professional services. Competitive bids are not required for the procurement of construction-related professional services.¹² Rather, the director of Public Works may submit a recommendation to the Commissioner of IDOA, who then awards the contract. The recommendation must be based on the competence and qualifications of the professional services firm in relation to the types of work to be performed. The cost of the contract is then negotiated by the department.¹³ All vendors interested in proposing on construction-related professional services contracts must apply to the Certification Board for prequalification. The Certification Board is responsible for determining whether applicants are competent, responsible, and have the necessary financial resources to comply with state code. If it determines that a vendor is qualified, then it issues a certificate of qualification to the vendor.¹⁴ If a professional services vendor does not hold a certificate of qualification, then the Public Works Division may reject that vendor's bid.

B. Collection and Analysis of Contract Data

BBC collected contracting and vendor data from IDOA, the Indiana Department of Transportation (INDOT), and participating state educational institutions (SEIs) to serve as the basis of key disparity study analyses, including the utilization, availability, and disparity analyses. The study team collected the most comprehensive data that were available on prime contracts and subcontracts that organizations awarded during the study period (i.e., July 1, 2013 through June 30, 2018). BBC sought data that included information about prime contractors and subcontractors regardless of the race/ethnicity and gender of their owners or their statuses as certified minority- or woman-owned business enterprises (MBE/WBEs) or Indiana veteran-owned small businesses (IVOSBs). The study team collected data on construction, professional services, and goods and other services prime contracts and subcontracts that participating organizations awarded during the study period.

The study team's analyses included contracts and procurements worth \$5,000 or more. The study team chose \$5,000 as its analysis threshold, because IDOA, INDOT, and participating SEIs often use procurement cards or other informal purchasing methods for purchases worth less than \$5,000. Procurements of \$5,000 or more accounted for the vast majority of the contract and procurement dollars that participating organizations awarded during the study period.

For each contract included in the study team's analyses, BBC examined the dollars that each organization paid to each prime contractor as of June 30, 2018 and the dollars that prime

¹² Professional services are services that require licensure from the state, such as attorneys, engineers, environmental health specialists, architects, those who design or determine feasibility of a building, or are recognized in the industry as professional in nature (IC 4-13.6-1-11).

¹³ IC 4-13.6-5-7.

¹⁴ IC-4-13.6-4.

contractors paid to any subcontractors.¹⁵ If a contract did not include any subcontracts, BBC attributed the entire amount paid during the study period to the prime contractor. If a contract included subcontracts, BBC calculated subcontract amounts as the total amount paid to each subcontractor during the study period and then calculated the prime contract amount as the total amount paid during the study period less the sum of dollars paid to all subcontractors.

a. Prime contract data. IDOA, INDOT, and each SEI provided BBC with electronic data on prime contracts that they awarded during the study period from the various data systems they maintain. BBC collected the following information about each relevant prime contract:

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date;
- Location of work;
- Originating state agency or campus (does not apply to INDOT);
- Prime contractor name; and
- Prime contractor identification number.

IDOA, INDOT, and each SEI advised BBC on how to interpret the provided data, including how to identify unique bid opportunities and, as appropriate, how to aggregate related procurement dollar amounts.

b. Subcontract data collection. With the exception of INDOT and Indiana State University (ISU), the organizations that participated in the disparity study do not collect comprehensive data on subcontracts, so BBC conducted surveys with prime contractors to collect information on the subcontracts that were associated with the contracts that they were awarded during the study period. BBC sent out surveys via mail and e-mail to prime contractors to request subcontract data associated with construction and professional services contracts on which they worked. After the first round of surveys, BBC sent a follow-up round of surveys to all prime contractors that had not yet responded, and each participating organization contacted the prime contractors that were awarded the largest amounts of contract dollars during the study period to further encourage them to submit subcontract data. BBC collected the following information about each relevant subcontract as part of the survey process:

- Associated prime contract number;
- Amount awarded on the subcontract;

¹⁵ BBC used the amount paid to prime contractors and subcontractors during the study period in all cases it was available. In the small number of cases where the amount paid was not available, BBC used the amount awarded to prime contractors and subcontractors.

- Amount paid on the subcontract as of June 30, 2018;
- Description of work; and
- Subcontractor name.

Despite BBC maximizing efforts to collect that information directly from prime contractors, the study team did not have access to data on all subcontracts.

i. IDOA. For IDOA, BBC sent surveys to 298 prime contractors to collect subcontractor data associated with 1,705 prime contracts, which accounted for approximately \$2.3 billion. Through the survey effort, BBC collected subcontract data for approximately \$1 billion worth of contracts.

ii. INDOT. INDOT provided BBC with electronic data on subcontracts related to contracts that the agency awarded during the study period, as it was available. INDOT provided subcontract data for 213 prime contracts, which accounted for approximately \$46.

iii. Ball State University (Ball State). For Ball State, BBC sent surveys to 328 prime contractors to collect subcontractor data associated with 2,293 prime contracts, which accounted for approximately \$197 million. Through the survey effort, BBC collected subcontract data for approximately \$79 million worth of contracts.

iv. Indiana State University (ISU). ISU provided BBC with electronic data on subcontracts related to prime contracts that the university awarded during the study period, as it was available. ISU provided subcontract data for 596 prime contracts, which accounted for approximately \$164. In addition, BBC sent surveys to 178 prime contractors to collect subcontractor data associated with 1,158 additional prime contracts. Those contracts accounted for approximately \$264 million. Through the survey effort, BBC collected subcontract data for \$186 million worth of contracts.

v. Indiana University (IU). For IU, BBC sent surveys to 417 prime contractors to collect subcontractor data associated with 1,516 prime contracts, which accounted for approximately \$1.1 billion. Through the survey effort, BBC collected subcontract data for approximately \$409 million worth of contracts.

vi. Ivy Tech Community College (Ivy Tech). For Ivy Tech, BBC sent surveys to 198 prime contractors to collect subcontractor data associated with 516 prime contracts, which accounted for approximately \$215 million. Through the survey effort, BBC collected subcontract data for approximately \$24 million worth of contracts.

vii. Purdue University (Purdue). For Purdue, BBC sent surveys to 302 prime contractors to collect subcontractor data associated with 1,029 prime contracts, which accounted for approximately \$353 million. Through the survey effort, BBC collected subcontract data for approximately \$26 million worth of contracts.

viii. University of Southern Indiana (USI). For USI, BBC sent surveys to 184 prime contractors to collect subcontractor data associated with 1,153 contracts, which accounted for approximately

\$107 million. Through the survey effort, BBC collected subcontract data for approximately \$21 million, worth of contracts.

ix. Vincennes University (Vincennes). For Vincennes, BBC sent surveys to 154 prime contractors to collect subcontractor data associated with 931 contracts, which accounted for approximately \$195 million. Through the survey effort, BBC collected subcontract data for approximately \$81 million, worth of contracts.

c. Contracts included in study analyses. Figure 4-1 presents dollars that BBC included its analyses for the participating organizations by relevant contracting area. BBC included information on:

- 4,258 relevant prime contracts and 358 associated subcontracts that IDOA awarded during the study period, accounting for approximately \$1.4 billion;
- 131 relevant prime contracts and 636 associated subcontracts that INDOT awarded during the study period, accounting for approximately \$111 million;
- 5,108 relevant prime contracts and 183 associated subcontracts that Ball State awarded during the study period, accounting for approximately \$366 million;
- 2,146 relevant prime contracts and 311 associated subcontracts that ISU awarded during the study period, accounting for approximately \$300 million;
- 17,897 relevant prime contracts and 1,050 associated subcontracts that IU awarded during the study period, accounting for approximately \$1.6 billion;
- 4,075 relevant prime contracts and 179 associated subcontracts that Ivy Tech awarded during the study period, accounting for approximately \$249 million;
- 10,066 relevant prime contracts and 377 associated subcontracts that Purdue awarded during the study period, accounting for approximately \$605 million;
- 1,821 relevant prime contracts and 308 associated subcontracts that USI awarded during the study period, accounting for approximately \$123 million; and
- 1,611 relevant prime contracts and 166 associated subcontracts that Vincennes awarded during the study period, accounting for approximately \$104 million.

Figure 4-1.
Number of contracts and dollars included in the disparity study

Source:
BBC Research & Consulting from IDOA, INDOT, and SEI contract data.

Contract type	Number	Dollars
Construction	17,512	\$2,218,021,852
Professional services	9,944	\$1,716,230,934
Good and other services	23,225	\$898,992,822
Total	50,681	\$4,833,245,607

C. Collection of Vendor Data

IDOA, INDOT, and each SEI provided electronic data on the businesses that participated in relevant contracts and procurements during the study period. BBC relied on those data and data from other sources to compile the following information on those businesses:

- Business name;
- Addresses and phone numbers;
- Ownership status (i.e., whether each business was minority- or woman-owned);
- Race/ethnicity of ownership (if minority-owned);
- MBE/WBE/IVOSB certification status (from IDOA’s Division of Supplier Diversity);
- Primary lines of work;
- Business size;
- Year of establishment; and
- Additional contact information.

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

- IDOA, INDOT, and SEI contract and vendor data;
- IDOA bidders list;
- State of Indiana MBE/WBE/IVOSB certification list;
- City of Indianapolis MBE/WBE certification list;
- INDOT Disadvantaged Business Enterprise certification list;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Purdue XBE certification list;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Surveys that the study team conducted with business owners and managers as part of the utilization and availability analyses;
- Business websites; and
- Reviews that IDOA, INDOT, and SEIs conducted of study information.

D. RGMA

BBC used IDOA, INDOT, and SEI contracting and vendor data to determine the RGMA—the geographical area in which the agency spends the substantial majority of its contracting dollars—for the study. The study team’s analysis showed that 87 percent of the construction, professional services, and goods and other services contract and procurement dollars that participating organizations awarded during the study period were awarded to businesses with locations in Indiana, indicating that Indiana should be considered the RGMA for the study. BBC’s analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on Indiana.

E. Relevant Types of Work

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

BBC combined related subindustries that accounted for relatively small percentages of total contracting dollars into five "other" subindustries—"other construction services," "other construction materials," "other professional services," "other goods," and "other support services." For example, the contracting dollars that participating organizations awarded to contractors for "musical instruments" represented less than 1 percent of total contract and procurement dollars that BBC examined in the study. Thus, BBC combined "musical instruments" with other goods subindustries that also accounted for relatively small percentages of total contracting dollars into the "other goods" subindustry.

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

- IDOA, INDOT, and SEIs awarded to universities, government agencies, utility providers, hospitals, or nonprofit organizations (\$3.8 billion);
- Were classified in subindustries that reflected *national markets* (i.e., subindustries that are dominated by large national or international businesses) or were classified in subindustries for which IDOA and SEIs awarded the majority of contracting dollars to businesses located outside of the relevant geographic market area (\$995 million);¹⁶
- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate leases or banking services; \$560 million); or
- Were classified in subindustries not typically included in a disparity study and account for small proportions of agency contracting dollars (\$298 million).¹⁷

¹⁶ Examples of such industries include dining services, scientific and medical equipment and educational or medical consulting.

¹⁷ Examples of industries not typically included in a disparity study include Internet service providers, airports and airlines, and grocery stores.

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

Note:

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

Source:

BBC Research & Consulting from
IDOA, INDOT, and SEI contract
data.

Industry	Total
Construction	
Structural steel and building construction	\$1,100,271,160
Plumbing and HVAC	\$229,740,152
Electrical work	\$153,235,647
Heavy construction	\$115,122,019
Wrecking, demolition, excavation, drilling	\$88,878,657
Insulation, drywall, masonry, and weatherproofing	\$66,442,042
Roofing	\$62,407,486
Electrical equipment and supplies	\$55,910,443
Glass and glazing	\$36,380,292
Plumbing and HVAC supplies	\$35,781,036
Other construction services	\$33,946,796
Concrete and related products	\$31,201,960
Structural metals	\$31,161,987
Other construction materials	\$29,475,463
Concrete work	\$27,156,998
Remediation and cleaning	\$23,940,936
Landscape services	\$20,938,377
Painting, striping, and marking	\$18,207,759
Water, sewer, and utility lines	\$12,934,825
Carpet and floors	\$12,807,296
Trucking, hauling and storage	\$11,993,359
Heavy construction equipment	\$9,375,597
Windows and doors	\$7,789,131
Paint supplies	\$2,922,435
Total construction	\$2,218,021,852
Professional services	
Medical providers	\$577,084,545
IT and data services	\$299,493,673
Architecture and design services	\$194,721,122
Engineering	\$112,941,596
Business services and consulting	\$107,048,372
Finance and accounting	\$106,181,124
Human resources and job training services	\$88,020,377
Advertising, marketing and public relations	\$86,867,971
Medical testing, laboratories and pharmaceutical service	\$75,564,209
Environmental services and transportation planning	\$27,898,213
Construction management	\$12,412,922
Real estate management	\$11,716,272
Other professional services	\$7,403,851
Surveying and mapmaking	\$4,743,309
Testing services	\$4,133,379
Total professional services	\$1,716,230,934

**Figure 4-2 (continued).
Contract and
procurement dollars
by subindustry**

Note:

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

Source:

BBC Research & Consulting from IDOA, INDOT, and SEI contract data.

Industry	Total
Goods and services	
Furniture	\$154,920,482
Food products, wholesale and retail	\$102,525,353
Other services	\$65,245,696
Communications equipment	\$60,072,648
Office equipment	\$56,153,116
Printing, copying, and mailing	\$39,900,116
Industrial equipment and machinery	\$38,918,233
Other goods	\$34,448,726
Vehicle parts and supplies	\$33,933,052
Elevator goods and services	\$32,301,039
Cleaning and janitorial services	\$29,585,560
Automobiles	\$24,380,183
Waste and recycling services	\$24,113,905
Transit services	\$21,078,246
Farm equipment and supplies	\$19,240,020
Industrial chemicals	\$17,995,249
Food services	\$17,651,230
Uniforms and apparel	\$17,132,793
Security systems services	\$17,055,740
Office supplies	\$13,939,289
Advertising goods	\$11,306,700
Food equipment and supplies	\$11,246,324
Sporting goods	\$9,430,059
Security guard services	\$9,351,067
Cleaning and janitorial supplies	\$9,093,896
Safety equipment	\$8,044,415
Recreation goods and services	\$7,840,121
Petroleum and petroleum products	\$6,012,150
Facilities management	\$5,339,092
Vehicle maintenance and repair	\$738,323
Total goods and services	\$898,992,822
GRAND TOTAL	\$4,833,245,607

F. Agency Review Process

Participating organizations reviewed BBC's prime contract and subcontract data several times during the study process. BBC consulted with representatives from the organizations to review the data collection process, information that the study team gathered, and summary results. Organizational staff also reviewed contract and vendor information. BBC incorporated their feedback in the final contract and vendor data that the study team used as part of the disparity study.

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority-, woman-, and veteran-owned businesses that are *ready, willing, and able* to perform on prime contracts and subcontracts that the Indiana Department of Administration (IDOA), Indiana Department of Transportation (INDOT), and state educational institutions (SEIs) award in the areas of construction, professional services, and goods and other services.^{1,2} Chapter 5 describes the availability analysis in five parts:

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

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority-, woman-, and veteran-owned businesses for IDOA, INDOT, and SEI prime contracts and subcontracts to refine the State of Indiana’s Minority- and Women-owned Business Enterprise (MWBE) Program and to use as benchmarks against which to compare the actual participation of minority-, woman-, and veteran-owned businesses in IDOA, INDOT, and SEI work. Comparisons between participation and availability allowed BBC to determine whether certain business groups were underutilized during the study period relative to their availability for IDOA, INDOT, and SEI contracts and procurements (for details, see Chapter 7).

B. Potentially Available Businesses

BBC’s availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of contracts and procurements that IDOA, INDOT, and SEIs awarded during the study period, which served as a proxy for the contracts and procurements participating organizations will award in the future. BBC began the availability analysis by identifying the specific subindustries in which IDOA, INDOT, and SEIs spend the majority of their contracting dollars as well as the geographic areas in which the majority of the businesses with which IDOA,

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

² Analyses for IDOA include contracts and procurements that any executive branch agency awarded during the study period except INDOT.

INDOT, and SEIs spend those contracting dollars are located (i.e., the *relevant geographic market area, or RGMA*; for details, see Chapter 4).³

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

1. Overview of availability surveys. The study team conducted telephone and online surveys with business owners and managers to identify local businesses that are potentially available for IDOA, INDOT, and SEI prime contracts and subcontracts. BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of businesses—regardless of ownership—that perform work in relevant industries and have a location within the RGMA. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. BBC collected information about business establishments listed under 8-digit work specialization codes, as developed by D&B, that were most related to the contracts that IDOA, INDOT, and SEI awarded during the study period. BBC obtained listings on 16,961 local businesses that do work related to those work specializations. The study team did not have working phone numbers for 1,981 of those businesses but attempted availability surveys with the remaining 14,980 business establishments.

2. Availability survey information. BBC worked with Engaging Solutions and Davis Research to conduct telephone and online surveys with the owners or managers of the identified business establishments. Survey questions covered many topics about each business, including:

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

³ BBC identified the RGMA for the disparity study as the entire state of Indiana.

- Race/ethnicity and gender of ownership; and
- Veteran status of ownership.

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

- Being a private sector business;
- Having performed work relevant to IDOA, INDOT, and SEI construction, professional services, or goods and other services contracting or procurement;
- Having bid on or performed construction, professional services, or goods and other services prime contracts or subcontracts in either the public or private sector in the RGMA in the past five years; and
- Being interested in work for state or other government organizations.⁴

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts that IDOA, INDOT, and SEIs award:

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

C. Businesses in the Availability Database

After conducting availability surveys with Indiana businesses, BBC developed a database of information about businesses that are potentially available for relevant IDOA, INDOT, and SEI contracts and procurements. Information from the database allowed BBC to identify businesses that are ready, willing, and able to perform work for participating organizations. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority-, woman-, or veteran-owned.⁵ The analysis included 1,991 businesses that are potentially available for specific construction, professional services, and goods and other services contracts and procurements that IDOA, INDOT, and SEIs award. As shown in Figure 5-1, of those businesses, 26.6 percent were minority- or woman-owned and 7.7 percent were veteran-owned.

The information in Figure 5-1 merely reflects a simple *head count* of businesses with no analysis of their availability for specific IDOA, INDOT, and SEI contracts. It represents only a first step toward analyzing the availability of minority-, woman-, and veteran-owned businesses for IDOA, INDOT, and SEI work.

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

⁵ BBC counted businesses that were owned by veterans of the United States military as veteran-owned regardless of the race/ethnicity or gender of the owners.

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

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

Source:
 BBC Research & Consulting availability analysis.

Business group	%
Non-Hispanic white woman-owned	16.0 %
Asian American-owned	1.8
Black American-owned	6.2
Hispanic American-owned	2.0
Native American-owned	0.6
<hr/>	
Total Minority-owned	10.6 %
Total Minority- and Woman-owned	26.6 %
Total Veteran-owned	7.7 %

D. Availability Calculations

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

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

1. For each contract element, BBC identified businesses in the availability database that reported they:
 - Are interested in performing construction, professional services, or goods and other services work in that particular role for that specific type of work for government organizations in Indiana;
 - Can serve customers in the geographic location where the work took place; and
 - Have bid on or performed work of that size in the past five years.
2. BBC then counted the number of minority-owned businesses, woman-owned businesses, veteran-owned businesses, and businesses owned by non-Hispanic white men who are not veterans in the availability database that met the criteria specified in Step 1.
3. BBC translated the numeric availability of businesses for the contract element into percentage availability.

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

BBC's availability calculations are based on prime contracts and subcontracts that IDOA, INDOT, and SEIs awarded between July 1, 2013 through June 30, 2018. A key assumption of the availability analysis is that the contracts and procurements that the organizations awarded during the study period are representative of the contracts and procurements that they will award in the future. If the types and sizes of those contracts and procurements differ substantially from the ones they awarded in the past, then participating organizations should consider adjusting availability estimates accordingly.

E. Availability Results

BBC estimated the availability of minority-, woman-, and veteran-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts that IDOA, INDOT, and SEIs awarded during the study period. BBC presents availability analysis results overall and, specifically for IDOA, for different subsets of contracts and procurements.

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

a. Overall. Figure 5-3 presents dollar-weighted availability estimates by relevant business group for IDOA contracts and procurements. Overall, the availability of minority- and woman-owned businesses for IDOA contracts and procurements is 18.2 percent, indicating that minority- and woman-owned businesses might be expected to receive 18.2 percent of the dollars that IDOA awards in construction, professional services, and goods and other services. Non-Hispanic white

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

On a contract that IDOA awarded during the study period, the prime contractor awarded a subcontract worth \$165,812 for engineering services. To determine the overall availability of minority-, woman-, and veteran-owned businesses for the subcontract, BBC identified businesses in the availability database that:

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

The study team found 70 businesses in the availability database that met those criteria. Of those businesses, 12 were minority- or woman-owned businesses and 8 were veteran-owned business. Thus, the availability of minority- and woman-owned businesses for the subcontract was 17 percent (i.e., $12/70 \times 100 = 17$) and the availability of veteran-owned businesses was 11 percent ($8/70 \times 100 = 11$).

woman-owned businesses (10.4%), Native American-owned business (3.3%), and Black American-owned businesses (3.4%) exhibited the highest availability among all groups.

Figure 5-3.
Overall availability estimates by racial/ethnic and gender group for IDOA 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-2 in Appendix F.

Source:
 BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	10.4 %
Asian American-owned	0.7
Black American-owned	3.4
Hispanic American-owned	0.5
Native American-owned	3.3
Total Minority-owned	7.9 %
Total Minority- and Woman-owned	18.2 %

BBC also estimated overall availability for minority- and woman-owned businesses for INDOT and SEI work. As presented in Figure 5-4, availability of minority-and woman-owned businesses for each organization’s contracts and procurements is as follows:

- INDOT: 13.7 percent;
- Ball State University: 19.9 percent;
- Indiana State University: 15.9 percent;
- Indiana University: 18.2 percent;
- Ivy Tech Community College: 17.1 percent;
- Purdue University: 21.7 percent;
- University of Southern Indiana: 19.4 percent; and
- Vincennes University: 15.6 percent.

b. Public Works. IDOA used MBE/WBE contract goals—a *race- and gender-conscious* measure—to award many contracts and procurements during the study period. Importantly however, during the study period, the Public Works Division did not use MBE/WBE contract goals to award any of its contracts (i.e., construction and construction-related professional services contracts). In other words, those contracts were awarded in a *race- and gender-neutral* manner. BBC examined availability separately for Public Works and non-Public Works contracts and procurements, because that information is particularly instructive as part of the disparity analysis. Those results are presented in Figure 5-5. As shown in Figure 5-5, the availability of minority- and woman-owned businesses is higher for Public Works contracts and procurements (19.4%) than for non-Public Works contracts and procurements (18.1%).

Figure 5-4.
Overall availability estimates by racial/ethnic and gender group for INDOT and SEIs

Organization and business group					
Indiana Department of Transportation	Availability %	Indiana University	Availability %	University of Southern Indiana	Availability %
Non-Hispanic white woman-owned	7.9 %	Non-Hispanic white woman-owned	9.1 %	Non-Hispanic white woman-owned	9.9 %
Asian American-owned	0.2	Asian American-owned	1.7	Asian American-owned	2.3
Black American-owned	3.7	Black American-owned	5.3	Black American-owned	4.7
Hispanic American-owned	1.3	Hispanic American-owned	0.9	Hispanic American-owned	2.0
Native American-owned	0.6	Native American-owned	1.2	Native American-owned	0.5
Total Minority- and Woman-owned	13.7 %	Total Minority- and Woman-owned	18.2 %	Total Minority- and Woman-owned	19.4 %
Ball State University	Availability %	Ivy Tech Community College	Availability %	Vincennes University	Availability %
Non-Hispanic white woman-owned	9.9 %	Non-Hispanic white woman-owned	9.2 %	Non-Hispanic white woman-owned	8.3 %
Asian American-owned	3.1	Asian American-owned	1.9	Asian American-owned	2.4
Black American-owned	4.9	Black American-owned	4.1	Black American-owned	3.4
Hispanic American-owned	0.8	Hispanic American-owned	0.9	Hispanic American-owned	0.3
Native American-owned	1.3	Native American-owned	1.0	Native American-owned	1.2
Total Minority- and Woman-owned	19.9 %	Total Minority- and Woman-owned	17.1 %	Total Minority- and Woman-owned	15.6 %
Indiana State University	Availability %	Purdue University	Availability %		
Non-Hispanic white woman-owned	7.6 %	Non-Hispanic white woman-owned	12.3 %		
Asian American-owned	1.9	Asian American-owned	1.5		
Black American-owned	4.0	Black American-owned	5.2		
Hispanic American-owned	0.6	Hispanic American-owned	1.4		
Native American-owned	1.7	Native American-owned	1.3		
Total Minority- and Woman-owned	15.9 %	Total Minority- and Woman-owned	21.7 %		

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

For more detail and results by group, see Figures F-17 through F-24 in Appendix F.

Source: BBC Research & Consulting availability analysis.

Figure 5-5.
Availability estimates for Public Works and non-Public Works contracts and procurements

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

Source:
 BBC Research & Consulting availability analysis.

Business group	Department	
	Public Works	Non-Public Works
Non-Hispanic white woman-owned	9.9 %	10.5 %
Asian American-owned	3.2	0.3
Black American-owned	3.9	3.3
Hispanic American-owned	1.3	0.4
Native American-owned	1.0	3.6
Total Minority-owned	9.5 %	7.6 %
Total Minority- and Woman-owned	19.4 %	18.1 %

c. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for IDOA prime contracts and subcontracts.⁶ Figure 5-6 presents those results. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is lower for IDOA prime contracts (15.4%) than for subcontracts (40.9%). That result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are thus often more accessible to minority- and woman-owned businesses.

Figure 5-6.
Availability estimates by contract role for IDOA work

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

Source:
 BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	9.8 %	15.1 %
Asian American-owned	0.6	1.5
Black American-owned	1.3	19.5
Hispanic American-owned	0.5	0.6
Native American-owned	3.2	4.1
Total Minority-owned	5.6 %	25.7 %
Total Minority- and Woman-owned	15.4 %	40.9 %

d. Industry. BBC examined availability analysis results separately for IDOA construction, professional services, and goods and other services contracts and procurements. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together is highest for IDOA’s construction contracts (20.6%) and lowest for goods and other services contracts and procurements (16.1%).

⁶ IDOA and most SEIs do not collect comprehensive data on subcontracts, and despite BBC maximizing efforts to collect that information directly from prime contractors, the study team did not have access to data on all subcontracts.

Figure 5-7.
Availability estimates by industry for IDOA work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	10.8 %	10.6 %	7.1 %
Asian American-owned	3.4	0.1	1.7
Black American-owned	3.4	3.5	2.3
Hispanic American-owned	1.5	0.1	3.4
Native American-owned	1.6	3.8	1.6
Total Minority-owned	9.9 %	7.4 %	9.0 %
Total Minority- and Woman-owned	20.6 %	18.0 %	16.1 %

e. Geography. BBC also examined availability analysis results separately for contracts and procurements that IDOA awarded in three different geographical regions of the state:

- Northern Indiana, including the areas around Gary, Michigan City, La Porte, South Bend, Elkhart, and Fort Wayne;
- Central Indiana, including the areas around Indianapolis, Lafayette, Kokomo, Anderson, and Muncie; Terre Haute, and Bloomington; and
- Southern Indiana, including the areas around Columbus, Vincennes, and Evansville.

As shown in Figure 5-8, the availability of minority- and woman-owned businesses considered together was highest for contracts that originated in Northern Indiana (22.9%) and lowest for contracts that originated in Central Indiana (18.0%).

Figure 5-8.
Availability estimates by geographical region for IDOA work

Note:

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

For more detail and results by group, see Figures F-14, F-15, and F-16 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Geographical region		
	Northern	Central	Southern
Non-Hispanic white woman-owned	12.3 %	10.2 %	14.1 %
Asian American-owned	4.9	0.5	1.1
Black American-owned	4.0	3.4	2.1
Hispanic American-owned	1.2	0.4	2.3
Native American-owned	0.5	3.5	0.4
Total Minority-owned	10.7 %	7.8 %	6.0 %
Total Minority- and Woman-owned	22.9 %	18.0 %	20.1 %

2. Veteran-owned businesses. BBC also examined the overall availability of veteran-owned businesses for IDOA, INDOT, and SEI work. The availability analysis indicated that the availability of veteran-owned businesses for each organization's work is as follows:

- IDOA: 3.5 percent;
- INDOT: 10.9 percent;
- Ball State University: 3.6 percent;

- Indiana State University: 4.2 percent;
- Indiana University: 4.4 percent;
- Ivy Tech Community College: 5.4 percent;
- Purdue University: 5.4 percent;
- University of Southern Indiana: 5.5 percent; and
- Vincennes University: 5.7 percent.

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority-, woman-, and veteran-owned businesses in construction, professional services, and goods and other services prime contracts and subcontracts that the Indiana Department of Administration (IDOA), the Indiana Department of Transportation (INDOT), and state educational institutions (SEIs) awarded between July 1, 2013 through June 30, 2018 (i.e., the *study period*).^{1,2} BBC Research & Consulting (BBC) measured the participation of minority-, woman-, and veteran-owned businesses in terms of *utilization*—the percentage of prime contract and subcontract dollars that participating organizations awarded to those businesses during the study period. For example, if 5 percent of IDOA prime contract and subcontract dollars went to woman-owned businesses on a particular set of contracts, utilization of woman-owned businesses for that set of contracts and procurements would be 5 percent. The study team measured the participation of minority-, woman-, and veteran-owned businesses in IDOA, INDOT, and SEI work regardless of whether they were certified as such with the Division of Supplier Diversity (DSD).

A. Minority- and Woman-owned Businesses

BBC examined the participation of minority- and woman-owned businesses for contracts IDOA, INDOT, and SEIs awarded during the study period. The study team assessed the participation of all of those businesses considered together and separately for each relevant racial/ethnic and gender group. BBC presents utilization analysis results for each organization overall, and specifically for IDOA, for different subsets of contracts and procurements.

1. All contracts. Figure 6-1 presents the percentage of total dollars that minority- and woman-owned businesses received on relevant construction, professional services, and goods and other services prime contracts and subcontracts that IDOA awarded during the study period. Minority- and woman-owned businesses considered together received 12.9 percent of the relevant contract and procurement dollars that IDOA awarded during the study period. Most of those dollars—9.1 percent—went to minority- and woman-owned businesses that were certified as such by DSD. The groups that exhibited the highest levels of participation were woman-owned businesses (7.9%), Black American-owned businesses (3.3%), and Asian American-owned businesses (1.5%). Note that IDOA used minority-owned business enterprise (MBE) and woman-owned business enterprise (WBE) contract goals—a *race- and gender-conscious* measure—to award many of those contracts and procurements.

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

² Analyses for IDOA include contracts and procurements that any executive branch agency awarded during the study period except INDOT.

Figure 6-1.
Utilization results
for IDOA contracts and procurements

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

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

Source:
 BBC Research & Consulting utilization analysis.

Business group	Utilization %
Minority- and Woman-owned	
Non-Hispanic white woman-owned	7.9 %
Asian American-owned	1.5
Black American-owned	3.3
Hispanic American-owned	0.1
Native American-owned	0.1
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Total Minority-owned	5.0 %
Total Minority- and Woman-owned	12.9 %
MBE/WBE-certified	
Non-Hispanic white woman-owned	4.4 %
Asian American-owned	1.4
Black American-owned	3.1
Hispanic American-owned	0.1
Native American-owned	0.1
<hr/>	
Total certified minority-owned	4.7 %
Total Certified Minority- and Woman-owned	9.1 %

BBC also calculated the participation of minority- and woman-owned businesses in INDOT and SEI contracts and procurements. As presented in Figure 6-2, the participation of minority- and woman-owned businesses in each organization’s work during the study period was as follows:

- INDOT: 19.4 percent;
- Ball State University: 11.0 percent;
- Indiana State University: 7.5 percent;
- Indiana University: 13.6 percent;
- Ivy Tech Community College: 15.7 percent;
- Purdue University: 12.2 percent;
- University of Southern Indiana: 14.5 percent; and
- Vincennes University: 9.1 percent.

2. Public Works. Although IDOA used MBE/WBE contract goals to award many individual contracts and procurements during the study period, importantly, the Public Works Division did not use such goals to award any of its contracts (i.e., construction and construction-related professional services contracts). In other words, those contracts were awarded in a *race- and gender-neutral* manner. BBC examined utilization analysis results separately for Public Works and non-Public Works contracts and procurements, because doing so provides information about the efficacy of IDOA’s use of MBE/WBE contract goals in encouraging the participation of minority- and woman-owned businesses in agency work.

Figure 6-2.
Utilization results for INDOT and SEIs

Organization and business group								
Indiana Department of Transportation		Utilization %	Indiana University		Utilization %	University of Southern Indiana		Utilization %
Non-Hispanic white woman-owned		9.3 %	Non-Hispanic white woman-owned		10.1 %	Non-Hispanic white woman-owned		13.3 %
Asian American-owned		0.2	Asian American-owned		0.8	Asian American-owned		0.0
Black American-owned		3.5	Black American-owned		0.8	Black American-owned		0.4
Hispanic American-owned		1.8	Hispanic American-owned		1.5	Hispanic American-owned		0.7
Native American-owned		4.7	Native American-owned		0.5	Native American-owned		0.0
Total Minority- and Woman-owned		19.4 %	Total Minority- and Woman-owned		13.6 %	Total Minority- and Woman-owned		14.5 %
Ball State University		Utilization %	Ivy Tech Community College		Utilization %	Vincennes University		Utilization %
Non-Hispanic white woman-owned		10.1 %	Non-Hispanic white woman-owned		6.0 %	Non-Hispanic white woman-owned		9.1 %
Asian American-owned		0.6	Asian American-owned		2.2	Asian American-owned		0.0
Black American-owned		0.1	Black American-owned		4.1	Black American-owned		0.0
Hispanic American-owned		0.1	Hispanic American-owned		3.1	Hispanic American-owned		0.1
Native American-owned		0.1	Native American-owned		0.3	Native American-owned		0.0
Total Minority- and Woman-owned		11.0 %	Total Minority- and Woman-owned		15.7 %	Total Minority- and Woman-owned		9.1 %
Indiana State University		Utilization %	Purdue University		Utilization %			
Non-Hispanic white woman-owned		3.2 %	Non-Hispanic white woman-owned		6.9 %			
Asian American-owned		2.0	Asian American-owned		2.1			
Black American-owned		0.0	Black American-owned		0.2			
Hispanic American-owned		1.9	Hispanic American-owned		1.3			
Native American-owned		0.2	Native American-owned		1.6			
Total Minority- and Woman-owned		7.5 %	Total Minority- and Woman-owned		12.2 %			

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail, see Figures F-17 through F-24 in Appendix C.

Source: BBC Research & Consulting utilization analysis.

As shown in Figure 6-3, the participation of minority- and woman-owned businesses in non-Public Works contracts and procurements (14.2%) was higher than in Public Works contracts and procurements (4.5%), suggesting that IDOA’s use of MBE/WBE goals may have been effective to some degree in encouraging the participation of minority- and woman-owned businesses.

Figure 6-3.
Utilization results for Public Works and non-Public Works contracts and procurements

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

Source:
 BBC Research & Consulting utilization analysis.

Business group	Department	
	Public Works	Non-Public Works
Non-Hispanic white woman-owned	1.6 %	8.8 %
Asian American-owned	1.3	1.5
Black American-owned	0.5	3.8
Hispanic American-owned	0.3	0.1
Native American-owned	0.7	0.1
Total Minority-owned	2.9 %	5.4 %
Total Minority- and Woman-owned	4.5 %	14.2 %

3. Contract role. Many minority- and woman-owned businesses are small businesses, and thus, often work as subcontractors. In addition, IDOA’s use of MBE/WBE contract goals is primarily designed to encourage the participation of minority- and woman-owned businesses in subcontracts, so the use of those goals is less likely to affect outcomes on prime contracts. For those reasons, it is useful to examine utilization analysis results separately for prime contracts and subcontracts.³ As shown in Figure 6-4, the participation of minority- and woman-owned businesses considered together was in fact higher in subcontracts (79.7%) that IDOA awarded during the study period than in prime contracts (4.5%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts, and thus may be more accessible to minority- and woman-owned businesses. In addition, it could be due to IDOA’s use of MBE/WBE contract goals to award many of its contracts during the study period.

³ IDOA and most SEIs do not collect comprehensive data on subcontracts, and despite BBC maximizing efforts to collect that information directly from prime contractors, the study team did not have access to data on all subcontracts.

Figure 6-4.
Utilization analysis results by contract role

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	3.2 %	45.1 %
Asian American-owned	1.2	3.9
Black American-owned	0.0	29.5
Hispanic American-owned	0.1	0.5
Native American-owned	0.1	0.7
Total Minority-owned	1.3 %	34.6 %
Total Minority- and Woman-owned	4.5 %	79.7 %

4. Industry. BBC also examined utilization analysis results separately for IDOA’s construction, professional services, and goods and other services contracts and procurements to determine whether the participation of minority- and woman-owned businesses in agency work differs by industry. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was highest in IDOA’s goods and other services procurements (34.8%) and lowest in construction contracts (3.4%).

Figure 6-5.
Utilization analysis results by industry

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	1.1 %	8.2 %	20.1 %
Asian American-owned	1.0	0.5	13.5
Black American-owned	0.1	4.2	0.4
Hispanic American-owned	0.4	0.0	0.7
Native American-owned	0.8	0.0	0.0
Total Minority-owned	2.3 %	4.7 %	14.6 %
Total Minority- and Woman-owned	3.4 %	12.9 %	34.8 %

5. Geography. BBC also examined utilization analysis results separately for contracts and procurements that IDOA awarded in three different geographical regions of the state:

- Northern Indiana, including the areas around Gary, Michigan City, La Porte, South Bend, Elkhart, and Fort Wayne;
- Central Indiana, including the areas around Indianapolis, Lafayette, Kokomo, Anderson, and Muncie; Terre Haute, and Bloomington; and
- Southern Indiana, including the areas around Columbus, Vincennes, and Evansville.

As shown in Figure 6-6, the participation of minority- and woman-owned businesses considered together was highest in IDOA contracts and procurements that originated in Central Indiana and lowest in contracts and procurements that originated in Southern Indiana.

Figure 6-6.
Utilization analysis results
by geographical region

Note:

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

For more detail and results by group, see Figures F-14, F-15, and F-16 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Geographical region		
	Northern	Central	Southern
Non-Hispanic white woman-owned	1.2 %	8.5 %	2.5 %
Asian American-owned	0.8	1.5	0.3
Black American-owned	0.1	3.6	0.2
Hispanic American-owned	0.1	0.1	0.0
Native American-owned	1.0	0.1	0.0
Total Minority-owned	2.0 %	5.4 %	0.6 %
Total Minority- and Woman-owned	3.2 %	13.8 %	3.0 %

B. Veteran-owned Businesses

BBC examined the participation of veteran-owned businesses in IDOA, INDOT, and SEI contracts and procurements. The participation of veteran-owned businesses in each organization’s work was as follows:

- IDOA: 2.4 percent;
- INDOT: 2.2 percent;
- Ball State University: 9.2 percent;
- Indiana State University: 3.0 percent;
- Indiana University: 4.1 percent;
- Ivy Tech Community College: 6.3 percent;
- Purdue University: 1.6 percent;
- University of Southern Indiana: 6.2 percent; and
- Vincennes University: 3.9 percent.

C. Concentration of Dollars

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

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

Figure 6-7 presents those results for each relevant business group. Although IDOA awarded contracting and procurement dollars to 122 different minority-, woman-, and veteran-owned businesses during the study period, a relatively small number of those businesses accounted for 75 percent or more of those dollars. For each relevant business group, three or fewer businesses

accounted for 75 percent or more of the dollars that the entire group was awarded during the study period.

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

Source:
 BBC Research & Consulting utilization
 analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	63	3	4.8 %
Veteran-owned	31	4	12.9
Asian American-owned	10	2	20.0
Black American-owned	16	2	12.5
Hispanic American-owned	5	2	40.0
Native American-owned	3	1	33.3

CHAPTER 7.

Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority-, woman-, and veteran-owned businesses in prime contracts and subcontracts that the Indiana Department of Administration (IDOA), the Indiana Department of Transportation (INDOT), and state educational institutions (SEIs) awarded between July 1, 2013 and June 30, 2018 (i.e., the *study period*) with the percentage of contract dollars that those businesses might be expected to receive based on their *availability* for that work.^{1,2} The analysis focused on construction, professional services, and goods and other services contracts and procurements that participating organizations awarded during the study period. Chapter 7 presents the disparity analysis in three parts:

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

A. Overview

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

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

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

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

² Analyses for IDOA include contracts and procurements that any executive branch agency awarded during the study period except INDOT.

groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.³

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

- Different participating organizations;
- Construction, professional services, and goods and other services work; and
- Prime contracts and subcontracts.

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

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

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as such as such by IDOA’s Division of Supplier Diversity (DSD).
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as such by DSD.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as such by DSD.
- Rows (5) through (9) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as such by DSD.
- Rows (10) through (17) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as such by DSD.

³ 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).

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

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,616	\$1,366,719	\$1,366,719				
(2) Minority and woman-owned	540	\$176,845	\$176,845	12.9	18.2	-5.3	70.9
(3) Non-Hispanic white woman-owned	411	\$108,642	\$108,642	7.9	10.4	-2.4	76.5
(4) Minority-owned	129	\$68,203	\$68,203	5.0	7.9	-2.9	63.5
(5) Asian American-owned	46	\$19,937	\$19,940	1.5	0.7	0.8	200+
(6) Black American-owned	43	\$45,082	\$45,090	3.3	3.4	-0.1	97.6
(7) Hispanic American-owned	9	\$1,400	\$1,400	0.1	0.5	-0.4	19.8
(8) Native American-owned	29	\$1,773	\$1,773	0.1	3.3	-3.2	3.9
(9) Unknown minority-owned	2	\$11					
(10) Minority- and woman-owned (certified)	268	\$123,730	\$123,730	9.1			
(11) Non-Hispanic white woman-owned (certified)	164	\$59,941	\$59,941	4.4			
(12) Minority-owned (certified)	104	\$63,789	\$63,789	4.7			
(13) Asian American-owned (certified)	36	\$19,028	\$19,028	1.4			
(14) Black American-owned (certified)	31	\$41,724	\$41,724	3.1			
(15) Hispanic American-owned (certified)	9	\$1,400	\$1,400	0.1			
(16) Native American-owned (certified)	28	\$1,637	\$1,637	0.1			
(17) Unknown minority-owned (certified)	0	\$0					

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

Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting disparity analysis.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) that BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 4,616 contract elements that IDOA awarded during the study period. The value presented in column (a) for each business group represents the number of contract elements in which businesses of that particular group participated. For example, as shown in row (6) of column (a), Black American-owned businesses participated in 43 prime contracts and subcontracts that the agency awarded during the study period.
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-1, BBC examined approximately \$1.4 billion for the entire set of contract elements. The dollar totals include both prime contracts and subcontracts dollars. The value presented in column (b) for each individual business group represents the dollars that the businesses of that particular group received on the set of contract elements. For example, as shown in row (6) of column (b), Black American-owned businesses received approximately \$45 million of the prime contracts and subcontracts that IDOA 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 minority-owned but for which specific race/ethnicity information was not available. Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. As shown in row (9), there were two contract elements in which minority-owned businesses with unknown race/ethnicity participated, accounting for \$11,000 of work.
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Black American-owned businesses, the study team divided \$45 million by \$1.3 billion and multiplied by 100 for a result 3.3 percent, as shown in row (6) of column (d).

2. Availability results. Column (e) of Figure 7-1 presents the availability of each relevant group for all contract elements that BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts. For example, as shown in row (6) of column (e), the availability of Black American-owned businesses for IDOA work is 3.4 percent.

3. Differences between participation and availability. Column (f) of Figure 7-1 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group for IDOA work. For example, as presented in row (6) of column (f) of Figure 7-1, the participation of Black American-owned businesses in IDOA contracts and

procurements was slightly less than their availability for that work, so the difference is -0.1 percentage points.

4. Disparity indices. BBC also calculated a disparity index for each relevant racial/ethnic and gender group. Column (g) of Figure 7-1 presents the disparity index for each group. For example, as reported in row (6) of column (g), the disparity index for Black American-owned businesses was approximately 98, indicating that Black American-owned businesses actually received approximately \$0.98 for every dollar they might be expected to receive based on their availability for the prime contracts and subcontracts that IDOA awarded during the study period. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.

B. Disparity Analysis Results

BBC measured disparities between the participation and availability of minority-, woman-, and veteran-owned businesses for various contract sets that IDOA, INDOT, and SEIs awarded during the study period.

1. Minority-and woman-owned businesses. BBC assessed disparities of minority- and woman-owned businesses for various contract sets that IDOA, INDOT, and SEI awarded.

a. All contracts and procurements. Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts that IDOA awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, indicating a substantial disparity. As shown in Figure 7-2, minority- and woman-owned businesses considered together exhibited a substantial disparity for IDOA contracts and procurements (disparity index of 71), indicating that those businesses only received \$0.71 for every dollar one would expect them to receive based on their availability for that work. Disparity analysis results differed across individual business groups:

- Hispanic American- (disparity index of 20), Native American- (disparity index of 4), and white woman-owned businesses (disparity index of 77) exhibited substantial disparities for IDOA contracts and procurements.
- Asian American- (disparity index of 200+) and Black American-owned businesses did not exhibit disparities for that work.

Note that IDOA used minority-owned business enterprise (MBE) and woman-owned business enterprise (WBE) contract goals—a *race- and gender-conscious* measure—to award many of those contracts and procurements, which likely affected outcomes for minority- and woman-owned businesses.

Figure 7-2.
Disparity analysis
results for all IDOA
contracts and
procurements

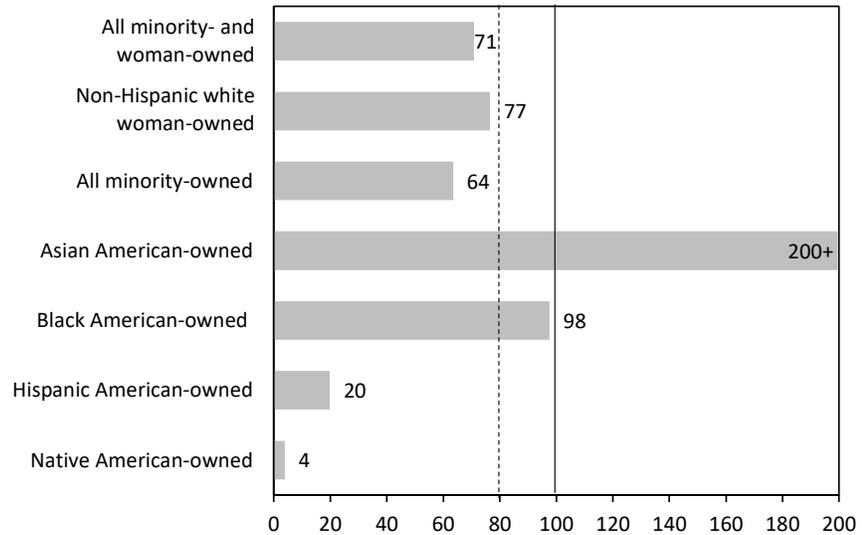
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



BBC also assessed disparities between participation and availability for minority- and woman-owned businesses for INDOT and SEI contracts and procurements, as presented in Figure 7-3. As shown in Figure 7-3, disparity indices for all minority- and woman-owned businesses considered together for each organization were as follows:

- INDOT: disparity index of 141;
- Ball State University: disparity index of 56;
- Indiana State University: disparity index of 47;
- Indiana University: disparity index of 75;
- Ivy Tech Community College: disparity index of 92;
- Purdue University: disparity index of 56;
- University of Southern Indiana: disparity index of 75; and
- Vincennes University: disparity index of 58.

Disparity indices for individual business groups by organization are also presented in Figure 7-4. Note that whereas INDOT used MBE/WBE goals to award most of its state-funded contracts and procurements during the study period, SEIs did not, which might help explain the larger disparities for minority- and woman-owned businesses on SEI work.

Figure 7-3.
Disparity analysis results for INDOT and SEIs

Organization and business group								
Indiana Department of Transportation		Disparity Index	Indiana University		Disparity Index	University of Southern Indiana		Disparity Index
Total Minority- and Woman-owned		141	Total Minority- and Woman-owned		75	Total Minority- and Woman-owned		75
Non-Hispanic white woman-owned		117	Non-Hispanic white woman-owned		111	Non-Hispanic white woman-owned		135
Asian American-owned		84	Asian American-owned		45	Asian American-owned		0
Black American-owned		94	Black American-owned		15	Black American-owned		9
Hispanic American-owned		133	Hispanic American-owned		177	Hispanic American-owned		37
Native American-owned		200+	Native American-owned		37	Native American-owned		0
Ball State University		Disparity Index	Ivy Tech Community College		Disparity Index	Vincennes University		Disparity Index
Total Minority- and Woman-owned		56	Total Minority- and Woman-owned		92	Total Minority- and Woman-owned		58
Non-Hispanic white woman-owned		102	Non-Hispanic white woman-owned		65	Non-Hispanic white woman-owned		109
Asian American-owned		19	Asian American-owned		112	Asian American-owned		0
Black American-owned		2	Black American-owned		102	Black American-owned		0
Hispanic American-owned		9	Hispanic American-owned		200+	Hispanic American-owned		18
Native American-owned		9	Native American-owned		29	Native American-owned		0
Indiana State University		Disparity Index	Purdue University		Disparity Index			
Total Minority- and Woman-owned		47	Total Minority- and Woman-owned		56			
Non-Hispanic white woman-owned		43	Non-Hispanic white woman-owned		56			
Asian American-owned		105	Asian American-owned		139			
Black American-owned		1	Black American-owned		5			
Hispanic American-owned		200+	Hispanic American-owned		97			
Native American-owned		14	Native American-owned		126			

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 Figures F-17 through F-24 in Appendix F.

Source: BBC Research & Consulting disparity analysis.

b. Public Works. Although IDOA used MBE/WBE contract goals—a *race- and gender-conscious* measure—to award many contracts and procurements during the study period, importantly, during the study period, the Public Works Division did not use such goals to award any of its contracts (i.e., construction and construction-related professional services contracts). In other words, those contracts were awarded in a *race- and gender-neutral* manner. BBC examined disparities between participation and availability separately for Public Works and non-Public Works contracts and procurements, because that comparison provides important information about the efficacy of MBE/WBE contract goals to address barriers for minority- and woman-owned businesses in IDOA work.

Figure 7-4 presents disparity analysis results separately for Public Works and non-Public Works contracts. As shown in Figure 7-4, minority- and woman-owned businesses considered together showed substantial disparities for both Public Works contracts (disparity index of 23) and non-Public Works contracts and procurements (disparity index of 78). Disparity analysis results differed for individual business groups across those contract sets:

- All relevant business groups exhibited substantial disparities on Public Works contracts.
- Only Hispanic American-owned (disparity index of 17) and Native American-owned businesses (disparity index of 1) exhibited substantial disparities on non-Public Works contracts and procurements.

Figure 7-4.
Disparity analysis
results for Public
Works and non-Public
Works contracts and
procurements

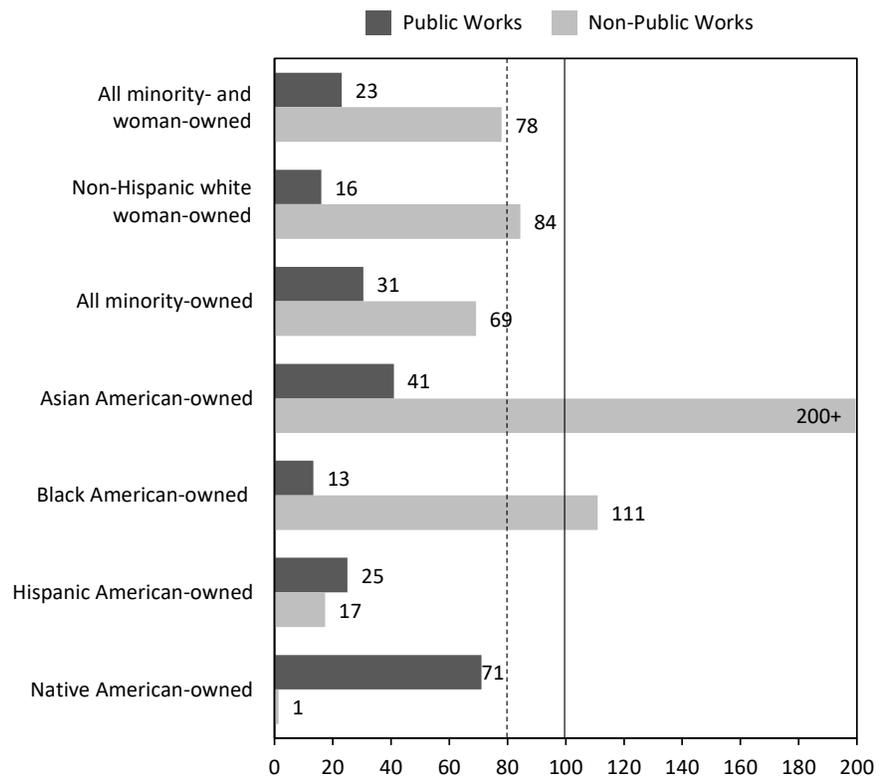
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



c. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. In addition, IDOA’s use of MBE/WBE contract goals is primarily designed to encourage the participation of minority- and woman-owned businesses in subcontracts, so the use of those goals is less likely to affect outcomes on prime contracts. For those reasons, it is useful to examine disparity analysis results separately for prime contracts and subcontracts.⁴ As shown in Figure 7-5, minority- and woman-owned businesses considered together showed a substantial disparity on prime contracts (disparity index of 29) but not on subcontracts (disparity index of 195). Disparity analysis results differed for individual business groups across those contract sets:

- All relevant business groups exhibited substantial disparities on prime contracts except Asian American-owned businesses (disparity index of 200+).
- Only Native American-owned businesses (disparity index of 17) exhibited substantial disparities on subcontracts, but Hispanic American-owned businesses exhibited a disparity that was close to the threshold of being considered substantial (disparity index of 81).

Figure 7-5.
Disparity analysis results by contract role

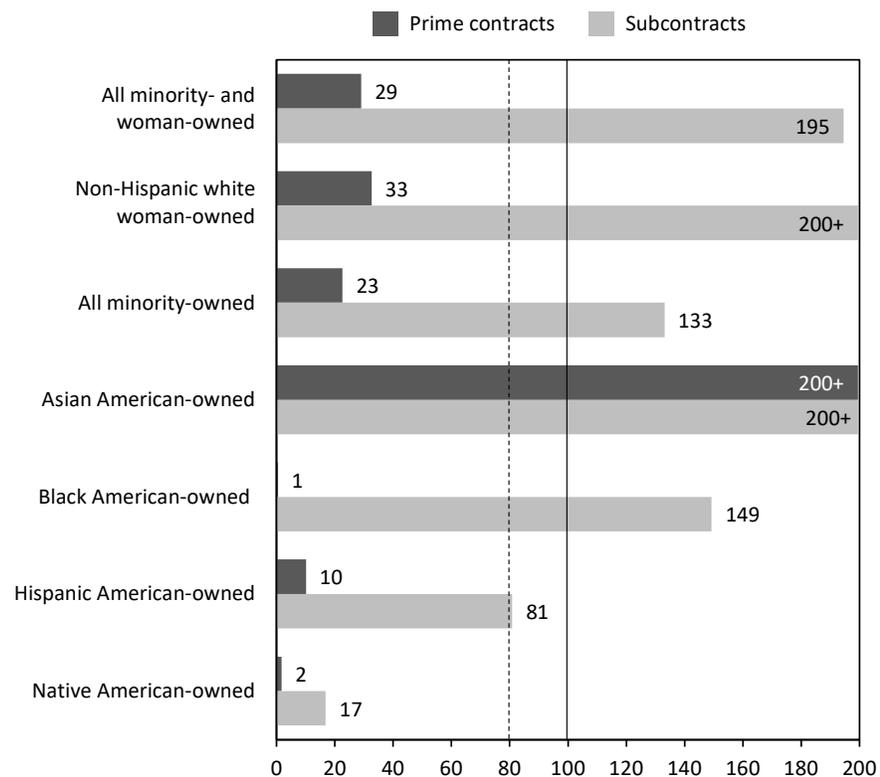
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



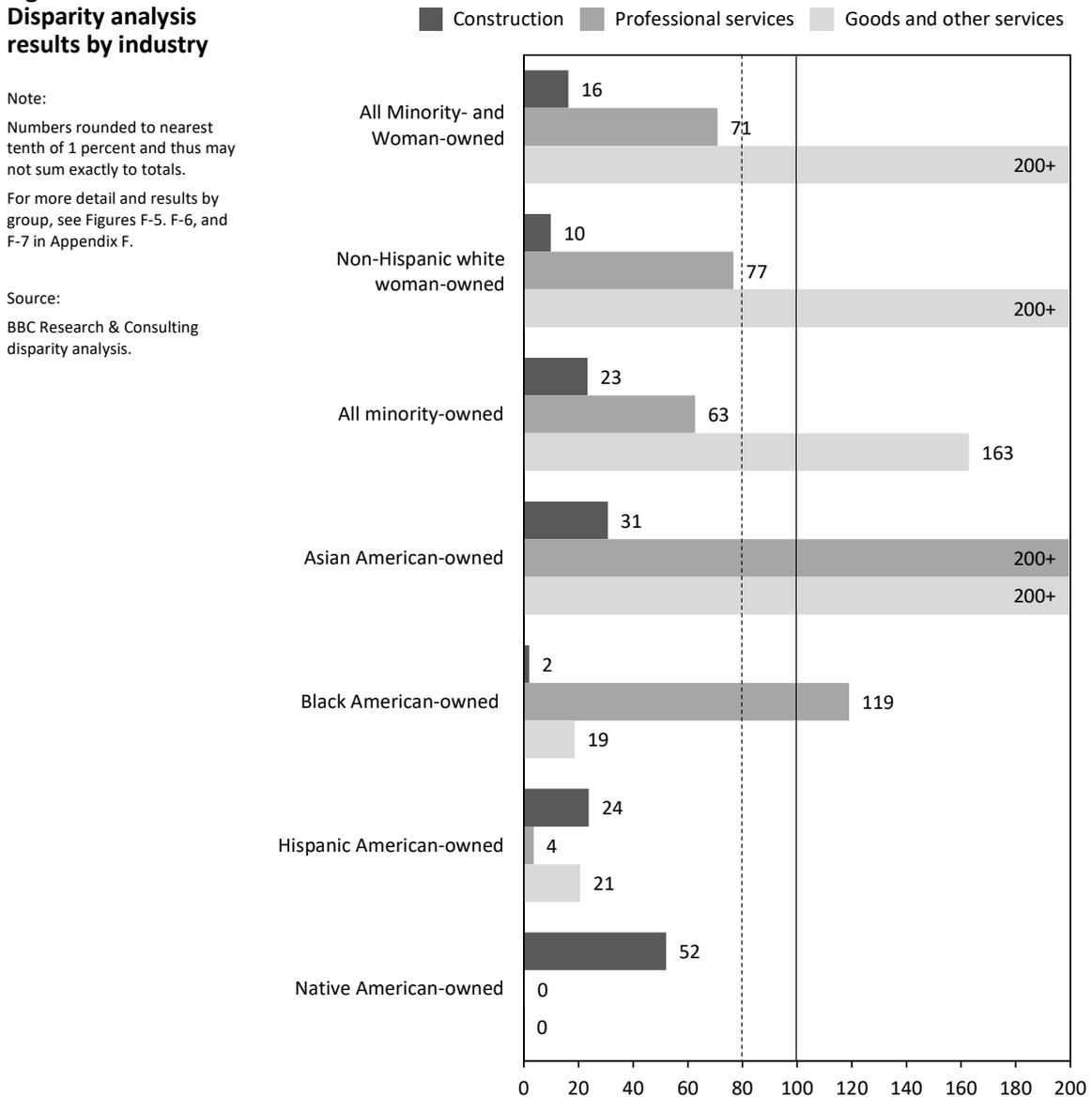
d. Industry. BBC examined disparity analysis results separately for IDOA’s construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by work type. As shown in Figure 7-6, minority- and woman-owned businesses considered together exhibited substantial

⁴ IDOA and most SEIs do not collect comprehensive data on subcontracts, and despite BBC maximizing efforts to collect that information directly from prime contractors, the study team did not have access to data on all subcontracts.

disparities for IDOA’s construction (disparity index of 16) and professional services contracts (disparity index of 71) but not for goods and other services work (disparity index of 200+). Disparity analysis results differed for individual business groups across those contract sets:

- All relevant business groups exhibited substantial disparities on construction contracts.
- Hispanic American- (disparity index of 4), Native American- (disparity index of 0), and white woman-owned businesses (disparity index of 77) exhibited substantial disparities on professional services contracts.
- Black American- (disparity index of 19), Hispanic American- (disparity index of 21), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on goods and other services contracts and procurements.

Figure 7-6.
Disparity analysis
results by industry



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

Source:
BBC Research & Consulting disparity analysis.

e. Geography. BBC also examined disparity analysis results separately for contracts and procurements that IDOA awarded in three different geographical regions of the state:

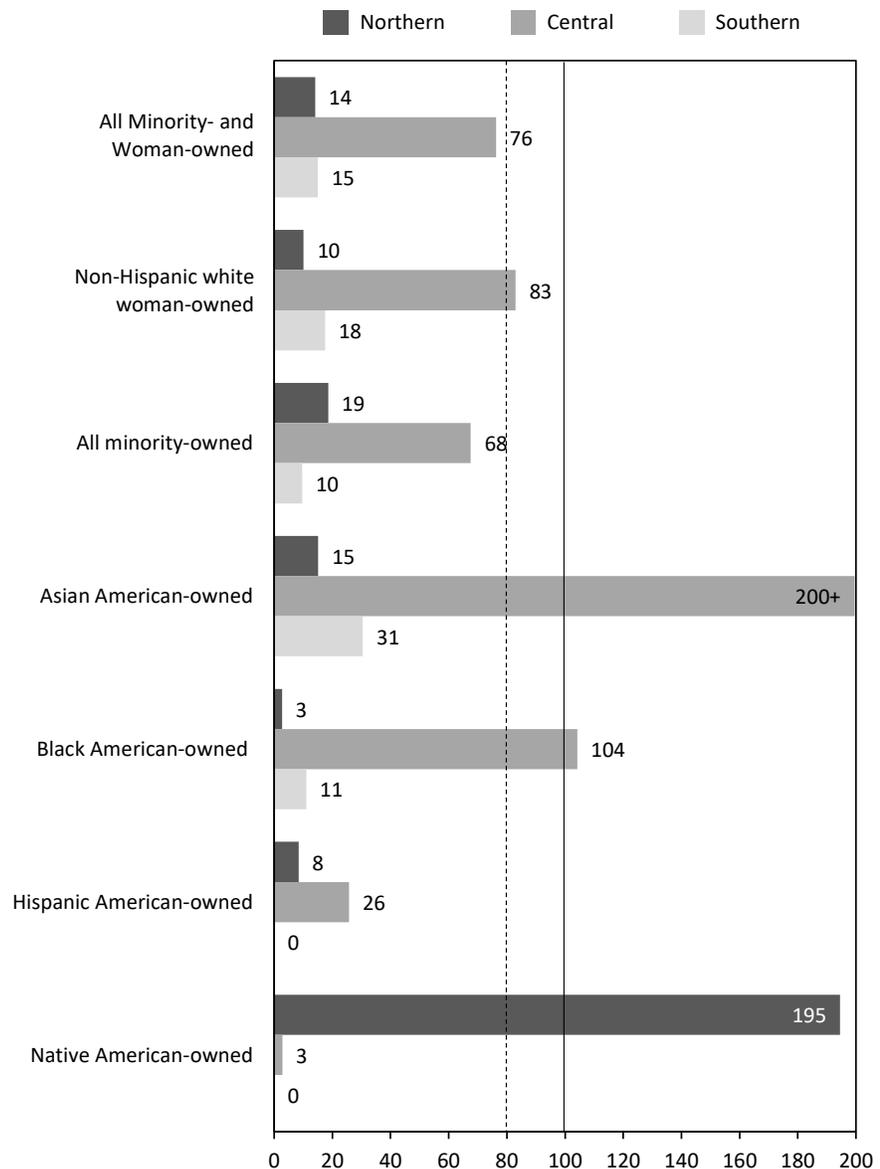
- Northern Indiana, including the areas around Gary, Michigan City, La Porte, South Bend, Elkhart, and Fort Wayne;
- Central Indiana, including the areas around Indianapolis, Lafayette, Kokomo, Anderson, Muncie, Terre Haute, and Bloomington; and
- Southern Indiana, including the areas around Columbus, Vincennes, and Evansville.

As shown in Figure 7-7, minority- and woman-owned businesses considered together showed substantial disparities for IDOA contracts in Northern Indiana (disparity index of 14), Central Indiana (disparity index of 76), and Southern Indiana (disparity index of 15).

Figure 7-7.
Disparity analysis
results by
geographical region

Note:
 Numbers rounded to nearest
 tenth of 1 percent and thus may
 not sum exactly to totals.
 For more detail and results by
 group, see Figures F-14,
 F-15, and F-16 in Appendix F.

Source:
 BBC Research & Consulting
 disparity analysis.



Disparity analysis results differed for individual business groups across those contract sets:

- All relevant business groups exhibited substantial disparities for Northern Indiana contracts and procurements except Native American-owned businesses (disparity index of 195).
- Hispanic American- (disparity index of 26) and Native American-owned businesses (disparity index of 3) exhibited substantial disparities for Central Indiana contracts and procurements.
- All relevant business groups exhibited substantial disparities for Southern Indiana contracts and procurements.

2. Veteran-owned businesses. BBC examined disparities between the participation and availability of veteran-owned businesses for IDOA, INDOT, and SEI contracts and procurements. Disparity analysis results for veteran-owned businesses by organization were as follows:

- IDOA: disparity index of 68;
- INDOT: disparity index of 20;
- Ball State University: disparity index of 200+;
- Indiana State University: disparity index of 71;
- Indiana University: disparity index of 94;
- Ivy Tech Community College: disparity index of 117;
- Purdue University: disparity index of 30;
- University of Southern Indiana: disparity index of 112; and
- Vincennes University: disparity index of 70.

C. Statistical Significance

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

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

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

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

2. Results. BBC ran Monte Carlo simulations on IDOA’s Public Works contracts as well as on the agency’s prime contracts to assess whether the substantial disparities that relevant business groups exhibited for that work were statistically significant. BBC chose those contract sets, because they represent the largest contract sets that IDOA awarded without the use of race- and gender-conscious measures. As shown in Figure 7-8, results from the Monte Carlo analysis indicated that the following disparity indices were statistically significant (confidence level in parentheses):

- Public Works contracts:
 - Minority- and woman-owned businesses considered together (95% confidence level);
 - Non-Hispanic white woman-owned businesses (95% confidence level);
 - Minority-owned businesses considered together (95% confidence level);
 - Asian American-owned businesses (95% confidence level);
 - Black American-owned businesses (95% confidence level); and
 - Hispanic American-owned businesses (90% confidence level).

- Non-Public Works prime contracts:
 - Minority- and woman-owned businesses considered together (95% confidence level);
 - Non-Hispanic white woman-owned businesses (95% confidence level);
 - Minority-owned businesses considered together (95% confidence level);
 - Black American-owned businesses (95% confidence level);
 - Hispanic American-owned businesses (95% confidence level); and
 - Native American-owned businesses (95% confidence level).

Figure 7-8.
Monte Carlo simulation results for IDOA Public Works
contracts and procurements and for IDOA prime contracts

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
Public Works contracts			
Minority-owned and woman-owned	23	0	<0.1 %
Non-Hispanic white woman-owned	16	0	<0.1 %
Minority-owned	30	0	<0.1 %
Asian American-owned	41	5,087	0.5 %
Black American-owned	13	0	<0.1 %
Hispanic American-owned	25	38,589	3.9 %
Native American-owned	71	322,272	32.2 %
Prime contracts			
Minority-owned and woman-owned	29	0	<0.1 %
Non-Hispanic white woman-owned	33	133	<0.1 %
Minority-owned	23	0	<0.1 %
Asian American-owned	200+	N/A	N/A %
Black American-owned	1	0	<0.1 %
Hispanic American-owned	10	0	<0.1 %
Native American-owned	2	0	<0.1 %

Source: BBC Research & Consulting disparity analysis.

CHAPTER 8.

Program Measures

As part of the State of Indiana’s Minority and Women’s Business Enterprises (M/WBE) Program, the Indiana Department of Administration (IDOA) uses a combination of *race- and gender-neutral* and *race- and gender-conscious* program measures to encourage the participation of minority- and woman-owned businesses in its contracting and procurement. IDOA also uses largely the same race- and gender-neutral program measures to encourage the participation of veteran-owned businesses as part of the Indiana Veteran-owned Small Business (IVOSB) Program. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or all small businesses—in an organization’s contracting. Participation in such measures is not limited to minority- or woman-owned or to certified MBEs or WBEs. In contrast, race- and gender-conscious measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization’s contracting (e.g., using M/WBE goals in the award of individual contracts).

As part of meeting the *narrow tailoring* requirement of the *strict scrutiny standard* of constitutional review, organizations that operate minority- and woman-owned business programs—such as the M/WBE Program—must meet the maximum feasible portion of overall annual minority- and woman-owned business participation goals through the use of race- and gender-neutral measures (for details, see Chapter 2 and Appendix B). If an agency cannot meet its overall goal through the use of race- and gender-neutral measures alone, then it can also consider using race- and gender-conscious measures.

BBC Research & Consulting (BBC) reviewed measures that IDOA currently uses to encourage the participation of minority- and woman-owned businesses as well as veteran-owned businesses in its contracting. In addition, BBC reviewed measures that other organizations in Indiana use. That information is instructive, because it allows an assessment of the measures that IDOA is currently using as part of the M/WBE and IVOSB Programs and additional measures that it could consider using in the future. BBC reviews IDOA’s program measures in three parts:

- A. Race- and gender-neutral measures;
- B. Race and gender-conscious measures; and
- C. Other organizations’ programs.

A. Race- and Gender-Neutral Measures

As part of the M/WBE and IVOSB Programs, IDOA uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many minority-, woman-, and veteran-owned businesses—in its contracting. IDOA uses the following types of race- and gender-neutral measures:

- Advocacy and outreach efforts;
- Capital, bonding, and insurance assistance;
- Prompt payment policies; and
- Technical assistance programs.

1. Advocacy and outreach efforts. IDOA participates in various advocacy and outreach efforts, including hosting quarterly resource fairs, facilitating matchmaking events between prime contractors and subcontractors, disseminating information about contracting opportunities through various channels, and using IVOSB goals to award individual contracts.

a. Matchmaking. IDOA coordinates matchmaking events during its business conferences in which minority-, woman-, and veteran-owned businesses are provided opportunities to meet with prime contractors. All types of businesses are invited to attend.

b. Partnerships. IDOA partners with organizations such as Indiana Black Expo, the Mid-States Minority Supplier Development Council, the Indiana Latino Expo, the Indy Chamber, the National Association of Women Business Owners, and the Women’s Business Enterprise Council (WBENC) to promote business fairs and networking events. IDOA’s advocacy and outreach efforts also include regular communication, promotion of MBE/WBE/IVOSB certification opportunities, and outreach partnerships with other organizations. IDOA also provides links on its website to information about many local business development organizations.

In addition, IDOA maintains memoranda of agreement with other organizations—including the City of Indianapolis and WBENC Great Lakes—to establish reciprocal MBE/WBE/IVOSB certification processes. Reciprocal certification allows businesses to certify with one organization and be recognized as being certified by partnering organizations. (However, IDOA’s Division of Supplier Diversity (DSD) still has the authority to deny MBE/WBE/IVOSB certification to businesses even if they are certified with other organizations.)

c. Contracting opportunity advertisements. IDOA advertises information about contracting and procurement opportunities through postings on its website and directly to registered businesses via e-mail. The agency also advertises information about contracting opportunities in local newspapers, as required by state law.

d. IVOSB goals. The State of Indiana has set an overall goal of 3 percent goal for the participation of IVOSBs in its contracts and procurements. It also uses IVOSB goals of 3 percent to award individual contracts and procurements. For contracts and procurements worth more than \$75,000—excluding public works contracts—prime contractors must partner with IVOSB subcontractors to meet the goal or submit evidence of good faith efforts that they tried to do so. In addition, for contracts worth less than \$75,000, IVOSBs bidding as prime contractors can claim a 15 percent bid discount. Businesses can get certified as IVOSBs through the United States Department of Veteran Affairs or through DSD.

2. Capital, bonding, and insurance assistance. As part of the M/WBE and IVOSB Programs, IDOA participates in financing and bonding workshops throughout the year and also offers bid discounts to small businesses.

a. Financing and bonding workshops. DSD hosts a bonding workshop at each of IDOA's resource fairs. IDOA partners with the Indiana Surety Association and other organizations to facilitate those workshops. The agency also partners with banking institutions and insurance companies to facilitate other financing and bonding workshops for small businesses, including many minority-, woman-, and veteran-owned businesses.

b. Bid discounts. IDOA discounts small businesses' bids by 15 percent for evaluation purposes on select contracts and procurements. That is, IDOA considers 85 percent of the value of small businesses' bids as the value of their total bids for evaluation purposes.

3. Prompt payment policies. IDOA has policies in place to help ensure prompt payment to both prime contractors and subcontractors. Indiana state law requires state agencies to pay prime contractor invoices within 35 days of receipt. IDOA also enforces state-mandated prompt payment processes that require prime contractors to pay subcontractors within 10 days of receiving payment. In addition, the agency uses the Pay Audit system to monitor and enforce compliance with MBE/WBE/IVOSB participation goals on its contracts and procurements.

4. Technical assistance programs. IDOA works provides technical assistance on a variety of topics, including business strategy, financing, and MBE/WBE/IVOSB certification.

a. Business Conferences and Business 2 Business (B2B). IDOA, in conjunction with the Business Conference, hosts quarterly resource conferences around the state that are open to all businesses. The conferences are one- to two-day events that include workshops, networking opportunities, and public discussions designed around different technical assistance topics. They also provide information and offer courses on business plan development, marketing strategies, and winning work with public agencies. The business conferences and workshops are heavily promoted through various means, including e-mail invitations to more than 4,000 local businesses and organizations. IDOA also promotes its conferences through radio talk shows, press releases, social media, direct email mailings, print materials, and its website, targeted specifically to small businesses and minority-, woman-, and veteran-owned businesses.

b. Partnerships. IDOA refers businesses and individuals to other partner organizations offering technical assistance, including the Indiana Small Business Development Center, the Office of Small Business and Entrepreneurship, and the Indy Chamber's Business Ownership Initiative.

c. DSD technical assistance. DSD offers technical assistance on a variety of topics to all interested businesses, including small businesses and minority-, woman-, and veteran-owned businesses. In addition, DSD offers MBE/WBE/IVOSB certification assistance, including monthly certification workshops during which potential applicants can review the certification application and ask questions of DSD staff.

d. Preparation Meeting Opportunity (PMO) Workshops. IDOA invites certain businesses to participate in PMO workshops that provide contract compliance training and tips for both prime contractors and subcontractors, particularly for minority-, woman, and veteran-owned businesses. The workshops do not apply to specific contract or procurement opportunities but instead provide guidance on how to do business with IDOA in general.

d. Business development. IDOA hosts several business development events, including four Indiana Business Conferences across the state, Tools for Success, and Opportunities and Barriers. It also partners with various organizations to host business development events, including Indiana Black Expo, Indiana Latino Expo, supplier diversity events, and development workshops. In addition, IDOA offers business development meetings to minority-, woman-, and veteran-owned businesses and other businesses interested in learning how to do business with the agency. DSD regularly evaluates the effectiveness of such programs in order to improve them. The division varies program offerings based on participant feedback, grows partnerships to further its reach, and works to expand its social media presence to reach more businesses.

B. Race- and Gender-Conscious Measures

IDOA currently uses MBE/WBE contract goals on many of its professional services and goods and other services contracts. It does not enforce the use of those goals on contracts that it awards through its Public Works Division, which comprise construction and construction-related professional services contracts. The agency does not use any other race- or gender-conscious measures. IDOA applies the same goals to each of its contracts in a particular contracting area, and those goals are the same as the overall annual goals that the Governor’s Commission on Supplier Diversity has set for relevant contracting areas, as shown in Figure 8-1.

Figure 8-1.
Overall Annual MBE/WBE Goals
(and MBE/WBE contract goals)

Source: www.in.gov/idoa/mwbe/2494.htm

Contracting area	Business type	
	MBE	WBE
Construction	7 %	5 %
Professional services	8 %	8 %
Goods and support services	4 %	9 %

Prime contractors can meet MBE/WBE contract goals by either making subcontracting commitments with certified MBE/WBE subcontractors at the time of bid or by submitting MBE/WBE program waivers showing they made all reasonable good faith efforts to meet the goals but could not do so. Good faith efforts include:

- Making direct contact or engaging in negotiations with certified MBE/WBE subcontractors;
- Advertising subcontracting opportunities for certified MBE/WBE subcontractors; and
- Sending notifications or solicitations to certified MBE/WBE subcontractors regarding subcontracting opportunities.

If prime contractors fail to meet MBE/WBE contract goals through subcontracting commitments or fail to make good faith efforts, DSD may deem their bids unresponsive and may recommend rejecting them.

C. Other Organizations’ Programs

In addition to the race- and gender-neutral measures that IDOA currently uses, there are many program measures that other organizations in Indiana use to encourage the participation of minority- and woman-owned businesses. Figure 8-2 provides examples of those measures.

Figure 8-2.
Examples of race- and gender-neutral programs that other organizations in Indiana use

Type	Examples in the local marketplace
<p>Advocacy and Outreach</p>	<p>The Indiana Black Expo's annual Statewide Conference provides minority businesses with opportunities to build capacity in order to compete for contract opportunities with local, state, federal, private, and post-secondary organizations. Attendees have the opportunity to hear directly from experts on sustaining and expanding their businesses and networking with key decision makers at the Mayor's Breakfast, Governor's Reception, and the state's largest corporate luncheon.</p> <p>The Mid-State Minority Supplier Development Council is the regional affiliate of the National Minority Supplier Diversity Council. The organization certifies minority-owned businesses, assists in capacity building, and provides networking opportunities for relationship building between minority-owned businesses and contracting firms or agencies. The organization also hosts an annual procurement conference to provide support to MBEs.</p> <p>The National Association of Women Business Owners has a local chapter in Indianapolis. The member organization offers events that include panel discussions and networking opportunities. It also assists in capacity building through the non-profit branch.</p> <p>The Indiana Latino Expo is a nonprofit organization that represents a platform of opportunities for the Latino community. It is designed to create awareness and promote the economic development of Hispanic American-owned businesses; drive cultural advancement and educational opportunities; and provide support in health and wellness.</p>
<p>Capital and Finance</p>	<p>Small business financing is available through several local agencies within Indiana. For example, the Flagship Enterprise Center, a Small Business Administration Microloan Intermediary, supports small business growth by offering loans ranging from \$500 to \$250,000. The Business Ownership Initiative of the Indianapolis Microloan Fund also offers loans to microenterprises whose owners cannot obtain regular commercial credit due to their size or lack of a proven track record. Those loans range in size from \$1,000 to \$50,000.</p> <p>The City of Kokomo's Business Assistance Programs work to help small businesses through the current economic conditions by offering financial assistance programs including low-interest capital loans and downtown facade work. Loans typically range from \$2,000 to \$15,000, though they can be up to \$300,00 for technology or industrial manufacturing companies.</p> <p>Other agencies in Indiana provide training on how to obtain financing, including the Minority Business Development Agency, the City of Gary, the City of Indianapolis, and the Indiana Small Business Development Center.</p> <p>The United States Department of Transportation Bonding Education Program (BEP) partners with the Surety and Fidelity Association of America (SFAA) to help small businesses become bond-ready. The BEP is designed to address what businesses need to do to become bond-ready and includes one-on-one sessions with local surety bonding professionals to help in assembling the materials necessary for a complete bond application. The program is tailored to businesses competing for transportation-related contracts.</p> <p>The Surety Association of Indiana is a nonprofit business league comprising professionals that specialize in providing surety credit to construction contractors. The organization's members include insurance agents, underwriters, insurance companies, accountants, law firms, and banks that are specialists in surety bonding</p> <p>The Small Business Administration guarantees bid, performance, and payment bonds issued by surety companies. That guarantee encourages surety companies to bond small businesses who are having difficulty obtaining bonding on their own.</p>

**Figure 8-2 (continued).
Examples of race- and gender-neutral programs that other organizations in Indiana use**

Type	Examples in the local marketplace
<p>Mentor-Protégé Programs</p>	<p>The Southwest Indiana Chamber's Propel Mentor/Protégé Program matches relatively large businesses with smaller businesses to help build capacity, improve financial literacy, and improve general business acumen. The program consists of a seven-week boot camp that includes weekly three-hour classes, monthly mentor/protégé meetings, and monthly peer-to-peer meetings</p> <p>The Indy Chamber's Hispanic Business Council's mentor-protégé Program is designed to develop Hispanic American-owned businesses by motivating and encouraging other businesses to assist them with business development; establish long-term relationships with large corporations; and compete more successfully in the marketplace.</p> <p>The Indiana Construction Roundtable launched its mentor-protégé program to increase the number of minority- and woman-owned businesses in the construction industry and to help increase their capacities. Other organizations, including the American Council of Engineering Companies and the National Association of Women Business Owners, have modeled their mentor-protégé programs after ICR's program.</p> <p>The Small Business Association 8(a) Business Development Mentor-Protégé Program pairs subcontractors with prime contractors to assist small businesses with management, financial, and technical issues. The program also helps small businesses explore joint ventures and subcontracting opportunities for federally-funded contracts.</p> <p>Eli Lilly & Company offers a mentor-protégé program to help develop minority- and woman-owned businesses in the private sector. The program supports emerging businesses to increase their capacities and competitiveness by providing business mentoring, partnering, technical assistance, and by marketing those businesses to internal clients and partners.</p>
<p>Technical Assistance</p>	<p>Many small business incubators across the state provide low-rent space, free or reduced-cost counseling, and other services to new small businesses. Those organizations include the Indiana Economic Development Association, INzone, and local and regional economic development organizations, among others.</p> <p>Virtuoso, an education and management consulting firm, assists prime bidders contracting with the State of Indiana and other states. As an MBE/WBE itself, the firm provide expertise in the procurement process and overall project management.</p> <p>The Minority Business Development Agency (MBDA), an agency of the United States Department of Commerce, has a program in place to help promote the growth and global competitiveness of small, medium, and large businesses that are owned and operated by members of minority communities. Through its network of more than 40 business centers and its wide range of strategic partners, MBDA provides minority- and woman-owned businesses with technical assistance and access to capital, contract opportunities, and new markets.</p> <p>The Indianapolis Service Corps of Retired Executives (SCORE) serves as a source of free small business advice for entrepreneurs. SCORE is a volunteer, non-profit organization whose mission is to promote the success of small businesses in central Indiana. SCORE mentors provide free and confidential business assistance to both prospective entrepreneurs and existing small business owners. The organization also conducts a variety of workshops that address many of the essential techniques necessary for establishing and managing a successful business.</p> <p>The Indiana Small Business Development Center provides access to business consultants in a variety of specialized fields, including business plan development, capital formation, exporting, government procurement, and strategic planning. Those consulting services are available at no cost to business owners</p> <p>The Indy Chamber's Business Ownership Initiative (BOI) offers a range of workshops to meet businesses' needs in any stage of business development. Workshop topics include business planning, business necessities, creating a business plan, recordkeeping, financial management, marketing, and sales.</p>

**Figure 8-2 (continued).
Examples of race- and gender-neutral programs that other organizations in Indiana use**

Type	Examples in the local marketplace
Technical Assistance	<p>The Small Business Administration operates the 7(j) Management and Technical Assistance Program to provide specialized assistance to underserved markets. The assistance focuses on helping businesses succeed in federal, state, and local government markets for goods and services, and as subcontractors to prime contractors working in government contracting. The assistance addresses myriad topics including marketing, strategic and operational planning, financial analysis, opportunity development and capture, contract management, and compliance.</p> <p>The Indianapolis Chapter of the National Association of Women Business Owners hosts events, including their Circle for Learning & Networking program, provide opportunities for members to learn about business development, contracting and procurement, and other business-related topics.</p> <p>The Indiana Procurement Technical Assistance Center offers no-cost counseling and workshops to any Indiana business that wants to sell goods or services to the government.</p>
COVID-19 Response	<p>The Indianapolis Chapter of the Local Initiatives Support Corporation is offering Small Business Relief Grants, flexibility in repayment terms of existing loans, and funds to community-based organizations such as community centers and development corporations.</p> <p>The Indy Chamber's Rapid Response Hub offers Ready to Restart grants of up to \$5,000 to help businesses purchase personal protective equipment in order to reopen.</p> <p>The Indiana Small Business Development Center created a COVID-19 Guide to help small business owners find out where to get help, including information about federal Small Business Administration assistance such as the Paycheck Protection Program and Economic Injury Disaster Loans. The guide also includes information on Indiana unemployment insurance, emergency paid sick leave, and other programs that may help companies impacted by COVID-19.</p> <p>The United Way of Central Indiana has established a COVID-19 Community Economic Relief Fund to help individuals, organizations, and companies impacted by the pandemic.</p>

CHAPTER 9.

Program Considerations

The disparity study provides substantial information that the Indiana Department of Administration (IDOA) and the Governor’s Commission on Supplier Diversity (the Commission) should examine as it considers potential refinements to the Minority and Women’s Business Enterprises (M/WBE) Program and ways to better encourage the participation of minority- and woman-owned businesses in state agency and state educational institution (SEI) contracts and procurements. BBC Research & Consulting (BBC) presents several key considerations IDOA should make. In making those considerations, IDOA should assess whether additional resources, new data systems, changes in internal policy, or changes in law might be required.

A. Data Collection

IDOA uses the Pay Audit system to collect and maintain data on subcontracts that are associated with the prime contracts that it awards. However, the agency only collects data on subcontracts that certified MBE/WBEs perform. Furthermore, IDOA relies on prime contractors to enter that information into the Pay Audit system on a voluntary basis, and prime contractors do not always comply. As a result, the agency does not have comprehensive subcontract data for any of the prime contracts that it awards. IDOA should consider collecting data on *all* subcontracts, regardless of subcontractors’ characteristics or whether they are certified as MBEs, WBEs, or Indiana Veteran-owned Small Businesses (IVOSBs), and making it a requirement for prime contractors to submit that information. Collecting data on all subcontracts will help ensure that IDOA monitors the participation of minority- and woman-owned businesses in its work accurately, assesses what subcontract opportunities exist for those businesses, and is able to identify additional businesses that could become certified. Collecting the following data on all subcontracts would be appropriate:

- Subcontractor names, addresses, phone numbers, and e-mail addresses;
- Types of associated work;
- Subcontract award amounts;
- Subcontract paid-to-date amounts;
- Race/ethnicity and gender of business owners;
- Veteran status of business owners; and
- Certification statuses.

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

B. Overall Aspirational Goal

Each year, the Commission sets overall aspirational goals for the participation of minority- and woman-owned businesses in state contracts and procurements. Currently, the Commission sets separate goals for minority- and woman-owned businesses for construction, professional services, and goods and other services contracts (i.e., six separate goals). The Commission could consider setting a single overall aspirational goal for minority- and woman-owned businesses, considered together, across all procurement areas, which is more typical of how organizations set overall aspirational goals as part of minority- and woman-owned business programs. Having a single goal rather than six goals might help reduce the administrative burden of operating the M/WBE Program and better focus IDOA's efforts in achieving the goals each year. Having a single goal for minority- and woman-owned businesses may also be more consistent with the *strict scrutiny* standard of constitutional review.

Regardless of whether the Commission decides to consolidate its overall aspirational goals into a single goal, the disparity study provides detailed information that could be helpful in establishing those goals in the future. The Commission and IDOA could consider following a two-step process to develop overall aspirational goals for the participation of minority- and woman-owned businesses in its contracts and procurements, consisting of *establishing a base figure* and *considering an adjustment* to the base figure based on conditions in the local marketplace and other factors. BBC presents an example of a two-step process below for a single overall aspirational goal for minority- and woman-owned businesses considered together.

1. Establishing a base figure. The availability analysis provides information that the Commission and IDOA can use for establishing a base figure for its overall aspirational goal for the participation of minority- and woman-owned businesses in state contracts and procurements. The analysis indicates that minority- and woman-owned businesses are potentially available to participate in 18.2 percent of IDOA's contract and procurement dollars, which the Commission and IDOA could consider as the base figure for its overall aspirational goal for minority- and woman-owned businesses considered together.

2. Considering an adjustment. In setting overall aspirational goals, organizations often examine various information to determine whether adjustments to their base figures are necessary to account for past participation of minority- and woman-owned businesses in their contracting; current conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses; and other relevant factors. For example, the Federal Disadvantaged Business Enterprise (DBE) Program, which organizations sometimes use as a model for goal-setting, outlines several factors that organizations might consider when assessing whether to adjust their goals:

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

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

The Commission and IDOA could consider making an adjustment to its base figure based on the degree to which minority- and woman-owned businesses have participated in state contracts and procurements in recent years. Figure 9-1 presents the percentage of contract and procurement dollars that IDOA awarded to certified MBE/WBEs in each year of the study period. The median participation of certified MBE/WBEs in IDOA contracts and procurements during that time was 9.7 percent, which supports a downward adjustment to the base figure.

Figure 9-1.
Certified M/WBE participation in IDOA work during the study period

Source:
BBC Research & Consulting utilization analysis.

Fiscal year	Participation
2014	10.9 %
2015	12.7
2016	1.2
2017	9.7
2018	4.7

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

Chapter 3 summarizes information about conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices C and D. BBC's analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the local marketplace. For example, marketplace analyses indicated that minorities are far less likely than non-Hispanic whites to earn college degrees in Indiana, minorities and women are less likely to work as managers in various industries in Indiana, minorities and women earn substantially less than non-Hispanic whites and men in Indiana, and minorities and women are substantially less likely to own businesses than similarly-situated non-Hispanic white men. Such barriers may decrease the availability of minority- and woman-owned businesses for IDOA contracts and procurements, which supports an upward adjustment to the base figure.

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

d. Other factors. There is also quantitative evidence that businesses owned by minorities and women earn less than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence, and Appendix C presents corresponding quantitative analyses. There

is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix D. Many businesses reported experiencing stereotyping, double standards, and business networks that are closed off to such businesses. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects certain types of businesses in the local marketplace, supporting an upward adjustment to the base figure.

3. SEI goals. The Commission and IDOA could consider working with SEIs to use a similar two-step process to set separate overall aspirational goals for the participation of minority- and woman-owned businesses in each organization's contracts and procurements. That process would account for the availability of minority- and woman-owned businesses for the specific work that each SEI awards and factors that might affect availability in their own marketplaces.

4. Goal revisions. The Commission sets overall aspirational goals on an annual basis, but it could consider setting those goals less frequently. For example, the Federal DBE Program requires agencies to set goals every three years. Regardless of how frequently the Commission sets goals in the future, as part of the goal-setting process, it should consider any changes IDOA plans on making to business development programs, procurement processes, staff resources, or other processes and programs that might affect its ability to support the growth of minority- and woman-owned businesses in the period that new goals will cover. The Commission should assess how those changes might affect the availability and capacity of minority- and woman-owned businesses to perform work on state contracts and procurements. It should also regularly review its goal-setting process to ensure that it provides adequate flexibility to respond to recent changes in marketplace conditions, anticipated contract and procurement opportunities, new statistical or anecdotal evidence, and other factors.

C. MBE/WBE Contract Goals

IDOA uses MBE/WBE contract goals in awarding many contracts and procurements. Prime contractors can meet those goals by either making subcontracting commitments with certified MBE/WBE subcontractors at the time of bid or by submitting MBE/WBE program waivers showing they made all reasonable good faith efforts to meet the goals but could not do so. Disparity analysis results indicated that most racial/ethnic and gender groups showed better outcomes on contracts and procurements that IDOA awarded with the use of MBE/WBE goals than on contracts and procurements that the agency awarded without the use of such measures. For example, all relevant business groups showed substantial disparities on public works contracts, which the Public Works Division awarded without the use of race- and gender-conscious measures. Based on those results and the fact that the myriad race- and gender-neutral measures that IDOA uses to encourage the participation of minority- and woman-owned businesses in state contracting have not sufficiently addressed disparities for those businesses, the agency should consider continuing its use of MBE/WBE contract goals in the future.

In using MBE/WBE contract goals, IDOA currently sets the same goal on each contract or procurement it awards within a particular procurement area equal to the overall aspirational goals for the procurement area. For example, IDOA uses an MBE goal of 4% and a WBE goal of 9% to award all goods and other services procurements. To use contract goals more effectively, IDOA could consider setting participation goals on individual contracts in a more tailored

manner based on the availability of minority- and woman-owned businesses for the types of work involved with the project and other factors. Sometimes, the goals would be higher than the agency's overall aspirational goal, sometimes they would be lower, and sometimes, IDOA would not set a goal for a particular based on a lack of availability of minority- and woman-owned businesses for the work involved. Because the use of such goals would be considered a race- and gender-conscious measure, IDOA must ensure that their use meets the strict scrutiny standard of constitutional review, including showing a *compelling governmental interest* for their use and ensuring that their use is *narrowly tailored* (for details, see Chapter 2 and Appendix B).

D. Public Works Contracts

Although IDOA used MBE/WBE contract goals to award many contracts and procurements during the study period, importantly, the Public Works Division did not use such goals to award any of its contracts (i.e., construction and construction-related professional services contracts). In other words, those contracts were awarded in a *race- and gender-neutral* manner. Disparity analysis results indicated substantial disparities for all racial/ethnic and gender groups on contracts that the Public Works Division awarded during the study period. IDOA should work with the Public Works Division to consider using MBE/WBE contract goals in awarding construction and construction-related professional services contracts to better encourage the participation of minority- and woman-owned businesses in that work. As stated above, because the use of such goals would be considered a race- and gender-conscious measure, IDOA would have to ensure that the Public Works Division's use of goals meets the strict scrutiny standard of constitutional review.

E. Utilization of Different Businesses

According to the information to which the study team had access, during the study period, state agencies awarded \$177 million worth of contracts and procurements to minority- and woman-owned businesses, but those dollars went to only 97 different businesses, only 34 of which were minority-owned. IDOA could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked, which might help encourage the participation of a larger number of minority- and woman-owned businesses in IDOA work. For example, as part of bids and proposals, IDOA might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked in the past. IDOA could award evaluation points or price preferences based on the degree to which prime contractors partner with subcontractors with which they have not previously worked.

F. MBE/WBE Certification

IDOA is responsible for certifying minority- and woman-owned businesses as MBE/WBEs as part of the M/WBE Program. Unlike many other minority- and woman-owned business programs, no revenue or net worth assessments are associated with IDOA's MBE/WBE certification process. IDOA should consider limiting MBE/WBE certification to those minority- and woman-owned businesses that are small and disadvantaged based on size thresholds. In that way, the M/WBE Program will better address barriers that small, disadvantaged businesses face. In addition, as part of in-depth interviews, focus groups, and public meetings, many minority- and woman-owned businesses characterized IDOA's MBE/WBE certification process

as difficult and cumbersome. IDOA should consider measures to simplify and streamline the process—particularly for recertification—to make it easier for minority- and woman-owned businesses to become certified and fully participate in the M/WBE Program.

G. Prime Contract Opportunities

Disparity analysis results indicated substantial disparities for most racial/ethnic and gender groups on the prime contracts that IDOA awarded during the study period. IDOA might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. Indiana state code already allows state agencies to set aside certain construction and goods and support services contracts for small businesses and allows state agencies to use small business price preferences for those purchases. IDOA could consider expanding its use of those programs to a larger number of small construction and goods and support services contracts. In addition, the State of Indiana could consider legislation to expand those programs to certain small, professional services contracts. To implement small business set asides effectively, IDOA would need to develop a small business certification program. It might use the same economic eligibility criteria that already exist in Indiana state code.

In addition, IDOA should consider counting prime contractor participation toward meeting MBE/WBE contract goals. Currently, minority- and woman-owned businesses that participate on IDOA contracts as prime contractors cannot count that participation toward meeting MBE/WBE contract goals. That policy might discourage minority- and woman-owned businesses from pursuing IDOA work as prime contractors and increasing their capacity to perform work as prime contractors both with government agencies and in the private sector.

H. Unbundling Large Contracts

In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that IDOA awarded during the study period. In addition, as part of in-depth interviews, focus groups, and public meetings, several businesses owners reported that the size of government contracts sometimes serves as a barrier to their success. To further encourage the participation of minority- and woman-owned businesses in its work, IDOA should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several, smaller contract pieces. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontracting opportunities into smaller contract pieces, making them more accessible to small businesses, and accepts such attempts as good faith efforts as part of its contracting goals program. Such efforts might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses.

I. Subcontracting Minimums

Subcontracts often represent accessible opportunities for small businesses, including many minority- and woman-owned businesses, to become involved in an organization's contracting and procurement. Accordingly, minority- and woman-owned businesses did not show any disparities on the subcontracts that were associated with the prime contracts that IDOA awarded during the study period. However, subcontracting accounts for a relatively small percentage of the total contract and procurement dollars that IDOA awards. To increase

subcontract opportunities, IDOA could consider implementing a program that requires prime contractors to subcontract a minimum amount of project work. For specific types of contracts where subcontracting or partnership opportunities might exist, IDOA could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed those thresholds in order for their bids or proposals to be considered responsive. If IDOA were to implement such a program, it should include good faith efforts provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

J. Prompt Payment Policies

Indiana state law requires state agencies to pay prime contractors within 35 days of agencies receiving invoices. In addition, IDOA requires prime contractors to pay their subcontractors within 10 days of receiving payment from the agency. However, as part of focus groups and in-depth interviews, and public forums, several businesses—including many minority- and woman-owned businesses—reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses (for details, see Appendix D). In light of such comments, IDOA should consider reinforcing its prompt payment policies with its procurement staff and with prime contractors. Doing so might help ensure that both prime contractors and subcontractors receive payment in a timely manner and minority- and woman-owned businesses have enough operating capital to remain competitive and successful.

K. Prequalification

All contractors and consultants bidding on most state public works projects worth more than \$150,000, including subcontracts, must be prequalified by IDOA. To be considered prequalified, contractors' bonding capacities must be greater than \$150,000 and their past experience must be considered satisfactory. Anecdotal evidence indicated that both prequalification processes and bonding requirements have been barriers for small businesses, including many minority- and woman-owned businesses. IDOA should consider ways to offset any burdensome aspects of prequalification or bonding to better encourage the participation of small businesses in the process. For example, the agency could explore working with local accountants to offer audits at reduced costs or relax prequalification requirements for certified MBE/WBE businesses.

L. Capacity Building

Results from the disparity study indicated that there are many minority- and woman-owned businesses in Indiana but most of them have relatively low capacities for state work. IDOA should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for relatively large state contracts and procurements. Anecdotal evidence indicated that businesses find such programs—when implemented well—to be valuable in helping them grow and learn the necessary skills required to compete in their industries. Anecdotal evidence also indicated that businesses face various challenges—such as access to financing, obtaining equipment, and back office accounting—that inhibit or slow their growth. In addition to considering programs that could be open to all minority- and woman-owned business, IDOA could consider implementing a

program to assist certain businesses with development and growth. As part of such a program, IDOA could have an application and interview process to select businesses with which to work closely to provide specific support and resources necessary for growth.

M. Growth Monitoring

IDOA might consider collecting data on the impact that the M/WBE Program has on the growth of minority- and woman-owned businesses over time. Doing so would require it to collect baseline information on MBE/WBE-certified businesses—such as revenue, number of locations, number of employees, and employee demographics—and then continue to collect that information from each business on an annual or semiannual basis. IDOA could consider collecting those data from businesses as part of certification and renewal processes. Such metrics would allow it to assess whether the program is helping businesses grow and tailor the measures it uses as part of the M/WBE Program to the specific needs of minority- and woman-owned businesses.

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the State of Indiana Disparity Study report.

Anecdotal Information

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

Availability Analysis

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

Business

A business is a for-profit enterprise, including sole proprietorships, corporations, professional corporations, limited liability companies, limited partnerships, limited liability partnerships, and any other partnerships. The definition includes the headquarters of the entity 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 that are listed separately).

Compelling Governmental Interest

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

Consultant

A consultant is a business that performs professional services contracts.

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction contracts.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

A custom census availability analysis is one in which researchers attempt surveys with potentially available businesses working in the local marketplace to collect information about key business characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts that an organization actually awarded during the study period to assess the percentage of dollars that one might expect a specific group of businesses to receive on contracts or procurements that the organization awards. A custom census availability 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 organization's contracts.

Division of Supplier Diversity (DSD)

DSD is the division of the Indiana Department of Administration that is responsible for implementing the state's Minority and Women's Business Enterprises Program and the Indiana Veteran-owned Small Business Program.

Disparity

A disparity is a difference or gap between an actual outcome and some benchmark. In this report, the term *disparity* refers specifically to a difference between the participation of a specific group of businesses in state contracting and procurement 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 state contracting and procurement 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 state contracting and procurement by the estimated availability of the group for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Dun & Bradstreet (D&B)

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

Executive Branch Agency

Executive branch agencies refer to the 102 different agencies, departments, and offices that make up the executive branch of Indiana's state government. Contract and procurement data from each executive branch agency were included as part of the disparity study.

Firm

See *business*.

Governor's Commission on Supplier Diversity (the Commission)

The Commission is responsible for overseeing the State of Indiana's Minority and Women's Business Enterprises Program and the Indiana Veteran-owned Small Business Program.

Indiana Department of Administration (IDOA)

IDOA is an Indiana state agency that provides support and other services to other state agencies throughout Indiana. One of IDOA's functions is to operate the State of Indiana's Minority and Women's Business Enterprises Program and the Indiana Veteran-owned Small Business Program. IDOA retained BBC Research & Consulting to conduct the 2020 State of Indiana Disparity Study.

Indiana Veteran-owned Small Business (IVOSB)

An IVOSB is a veteran-owned small business that is certified as such through DSD. Businesses seeking IVOSB certification are required to submit applications to DSD and must meet the following criteria:

- The majority of their payrolls must be accounted for by Indiana residents.
- The majority of their staffs must comprise Indiana residents.
- They must make substantial capital investments in Indiana.
- They must be headquartered in Indiana.

The application is available online and requires businesses to submit various information, including business name, contact information, tax information, and work specializations. DSD reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

Indiana Veteran-owned Small Business (IVOSB) Program

The IVOSB Program is designed to assist veteran-owned businesses attempting to perform work on state contracts and procurements. The program's objectives are to promote meaningful business opportunities for veterans, build productive partnerships among veteran-owned businesses and other organizations, and successfully integrate veteran-owned businesses within the business infrastructure of Indiana. Each year the Commission establishes overall annual goals for the participation of veteran-owned businesses in state prime contracts and subcontracts. State agencies use various race- and gender-neutral measures to try to meet the overall annual goals.

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*.

Majority-owned Business

A majority-owned business is a for-profit business that is at least 51 percent owned and controlled by non-Hispanic white men who are not veterans.

Minority

A minority is an individual who identifies with one of the following racial/ethnic groups: Asian American, Black American, Hispanic American, or Native American.

Minority-owned Business

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

Minority-owned Business Enterprise (MBE)

An MBE is a minority-owned business that is certified as such through DSD. Businesses seeking MBE certification with the State of Indiana are required to submit applications to DSD. The application requires businesses to submit various information, including name and contact information, tax information, work specializations, and information about the owner's gender and ethnicity. DSD reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required information. There are no revenue or net worth assessments associated with DSD's MBE certification process.

Minority and Women’s Business Enterprises (M/WBE) Program

The M/WBE Program is designed to encourage the participation of minority- and woman-owned businesses in state contracting and to create a fair, competitive, and equitable environment for those businesses. The following groups are presumed to be socially and economically disadvantaged according to the M/WBE Program: Asian Americans, Black Americans, Hispanic Americans, Native Americans, and women of any race or ethnicity. Each year, the Commission establishes overall annual goals for the participation of minority- and woman-owned businesses in state prime contracts and subcontracts. The Commission sets separate goals for construction, professional services, and goods and other services contracts and procurements based on appropriate research, which the state is required to conduct every five years. The program comprises various race- and gender-neutral and race- and gender-conscious measures to meet the overall annual goals.

Narrow Tailoring

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

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

Participation

See *utilization*.

Prime Consultant

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

Prime Contract

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

Prime Contractor

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

Procurement

See *contract*.

Project

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

Race- and Gender-conscious Measures

Race- and gender-conscious measures are contracting measures that are specifically designed to increase the participation of minority- and woman-owned businesses in government contracting. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but 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 organization's use of minority- or woman-owned business participation goals on individual contracts.

Race- and Gender-neutral Measures

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

Rational Basis

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

Relevant Geographic Market Area

The relevant geographic market area is the geographic area in which the businesses to which state agencies award most of their contracting dollars are located. The relevant geographic market area is also referred to as the *local marketplace*. 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 2020 State of Indiana Disparity Study is the state of Indiana.

State Educational Institution (SEI)

An SEI is any state-funded university, college, or other educational institution in Indiana. Contract and procurement data from the following seven SEIs were included as part of the disparity study: Ball State University, Indiana State University, Indiana University, Ivy Tech Community College, Purdue University, University of Southern Indiana, and Vincennes University.

State-funded Contract

A state-funded contract is any contract or project that is wholly funded by state or local sources. That is, they do not include any federal funds.

Statistically Significant Difference

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

Strict Scrutiny

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

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

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. State 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 January 1, 2013 through December 31, 2018.

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*).

Utilization

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

Vendor

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

Veteran-owned Business

A veteran-owned business is a business with at least 51 percent ownership and control by veterans of the United States military, the National Guard, or the Indiana National Guard.

Woman-owned Business

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

Woman-owned Business Enterprise (WBE)

A WBE is a woman-owned business that is certified as such through DSD. The application requires businesses to submit various information, including name and contact information, tax information, work specializations, and information about the owner's gender and ethnicity. DSD reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required information. There are no revenue or net worth assessments associated with IDOA's WBE certification process.

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58. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003).....269

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59. 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).....270

60. Rothe Development Corp. v. U.S. Dept. of Defense, et al., 545 F.3d 1023 (Fed. Cir. 2008).....273

61. 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).....281

62. 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).....286

63. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007).294

APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise (“MBE/WBE/DBE”) programs. The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, including decisions that analyze the legal framework for MBE/WBE/DBE programs, the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,¹ the implementation of the Federal DBE Program by local and state governments, and that consider the application of disparity studies.

The appendix provides a summary of the legal framework for the disparity study as applicable to the Indiana Department of Administration, Indiana Department of Transportation, Indiana University, Purdue University, Indiana State University, Ball State University, University of Southern Indiana, Ivy Tech Community College of Indiana, and Vincennes University.

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, MBE/WBE/DBE Programs, the Federal DBE Program, the state and local governments implementing the Federal DBE Program, the strict scrutiny analysis, intermediate scrutiny analysis, rational basis standard, and related guidance and authorities. This analysis reviews Seventh Circuit Court of Appeals and federal district court decisions in the Seventh Circuit pertinent to the study and MBE/WBE/DBE programs, including *Dunnet Bay Construction*

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

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

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

Co. v. Illinois DOT,⁴ *Northern Contracting, Inc. v. Illinois DOT*,⁵ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,⁶ *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*⁷ and *Indianapolis Minority Corrections Assoc., Inc. v. Wiley*,⁸ regarding MBE/WBE/DBE programs, the Federal DBE Program, and local and state government programs in their implementation of the Federal DBE Program.

The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study, including, *H.B. Rowe v. NCDOT*,⁹ *Kossman Contracting Co. v. City of Houston*,¹⁰ *Concrete Works of Colorado, Inc. v. City and County of Denver*,¹¹ and *In Re City of Memphis*,¹² *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), *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3rd 206 (5th Cir. 1999), *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997), *Eng'g Contractors Ass'n of S. Florida v. Metro Dade County*, 122 F.3d 895 (11th Cir. 1997), and *Contractor's Association of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996).

In addition, the analysis reviews in Section F below recent federal cases in other jurisdictions and states throughout the United States that have considered the validity of the Federal DBE Program, its implementation by a state or local government agency or a recipient of federal funds, and disparity studies, which are instructive to the study, including: *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*,¹³ *Western States Paving Co. v. Washington State DOT*,¹⁴ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*,¹⁵ *M.K. Weeden Construction v. Montana, Montana DOT, et al.*,¹⁶ *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹⁷ *Geyer*

⁴ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), *cert. denied*, 137 S. Ct. 31, 2016 WL 193809, (October 3, 2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir., 2015).

⁵ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

⁶ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). Midwest Fence filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, *see* 2017 WL 511931 (Feb. 2, 2017), which was denied, 2017 WL 497345 (June 26, 2017).

⁷ *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001).

⁸ *Indianapolis Minority Corrections Assoc., Inc. v. Wiley*, 1998 WL 1988826 (S.D. Ind. 1998).

⁹ *H.B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010).

¹⁰ *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari).

¹² *In Re City of Memphis*, 293 F.3d 345 (6th Cir. 2002).

¹³ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); U.S.D., C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, F.3d 1187, (9th Cir. 2013).

¹⁴ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

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

¹⁶ *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹⁷ *Sherbrooke Turf, Inc. v. Minn. DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

Signal, Inc. v. Minnesota DOT,¹⁸ *Geod Corporation v. New Jersey Transit Corporation*,¹⁹ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.²⁰

The analyses of these and other recent cases summarized below, including the Seventh Circuit and federal district court decisions in the Seventh Circuit, are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to disparity studies, MBE/WBE/DBE Programs, the Federal DBE Program and its implementation by local and state governments, and construing the validity of government programs involving MBE/WBE/DBEs.

In *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, Illinois State Toll Highway Authority*, the Seventh Circuit Court of Appeals in 2016 upheld the constitutionality of the Federal DBE Program and its implementation by the Illinois DOT, and upheld the Illinois DBE Program.²¹ The court also upheld the validity of the DBE Program adopted by the Illinois Toll Highway Authority, which does not receive federal funds. The Toll Highway Authority adopted its own DBE Program, which although it mirrored the Federal DBE Program, does not implement the Federal DBE Program.²²

The court in *Midwest Fence* held the Illinois DOT's DBE Program was constitutional and satisfied the strict scrutiny test, which will be described below.²³ The court found that the Illinois DOT and the Toll Highway Authority followed the Seventh Circuit Court of Appeals' decision in *Northern Contracting, Inc. v. Illinois*.²⁴ *Midwest Fence* filed a Petition for a Writ of Certiorari with the United States Supreme Court, which was denied.²⁵

Also, the Seventh Circuit in 2015 in *Dunnet Bay Construction Co. v. Illinois DOT, et al.*, upheld the implementation of the Federal DBE Program by the Illinois DOT.²⁶ The court held *Dunnet Bay* lacked standing to challenge the Illinois DOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there was no evidence the Illinois DOT exceeded its authority under federal law.²⁷

The Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,²⁸ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*²⁹, are the most recent Seventh Circuit decisions involving challenges to MBE/WBE/DBE type programs and upheld the implementation of the Federal DBE Program by the Illinois DOT.³⁰ The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional applying the strict scrutiny standard. The court agreed with the Eighth,

¹⁸ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

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

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

²¹ *Midwest Fence*, 840 F.3d 932, 2016 W.L. 6543514 (7th Cir. 2016); *Midwest Fence*, 2015 W.L. 1396376 (N.D. Ill. March 24, 2015), affirmed in 840 F.3d 932 (7th Cir. 2016).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id. See U.S. Supreme Court, Docket No. 16-975, 2017 WL 511931 (Feb. 2, 2017), denied, 2017 WL 497345 (June 26, 2017).*

²⁶ 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 137 S. Ct. 31, 2016 WL 193809 (2016); *Dunnet Bay Constr. Co. v. Illinois DOT, et al.*, 2014 WL 552213 (C.D. Ill. 2014), affirmed 799 F.3d 676 (7th Cir. 2015).

²⁷ *Id.*

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

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

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

Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.³¹ These Seventh Circuit cases are discussed in Section D below.

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,³² 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 evidence³³. 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.

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.³⁴ J.A. Croson Co. ("Croson") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises ("MBE"). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."³⁵ 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.³⁶ 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.

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

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

³³ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

³⁴ 488 U.S. 469 (1989).

³⁵ 488 U.S. at 500, 510.

³⁶ 488 U.S. at 480, 505.

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.³⁷

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.³⁸ 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.”³⁹

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that “the city does not even know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁴⁰ “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.”⁴¹

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.”⁴² 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.”⁴³

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.”⁴⁴ “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.”⁴⁵

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

³⁷ 488 U.S. at 507-510.

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

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

⁴⁰ 488 U.S. at 502.

⁴¹ *Id.*

⁴² 488 U.S. at 509.

⁴³ *Id.*

⁴⁴ 488 U.S. at 509.

⁴⁵ *Id.*

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.”⁴⁶

2. Adarand Constructors, Inc. v. Pena (“Adarand I”), 515 U.S. 200 (1995). In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

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

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs

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

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.⁴⁷ 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.⁴⁸

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

⁴⁶ 488 U.S. at 492.

⁴⁷ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁴⁸ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

program.⁴⁹ 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.⁵⁰ 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.⁵¹

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁵² 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).⁵³ 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.⁵⁴
- 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.⁵⁵
- 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.⁵⁶
- 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

⁴⁹ *Id.*

⁵⁰ *Id.*; *see, e.g., Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁵¹ *See, e.g., Concrete Works I*, 36 F.3d at 1520.

⁵² *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000)); *Western States Paving*, 407 F.3d at 992-93.

⁵³ *See, e.g., Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); *see also Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵⁴ *Adarand VII*, 228 F.3d. at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; *see Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

⁵⁵ *Adarand VII*, at 1170-72 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237.

⁵⁶ *Id.* at 1172-74 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.⁵⁷

The Federal DBE Program Implemented By State and Local Governments

It is instructive to analyze the Federal DBE Program and its implementation by state and local governments because the Program on its face and as applied by state and local governments has survived challenges to its constitutionality, concerned application of the strict scrutiny standard, and involved consideration of disparity studies. The cases involving the Program and its implementation by state and local governments are recent and applicable to the legal framework regarding MBE/WBE/DBE state and local government programs and disparity studies.

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁵⁸ Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁵⁹ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁶⁰ Most recently, in October 2018, Congress passed the FAA Reauthorization Act⁶¹. As shown below, these Congressional Acts and their history made significant findings based on evidence, including disparity studies, instructive to MBE/WBE/DBE programs, as to the continuation of discrimination and related barriers that continue to pose significant obstacles for minority- and women-owned businesses.

The Federal DBE Program as amended changed certain requirements for state and local government 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-

⁵⁷ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); see, *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

⁵⁸ *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*.

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

⁶⁰ *Pub. L. 114-94, H.R. 22, § 1101(b)*, December 4, 2015, 129 Stat. 1312.

⁶¹ *Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.*

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.⁶²

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

Provided in 49 CFR § 26.45 are instructions as to how local and state governments as recipients of federal funds should set the overall goals for their DBE programs. In summary, the state or local government establishes a base figure for relative availability of DBEs.⁶³ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁶⁴ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁶⁵ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.⁶⁶ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.⁶⁷

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁶⁸ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁶⁹

State and local governments are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁷⁰

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

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

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

⁶⁴ *Id.*

⁶⁵ *Id.* at § 26.45(d); *Id.* at § 23.51(d).

⁶⁶ *Id.*

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

⁶⁸ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁶⁹ 49 CFR § 26.51(b); 49 CFR § 23.25.

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

analysis applied by the courts in challenges to state and local government DBE programs, the use and application of disparity studies, and the evidentiary basis and findings by Congress regarding the Program are instructive to state and local governments and this study.

- 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.⁷¹ 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.⁷²

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

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.

⁷¹ 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.

⁷² *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).

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

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

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners 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.⁷³

⁷³ Pub L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat 1312.

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.⁷⁴ In MAP-21, Congress specifically found as follows:

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

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

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

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and 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.”⁷⁵

Thus, Congress in MAP-21 and the subsequent Acts noted above 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.⁷⁶

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.⁷⁷ If the government

⁷⁴ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

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

⁷⁶ *Id.*

⁷⁷ 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*

makes its initial showing, the burden shifts to the challenger to rebut that showing.⁷⁸ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁷⁹

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.⁸⁰ It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.⁸¹ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁸²

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."⁸³ "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.'"⁸⁴ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁸⁵

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁸⁶ Once the governmental entity has

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).

⁷⁸ *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.

⁷⁹ *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.

⁸⁰ *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.

⁸¹ *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).

⁸² *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.

⁸³ *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).

⁸⁴ *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).

⁸⁵ *Croson*, 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrans*, 713 R.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁶ *Adarand Constructors, Inc. v. Pena*, ("Adarand III"), 515 U.S. 200 at 235 (1995); *see, e.g., Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*,

shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.⁸⁷ 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.⁸⁸

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.⁸⁹ This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.⁹⁰ Conjecture and unsupported criticisms of the government's methodology are insufficient.⁹¹ 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.⁹²

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.'"⁹³ 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."⁹⁴

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).

⁸⁷ *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).

⁸⁸ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁸⁹ 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.

⁹⁰ 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).

⁹¹ *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.

⁹² *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).

⁹³ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

⁹⁴ *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”⁹⁵ 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.⁹⁶ 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.⁹⁷ It has been further held by the courts that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.⁹⁸

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.”⁹⁹ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”¹⁰⁰

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.¹⁰¹

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.¹⁰² “Where gross statistical disparities can be shown,

⁹⁵ *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).

⁹⁶ *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).

⁹⁷ *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).

⁹⁸ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹⁹ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

¹⁰⁰ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

¹⁰¹ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

¹⁰² See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹⁰³

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.¹⁰⁴ The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.¹⁰⁵ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹⁰⁶

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.¹⁰⁷ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹⁰⁸ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹⁰⁹
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBES and DBEs.¹¹⁰

¹⁰³ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹⁰⁴ *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (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 *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁵ 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; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁶ *Western States Paving*, 407 F.3d at 1001.

¹⁰⁷ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁸ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁹ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁰ 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.

- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹¹¹ A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”¹¹²
- **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.¹¹³

In terms of statistical evidence, the courts, including the Seventh 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.¹¹⁴

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.¹¹⁵ 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*.¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸

¹¹¹ *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).

¹¹² *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.

¹¹³ *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.

¹¹⁴ *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; *see, e.g., Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); *see also Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁵ *Id.* at 973.

¹¹⁶ *Id.*

¹¹⁷ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹¹⁸ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.¹¹⁹ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹²⁰

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.¹²¹ 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.¹²²

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.¹²³ 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.¹²⁴

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.¹²⁵ (“[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.*”¹²⁶ 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.”¹²⁷ 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.¹²⁸

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.”¹²⁹ The Tenth Circuit ruled that the local government can demonstrate that it is a “passive participant’ in a system of racial exclusion practiced by

¹¹⁹ *Id.* at 973.

¹²⁰ *Id.*

¹²¹ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹²² *Id.*

¹²³ *Id.* at 974.

¹²⁴ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹²⁵ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹²⁶ *Id.* (emphasis added).

¹²⁷ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹²⁸ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹²⁹ *Id.*

elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹³⁰

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.”¹³¹

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.¹³²

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.¹³³

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.¹³⁴

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.¹³⁵ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹³⁶ It has been held that anecdotal evidence of a

¹³⁰ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹³¹ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹³² *Id.* at 977.

¹³³ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹³⁴ *Id.* at 979-80.

¹³⁵ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 924-25; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹³⁶ 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).

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.”¹³⁷

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.¹³⁸

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.¹³⁹

b. The Narrow Tailoring Requirement. The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be “narrowly tailored” to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Seventh 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

¹³⁷ *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).

¹³⁸ 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).

¹³⁹ 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 impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹⁴⁰

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.¹⁴¹

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.”¹⁴² Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁴³

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.’”¹⁴⁴

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁴⁵ also found that race- and ethnicity-based measures should be employed as a last resort. The majority

¹⁴⁰ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁴¹ 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.

¹⁴² *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).

¹⁴³ 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.

¹⁴⁴ *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730, 738 (6th Cir. 2000).

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

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.”¹⁴⁶ 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 local and state government recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.¹⁴⁷ The narrow tailoring requirement has several components.

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.”¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁵¹ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court’s decision upholding the validity of IDOT’s DBE program.¹⁵²

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

¹⁴⁶ 551 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).

¹⁴⁷ *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.

¹⁴⁸ 473 F.3d at 722.

¹⁴⁹ *Id.* at 722.

¹⁵⁰ *Id.* at 723-24.

¹⁵¹ *Id.*

¹⁵² *Id.*; See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), affirmed, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

showing that the state exceeded its federal authority.¹⁵³ 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.¹⁵⁴ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁵⁵ 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.¹⁵⁶

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁵⁷ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁵⁸

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.¹⁵⁹

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.¹⁶⁰ And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without

¹⁵³ *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁵⁴ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁵⁵ *Id.*

¹⁵⁶ 840 F.3d 932 (7th Cir. 2016).

¹⁵⁷ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁵⁸ *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.

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

¹⁶⁰ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass'n* (CAEP I), 6 F.3d at 1008-1009 (3d Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.¹⁶¹

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.”¹⁶²

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁶³

¹⁶¹ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁶² *Croson*, 488 U.S. at 509-510.

¹⁶³ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁶⁴

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.¹⁶⁵ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁶⁶ (2) good faith efforts provisions;¹⁶⁷ (3) waiver provisions;¹⁶⁸ (4) a rational basis for goals;¹⁶⁹ (5) graduation provisions;¹⁷⁰ (6) remedies only for groups for which there were findings of discrimination;¹⁷¹ (7) sunset provisions;¹⁷² and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁷³

Several federal court decisions, including in the Seventh Circuit, have upheld the Federal DBE Program and its implementation by state and local government recipients of federal funds, including satisfying the narrow tailoring factors.¹⁷⁴

¹⁶⁴ *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.

¹⁶⁵ 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).

¹⁶⁶ *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).

¹⁶⁷ *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.

¹⁶⁸ *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).

¹⁶⁹ *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).

¹⁷⁰ *Id.*

¹⁷¹ 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.

¹⁷² 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).

¹⁷³ *Coral Constr.*, 941 F.2d at 925.

¹⁷⁴ 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 WL 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.¹⁷⁵ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁷⁶

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.¹⁷⁷

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.¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰

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

¹⁷⁵ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally, Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

¹⁷⁶ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, also Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993).

¹⁷⁷ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see, e.g., Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

¹⁷⁸ *Id.*

¹⁷⁹ *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.”)

¹⁸⁰ *Coral Constr. Co.*, 941 F.2d at 931-932; *see Eng’g Contractors Ass’n*, 122 F.3d at 910.

gender based programs in connection with a challenge to the MBE Program involved in that case¹⁸¹. The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

The Tenth Circuit in *Concrete Works*, stated with regard evidence as to woman-owned business enterprises as follows:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. See *Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”). Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort ... Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁸²

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.”¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ But the

¹⁸¹ 256 F.3d 642, 644-45 (7th Cir. 2001). *But, see, Hines v. Caston School Corp.* 651 N.E. 2d 330, 335-336 (Indiana App. 1995) (Indiana court recognized intermediate scrutiny for gender based classifications); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

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

¹⁸³ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁸⁴ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁸⁵ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁸⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁸⁷ *Id.*

record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁸⁸ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹

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.”¹⁹² So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.¹⁹³

“[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.”¹⁹⁴ 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”.¹⁹⁵

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

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (*stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.*); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254.

¹⁹¹ *See, Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (*stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.*); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *see, e.g., City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹² *See, e.g., Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (*citations omitted*); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (*Under rational basis standard, a legislative classification is accorded a strong presumption of validity*); *see, e.g., City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹³ *Id.*; *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (*citing FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); *see, e.g., City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹⁴ *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 189 (2012) (*citing Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (*quotation marks and citation omitted*); *see, e.g., City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹⁵ *Heller v. Doe*, 509 U.S. 312, 321 (1993).

purpose.”¹⁹⁶ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”¹⁹⁷

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”) ¹⁹⁸.

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”¹⁹⁹

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.²⁰⁰ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²⁰¹

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.²⁰² 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....”²⁰³

4. Pending cases (at the time of this report). There are pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and that may potentially impact and be instructive to the study, including the following:

- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.**, U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-

¹⁹⁶ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); see, e.g., *City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹⁷ *Id.*

¹⁹⁸ 2012 WL 5939228 (Fed. Cl. 2012).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

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 parties are engaged in discovery.

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 has recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County’s ability to present proof at trial due to the non-party MTA’s failure to meet its discovery obligations, that nothing in the record attributes MTA’s failure to meet its discovery obligations to the County, and that MTA’s efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA’s appeal to the Ninth Circuit. The district court in Tennessee stated in a footnote: “Now that the Ninth Circuit has dismissed MTA’s appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose.”

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September.

The parties filed on September 25, 2020 with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission. The County Commission voted on this matter in November, 2020 and approved Settlement of the case with the County paying Plaintiffs \$331,950. The minority-owned business program appears will be changing from its current form.

Thus, at the time of this report the case in federal court in Tennessee remains pending until and if the settlement is approved by the court.

- **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 has 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 shall be scheduled for a hearing at a date mutually agreeable to the parties.

At the time of this report, MTA had filed a Motion to Dismiss the Second Amended Complaint. The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether the documents at issue that have been provided by MTA to the court for in-camera inspection are exempted from the Public Records Act.

The court also ordered that MTA and the County file a discovery briefing schedule, and Intervenor the AGC may file a discovery brief. The court also stated that if there is limited discovery, the AGC may participate in depositions and file a motion for discovery. If the parties agree to limited discovery, then that discovery deadline is October 30, 2020.

The court on November 17, 2020 issued an order finding that certain documents generated by MTA are exempt from the public records requests as trade secrets under Florida's Uniform Trade Secrets Act.

- **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 this case arises from Defendant's MWBE 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 allege 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. Plaintiffs allege 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 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 Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

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 of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

At the time of this report, the court has issued a Memorandum and Order, dated July 27, 2020, which provides the the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August 2020 and reply briefs are due in September 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020.

■ **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.**, U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants have filed a Motion to Dismiss asserting *inter alia* that the court does not have jurisdiction, which is pending. The parties are to complete filing briefs by September 2020. Plaintiff has filed written discovery, which is pending, as defendants have filed a motion to stay discovery pending the outcome of the Motion to Dismiss.

- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

This is a state court case that is instructive to the study as it discusses and analyzes the evidence presented by the state government to justify its legislation providing a preference to MBEs, and applies the strict scrutiny test to determine if the state had sufficient evidence to establish a race conscious preference program to MBEs.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award fifteen percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found persuasive courts that have held "post-enactment evidence

may not be used to demonstrate that the government’s interest in remedying prior discrimination was compelling.”

The only evidence clearly considered by the legislature *prior* to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence

supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians, and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio’s MBE program. The last studies Defendants reference to support the legislature’s conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio’s MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could have found this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to *government procurement contracts* only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts *before* enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires fifteen percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the fifteen percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are

based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities

pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a fifteen percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the fifteen percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

Upon review of all factors together, 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 lac 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 finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

The case at the time of this report is on appeal in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954.

- **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 brought in federal court in Indiana 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.

This list of pending cases is not exhaustive, but in addition to the cases cited previously may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, disparity studies, the Federal DBE Program and the implementation of the Federal DBE Program by state and local government recipients of federal funds, which are instructive to the study. 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 or Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE Program in the Seventh Circuit Court of Appeals

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% of prime contractors in the construction field, received 9.13% of prime contracts valued below \$500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts’ value that DBEs received dropped dramatically, to just 1.5% of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

Tollway program. Tollway also relied on a disparity study limited to the Tollway’s contracting market area. The study used a “custom census” process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway’s historical

contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector.” *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01% across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence’s criticisms. Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at *15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise

a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence’s strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence’s expert’s “speculation” that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence’s argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, an

d that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence’s attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants’ statistical analyses. *Id.* at *15.

In connection with Midwest Fence’s argument relating to the Tollway defendant, Midwest Fence argued that the Tollway’s supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway’s data were not exact. *Id.* The court said that while every single number in the Tollway’s “arsenal of evidence” may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence’s “abstract criticisms” do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT’s and the Tollway’s implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants’ strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral

measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the "theoretical possibility of a 'mismatch' could be a problem, but we have no evidence that it actually is." *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* "So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination", according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact "on this point." *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

2. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016). Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met

the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT’s DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT’s DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT’s DBE Program is not a “set aside program,” in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT’s DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT’s DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay’s bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay’s average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay’s size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay’s size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay’s claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state’s application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined “must be limited to the question of whether the state exceeded its authority.” *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal

treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causal or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any

part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

3. Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007). In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-

21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the

Milwaukee decision was compromised by the fact that it was decided under the prior law “when the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes 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. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7th Cir. 2006). In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties’ dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that “§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate.”

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham’s decision to hire Rapid Test’s competitor.

5. Builders Ass’n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001). This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, quoting in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against

nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

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). In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants’ Motion to Dismiss Midwest Fence’s request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said,

presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727, citing *Rothe*, 545 F.3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court quoting *Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is "overinclusive." *Id.* at 728. The court found that

each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest’s expert’s reports “cast doubt on the validity of IDOT’s methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias.” *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT’s availability calculations. *Id.*

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program’s burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT’s determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

The study employed a “custom census” approach to calculate DBE availability, and examined the Tollway’s contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an “economy-wide analysis” examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person’s race or sex and their earning power and ability to form a business. *Id.*

Midwest’s challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an “economy-wide analysis” similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make

this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

7. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois

DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015). In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court’s Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded

“because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*.” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The “no-waiver” policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT’s decision rejecting Dunnet Bay’s bid was consistent with the regulations and did not exceed IDOT’s authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay’s argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay’s bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT’s authority under federal law, the Court held Dunnet Bay’s claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT’s rejection of Dunnet Bay’s bid nor the decision to rebid was based on the race of Dunnet Bay’s owners or any class-based animus. *Id.* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the “injury in fact” in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged “no-waiver” policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a “no-waiver” policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its

authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

8. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007). This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger

contractors and to encourage the involvement of small firms in major construction projects);

3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that

there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at *16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at *19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.’

Id. at *21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “plausible lower-bound estimate’ of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

9. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004). This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal

government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

10. 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).

11. Indianapolis Minority Corrections Assoc., Inc. v. Wiley, 1998 WL 1988826 (S.D. Ind. 1998). In this case, plaintiffs, an association of Indianapolis Minority Contractors, brought suit to challenge the manner in which the State of Indiana administered its program for minority and disadvantaged businesses that is a part of the federal DBE program, which is regulated by the United States DOT. The plaintiffs contended that state officials and others engaged in wrongful actions in disbursement of federal highway funds to undeserving businesses that did not qualify for the DBE program because they were not controlled by either minority individuals or financially disadvantaged individuals. In addition, the plaintiffs claimed that because of this wrongdoing, they did not receive their fair share of the federal highway funds as minority contractors. The district court stated that this case concerns whether the State of Indiana complied with federal law related to the receipt of Federal Highway funds or whether it engaged in a practice of discrimination with respect to those funds. 1998 WL 1988826 at *10. The district court noted the case did not involve a challenge concerning the State of Indiana Minority Business Enterprise Program that did not involve projects utilizing federal funds.

The district court rejected testimony submitted by the plaintiffs as not meeting standards for expert testimony with regard to claims that the defendants were discriminating against African Americans, because the court concluded the claims were conclusory allegations and opinions, based in part on speculation, hearsay and not on any sufficient probative evidence to support the opinions. 1998 WL 1988826 at *13-15. The court rejected the statistical analysis submitted regarding a disparate impact on African Americans, finding there was no evidence shown concerning any possible error rate, standard deviation or confidence levels related to the proffered results. *Id.* The court found there was no evidence related to whether the proper statistical pool was used to calculate the percentages proffered as evidence of a disparate impact. *Id.* The testimony submitted by the plaintiffs compared Indiana DOT's compliance with the mandatory Federal DBE Program with other states, and concluded that Indiana ranked as one of the worst based on the testimony that Indiana's demographics were eight to nine percent black. *Id.* at *14. But, the district court found the state-wide demographic utilized may be a statistical universe larger than the number of firms actually qualified, willing and able to work on the construction contracts. *Id.*

The district court also found that the testimony proffered was not sufficient in connection with the claim that the defendants were discriminating against African Americans. *Id.* at *13. The court stated plaintiffs "merely" concluded that the State was discriminating based upon a review of the percentages of payments which the plaintiffs' witness considered to be "legitimate black companies," as compared to the payments made to what the witness considered to be "front" companies. *Id.* at *13. The court found that these were conclusory opinions based only on the witness's knowledge of "legitimate black companies," and deemed the opinions "problematic." The court stated the witness admitted he had not been involved in activities within the State for many years, and he did not show any basis for his knowledge as to which companies that were paid funds by Indiana DOT were "legitimate black companies" and which were not. *Id.*

The court rejected plaintiffs' witness's opinion concerning his finding that only 3.8 percent of the total contracts went to "legitimate black-owned businesses." The court noted that the regulations do not provide for a 10 percent participation by African Americans, but a 10 percent participation by many groups, including African Americans, and that the witness did not testify as to whether he performed any study of the federal reports to test Indiana DOT's compliance with the 10 percent goal based on all DBE as defined by federal law. *Id.* at *13. The district court concluded that unsupported, conclusory testimony is not sufficient. *Id.*

The court also considered the issue raised by the plaintiffs as to whether the then existing federal regulations, 49 C.F.R. Part 23, provided enforceable rights subject to a 42 U.S.C. § 1983 action brought by the plaintiffs. The court concluded that the federal regulations do not provide a basis to conclude that they were intended to provide rights enforceable under Section 1983. *Id.* at *28. The district court found that the federal regulations provide a means to assure that the federal DBE program benefits legitimate DBEs, and provides the Secretary of the United States DOT a means to ensure its integrity. *Id.*

The court stated these regulations provided a method for the USDOT to oversee the services provided by the States, rather than a means to ensure that individual DBEs receive funds for services. *Id.* at *28. The federal regulations do not create an individual entitlement to services, but are a yardstick for the USDOT to measure the system-wide performance of the program. *Id.* Therefore, the district court concluded that although the plaintiffs may benefit from their State's plan implemented in order to receive federal transportation funds, they are only indirect beneficiaries. *Id.* at *29. Further, the court held that as the DBE program is not an entitlement program, the regulations implementing the program do not provide enforceable rights under § 1983.

In conclusion, the court held that the plaintiffs may utilize § 1983 to enforce their right to a state-wide plan that complies with the federal requirements for the receipt of federal transportation and highway funds. *Id.* at *29. The plaintiffs, the court held, do not have rights under § 1983 to remedy isolated violations of requirements under the plan, which includes claims that certain companies should not have been certified under the DBE program. The court dismissed all claims under 42 U.S.C. § 1983 brought against the State, Indiana DOT and the Indiana Department of Administrative Services and all claims for damages against the State officials sued in their official capacity.

The court then found that Indiana's DBE program met all federal requirements, including ensuring that DBEs have an equitable opportunity to compete for contracts and subcontracts as mandated by 49 C.F.R. § 23.45(c). The court pointed out that Indiana DOT arranges solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules to facilitate participation by DBEs. *Id.* at *35. The district court pointed out that Indiana DOT requires prime contractors to solicit bids from certified DBEs as part of its good-faith efforts requirements, that certified DBEs are provided notices of bids and that these notices are also posted on the Internet and in Indiana Contractors' Association publications. *Id.*

The court also indicated Indiana DOT's Civil Rights Division had a Supportive Services Division that provided managerial and technical assistance to DBEs, training workshops and one-on-one consultations in estimating, bidding, bookkeeping, marketing, financial issues and other areas directed by Indiana DOT. The DBE assistance provided for business planning, bookkeeping, marketing, accounting, estimating, bidding, employee relations, contract negotiations, computerization, financial decisions and other business related issues. Consultants were contracted to perform selected training or individualized assistance to DBEs. *Id.* at *35–36.

Specifically, Indiana DOT provided services to assist DBEs, at no cost to them, including conducting internal orientation sessions for newly certified DBEs; provided training on the metric system through Ivy Tech State College; consulting one-on-one with individual DBE firms to improve their business operations, provided training in finance and bookkeeping analysis, business plan preparation, job cost, cash flow preparation and analysis, bid estimation, computerization, strategic planning, loan packaging assistance and other operations; attended trade fairs, organized meetings, and performed other outreach functions for the purpose of

reaching non-certified DBE firms, informing them of Indiana DOT DBE programs, and encouraging them to become certified; referred DBEs to establish state and federal business assistance organizations when appropriate; encouraged DBE firms to contact the civil rights office regarding any problems that arise on the job site or with respect to any aspect of their relationship with Indiana DOT and prime contractors and responded and sought to resolve the problems and complaints in a prompt manner; and provided classroom style training workshops including a twelve-day workshop to instruct 25 to 30 Indiana DBEs on all aspects of operations of the construction business. *Id.* at *35-36.

The court also found that Indiana DOT strived to remove barriers DBEs frequently encountered in other states by not requiring subcontractors to be bonded, and exploring using Supportive Services funding to provide direct financial assistance to DBEs, utilizing funds from the FHWA exclusively for the recruitment of DBEs, managerial and technical assistance to DBEs, and monitoring DBE activities. Indiana DOT also established a mentor-protégé program for contractors on Indiana DOT contracts. *Id.* at *37.

The district court stated that Indiana DOT met its overall 10 percent DBE goal and set practical contract goals on individual contracts complying with the requirements of the federal acts and regulations. In setting the individual contracts goal, the Indiana DOT evaluated each contract individually, including factors such as geographic location of the contract, its size, the number of items that can be performed by certified DBEs, the number of certified DBEs that can perform the work, the relative location of certified DBEs who can and are willing to work in the area, the current workload of those DBEs and DBE prequalification limits. *Id.* at *39.

The district court found that the individual contract goals were not rigid requirements that contractors must meet under all circumstances. The bidder that fails to achieve an individual contract DBE goal may remain eligible to be awarded the contract if it can demonstrate that it has made good faith efforts to meet the goal. *Id.* at *39. The district court pointed out that Indiana DOT's methods to ensure compliance with the federal regulations, reporting and recordkeeping requirements were met by Indiana DOT and that Indiana DOT's Civil Rights Office responded to requests for assistance as a part of its daily activities. *Id.* at *42.

The district court noted that none of the plaintiffs complained to Indiana DOT that he bid on a subcontract to a construction contract administered by Indiana DOT and was denied the bid on the basis of race-based discrimination. *Id.* at *42. The district court analyzed plaintiff's claims that the State does not have a bonding or financial assistance program in place, did not always conduct site visits as part of the DBE certification process, and never met the 10 percent goal requirement. *Id.* at *43. The court in reviewing the federal regulations concluded that the bonding and financial assistance programs were not mandatory requirements of state wide plans, although they were mentioned in the federal regulations. *Id.* at *44.

The district court found that although the State may not always conduct site visits in the certification process, the testimony did not conclusively establish that site visits were not conducted. The court also found that plaintiffs did not establish that Indiana failed to meet the 10 percent goal that existed at this time in the federal regulations. In light of the evidence, the court found that the plaintiffs failed to show any genuine issues of fact regarding the State's compliance with the requirements for the DBE plan necessary to receive federal transportation funds and granted the defendants' Motion for Summary Judgment. *Id.* at *45.

The district court also considered plaintiffs' claims under § 1983 that the State's administration of the required DBE program violated their rights under the Equal Protection Clause of the

Fourteenth Amendment. The court found that the plaintiffs produced no evidence that showed a race-based or discriminatory policy of the State, or barrier otherwise imposed by the State, that impeded the plaintiffs' ability to bid on contracts. *Id.* at *48. The district court found that the plaintiffs did not show how they were treated differently from all other qualified DBEs in their efforts to obtain contracts, and that the State of Indiana does not have the power to modify the Congressional mandate that all certified DBEs are to compete on an equal basis. *Id.* Thus, the court rejected the plaintiffs' argument that because women-owned DBEs are receiving a disproportionate share of federally funded contracts, a discriminatory practice must be in place. *Id.*

The district court held that the plaintiffs could not show any discriminatory intent by the State of Indiana. Plaintiffs alleged that defendants had raised barriers to their participation in contracts funded by federal dollars and that they had not received their fair percentage of the contracts compared to non-African American DBEs. The court found the plaintiffs failed to demonstrate that such barriers exist, and that they did not demonstrate how they had been treated differently than the other similarly situated minority and disadvantaged enterprises served by the DBE program. *Id.* at *49. The court held that a showing of a disproportionate impact is not enough, as a state's "official action will not be held unconstitutional solely because it results in a racially disproportionate impact ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at *49. (citations omitted).

Lastly, the district court pointed out that the plaintiffs did not challenge the constitutionality of the federal DBE program, but only challenged the State's administration of that program. *Id.* at *50. Thus, the court held "If the DOA and INDOT are only doing 'what federal law requires, [their] conduct is constitutional, at least where, as here, the constitutionality of the federal program is not challenged.'" *Id.* at *50, quoting *Converse Construction Co., Inc. v. Massachusetts Bay Transportation Authority*, 899 F.Supp. 753, 761 (D.Mass. 1995)(citing *Milwaukee Co. Pavers*, 922 F.2d at 423). The court noted that the Second, Sixth, and Tenth Circuits reached the similar conclusion that 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. *Id.* at *50 (citations omitted).

Therefore, the court granted summary judgment to the defendants finding that they were complying with federal law and could not be enjoined under the Equal Protection Clause or under a claim based on Title VI.

12. Milwaukee County Pavers, Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991).

State and federal programs challenged. In this case an association of highway contractors in Wisconsin brought suit to enjoin programs by which the State of Wisconsin "sets aside" certain highway contracts for firms that are certified as disadvantaged business enterprises (DBEs), and also requires highway contractors to give preferential treatment to subcontractors that are certified as DBE's. 922 F.2d at 421. In the first type of program challenged by the highway contractors, according to the Court, the State of Wisconsin is the principal, rather than an agent of federal highway authorities, because the state receives no money from the federal government. *Id.* The state program involving non-federal funds was enjoined by the district court. *Id.*

In a second type of program challenged by the highway contractors, the Court finds the State of Wisconsin is the administrator and disbursing agent of federal highway grants. *Id.* at 421. This federal program the district court refused to enjoin. *Id.*

State Program. The Court states that the majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities, unless the purpose is to provide a remedy for discrimination against the favored group. *Id.* at 421-422. The Court found that Wisconsin made no effort to show that its program was remedial in any sense. The Court rejected Wisconsin's argument that *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), does not apply because its program involved DBEs and not MBEs.

The Court affirmed the injunction against the State of Wisconsin Program because the state did not establish that the purpose was to remedy discrimination.

Role of states as agent under the federal program for DBEs. The Court states that the basic question raised by the contractors' appeal is the proper characterization of the state's role under the 1987 Congressional Act relating to providing financial assistance to states for highway construction. *Id.* at 422. The Court points out that the Congressional Act offers the states financial assistance, and the receipt of funds under the Federal Act is voluntary, but a state that decides to receive such funds is bound by the federal regulations. *Id.*

The contractors did not question the validity of the 1987 federal Act authorizing the DBE program, the validity of the "set-aside provision" in the Act, or the validity of the federal regulations that implement that provision. *Id.* at 423. The contractors challenged the 1987 Act neither on its face nor as applied. *Id.* But, they argued that the Supreme Court decision in *Croson* prevents the state from playing the role envisaged for it by the Act and federal regulations unless the state is able to show that the "set-aside program", as implemented in Wisconsin, is necessary to rectify invidious discrimination. *Id.* at 423.

The Court found that these arguments, whatever merit they have or lack, are inconsistent with the contractors' decision not to challenge the validity of the federal statute or regulations. *Id.* at 423. The Court held as follows: "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 servants who drafted the regulations." *Id.* at 423.

The Court concludes the federal statute contemplates that states which decide to accept funds under it will reserve a portion of those funds for a class of disadvantaged contractors. *Id.* at 423. And, by virtue of a presumption created by federal regulations, which in this case were conceded to be valid, the disadvantaged contractors are likely to consist for the most part of enterprises controlled by members of the favored groups. *Id.* at 423. The Court held that if the state of Wisconsin does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, the state cannot have violated the Constitution. *Id.* at 423.

The federal statute does not "require" the states to accept funds under it, but it authorizes them to do so, and the Court states that an action pursuant to a valid authorization is valid. *Id.* at 423. The lesson of the U.S. Supreme Court decisions, including *Croson*, according to the Court, is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. *Id.* at 424.

And, the Court finds one way the federal government can do that is by authorizing states to do things that they could not do without federal authorization. *Id.*

Vulnerable to challenge or impermissible collateral attack depending on if state complied with or exceeded its federal authority. The Court makes clear that the plaintiffs in this case did not challenge the federal “set-aside program”, a creature of federal statute and federal regulations. *Id.* at 424. Rather, they challenged the state’s role in the federal program. *Id.* The Court thus held as follows: “Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations.” *Id.* at 424.

The Court also held that if the state exceeded its federal authority, it would be vulnerable to challenge under *Croson*. *Id.* at 424. The Court concluded that the state is vulnerable to such challenge insofar as it took the presumption in the federal regulations and applied it to programs not funded under, and therefore not governed by, the federal statute. *Id.*

The district court found that the state exceeded its authority under the federal statute in two other minor ways in addition to applying the presumption in the federal regulations to state funded programs, and the lower court enjoined those violations. *Id.* at 425. The Court agreed with the district court in connection with the ruling that the state exceeded its authority under the federal statute. *Id.* at 425, *citing* the district court decision in *Milwaukee County Pavers*, 731 F.Supp. at 1413-15. The district court enjoined the State of Wisconsin program in which the state was acting as the principal, not an agent, under a program in which Wisconsin set aside certain exclusively state-funded highway contracts for firms certified as DBEs. *Id.* The state Program was in violation of equal protection based on the absence of showing by the state of Wisconsin that discrimination was necessary to rectify discrimination against such minorities. *Id.*

However, the Court found that the contractors complaint about the state’s *administration* of the racial presumption in the federal regulations was not sufficient to rebut the presumption. *Id.* at 425. The contractors acknowledged that they made no effort to present, in proceedings for the certification of DBEs, evidence rebutting the presumption accorded the members of the favored groups. *Id.* The contractors, the Court states, are quarreling with the federal regulation whose validity they have conceded. *Id.*

Holding. The Court held that the state funded program under which Wisconsin “set aside” certain state-funded contracts for firms certified as DBEs racially discriminates in favor of minorities in violation of the Equal Protection Clause because there was no evidence presented by the state showing that discrimination was necessary to rectify discrimination against such minorities. The Court also held that the state, by accepting federal funds under the federal statute and federal regulations, did not violate equal protection. The Court further held that the state, to the extent it exceeded its authority under the federal law and the federal regulations, its conduct was vulnerable to an equal protection challenge.

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

13. H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al., 615 F.3d 233 (4th Cir. 2010). The State of North Carolina enacted statutory legislation that required prime contractors

to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation (“NCDOT”). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the

relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 *quoting Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated “that mere speculation that the state’s

evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, citing *Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, citing *Alexander*, 95 F.3d at 315 (citing *Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.*, quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id.* at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id.* at 242, quoting *Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 quoting *Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 quoting *Hogan*, 458 U.S. at 726.

Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-

owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, *quoting Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, *citing Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For

African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to

firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, citing *Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot- be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State’s evidence showing a gross statistical disparity between the availability of qualified African American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State’s anecdotal evidence of discrimination against

these two groups sufficiently supplemented the State’s statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by “disturbing” anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State’s compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” but a state need not “exhaust [] ... every conceivable race-neutral alternative.” 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program’s goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State’s compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

Women-owned businesses overutilized. The study’s public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Asheville, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was “the result of mere chance.” *Id.* at 255. The Court found troubling the “evidentiary gap” that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any

anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program “must always tie private discrimination to public action.” 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data’s probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program’s current inclusion of women subcontractors in setting participation goals. *Id.*

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme’s flexibility and responsiveness to the realities of the marketplace, and given the State’s strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State’s application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court’s judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

14. 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.

15. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion). Although it is an unpublished opinion, *Virdi v.*

DeKalb County School District is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the “District”) to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the “Board”) and the Superintendent (both individually and in his official capacity) (collectively “defendants”) pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district’s Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants’ Motions for Summary Judgment on all of Virdi’s claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants’ Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants’ motion for a judgment as a matter of law on the remaining claims at the close of Virdi’s case. *Id.*

In 1989, the Board appointed the Tillman Committee (the “Committee”) to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a “general feeling” that minorities were under-represented, the Committee issued the Tillman Report (the “Report”) stating “the Committee’s impression that “[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.” *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious ... policies must be limited in time.” *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Viridi. *Id.* at 270.

16. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari). This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court

ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver

Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for

the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by

the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a “city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, citing *Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they

measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*,

228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of

evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.” *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

Variables. CWC challenged Denver’s disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm’s size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver’s argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver’s argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver’s expert testified that discrimination by banks or bonding companies would reduce a firm’s revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, “suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms.” *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver’s disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City’s position that a firm’s size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver’s studies would decrease or disappear if the studies controlled for size and experience to CWC’s satisfaction. Consequently, the court held CWC’s rebuttal evidence was insufficient to meet its burden of discrediting Denver’s disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver’s disparity studies because they did not control for firm specialization. The court noted the district court’s criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City’s expert, that the data he reviewed showed that MBEs were represented “widely across the different [construction] specializations.” *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver’s studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver’s studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver’s argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC’s argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC’s argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver’s evidence. *Id.* at 984.

Consistent with the court’s mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and “reflect[ed] the intended remedial effect on MBE and WBE utilization.” *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver’s position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver’s witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC’s argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. The court stated that anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. *Id.*

After considering Denver’s anecdotal evidence, the district court found that the evidence “shows that race, ethnicity and gender affect the construction industry and those who work in it” and that the egregious mistreatment of minority and women employees “had direct financial consequences” on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver’s initial burden. *Id.* at 989-90, citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

Summary. The court held the record contained extensive evidence supporting Denver’s position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver’s evidence, the court stated CWC was required to “establish that Denver’s evidence did not constitute strong evidence of such discrimination.” *Id.* at 991, quoting *Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver’s evidence. Rather, it must present “credible, particularized evidence.” *Id.*, quoting *Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC hypothesized that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, citing *Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

17. In re City of Memphis, 293 F.3d 345 (6th Cir. 2002). This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, citing *Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

18. Associated Gen. Contractors v. Drabik, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998). This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision

enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, citing *Croson*, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, quoting *Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio’s most “compelling” statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio’s statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. *Id.* at 736. “If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.” *Id.* at 736.

The Court stated the only cases found to present the necessary “compelling interest” sufficient to justify a narrowly tailored race-based remedy, are those that expose “pervasive, systematic, and obstinate discriminatory conduct. ...” *Id.* at 737, quoting *Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in

government contracting” *Id.* at 737, quoting *Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from “overinclusiveness.” *Id.* at 737, quoting *Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. *Id.*

In addition, the Court found that Ohio’s own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state’s 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state’s existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court’s hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was “not reconcilable” with the Ohio Supreme Court’s decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

19. W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999). A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5% of all city contracts. 199 F.3d at 208. *Id.* The 5% goal was not based on any objective data. *Id.* at 209. Instead, it was a “guess” that was adopted by the City. *Id.* The goal was later increased to 15% because it was found that 10% of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program’s adoption, the City’s Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15% participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5% participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20% of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City’s adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15%. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15% MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5% WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1%. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City’s Financial Legal Departments, approved Scott’s bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15% minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id.* at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15% DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15% of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the “relevant statistical pool,” of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* at 218, n.11. The sufficiency of a municipality’s findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study’s findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City’s Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City’s construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City’s construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City’s 15% DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott’s low bid because Scott failed to meet the Special Notice’s DBE-participation goal, not because Scott’s bid exceeded the City’s budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

20. Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997). This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term “goals” as opposed to “quotas,” the Ninth Circuit rejected such a distinction, holding “[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” The case also is instructive because it found the use of “goals” and the application of “good faith efforts” in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the “plaintiff”) submitted the low bid for a construction project for the California Polytechnic State University (the “University”). 125 F.3d 702, 704 (9th Cir. 1994). The

University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme ‘[did] not involve racial or gender quotas, set-asides or preferences,’” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court's finding, such a difference was not *de minimis*. *Id.*

The defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

21. Eng’g Contractors Ass’n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997). *Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association* is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the “plaintiffs”) filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the “County”) as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and

4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to

more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”

Id. at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship

between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal

citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm’s owner, and asked for information on the firm’s total sales and receipts from all sources. *Id.* The County’s expert then studied the data to determine “whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert’s hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing “the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority-

and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBes, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBes. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. *Id.* However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id.* In her plurality opinion in *Croson*, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified." *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market." *Id.*

Narrow tailoring. "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must only be a 'last resort' option." *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide "a useful analytical structure." *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id.*

The Eleventh Circuit

flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of

medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-

conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

22. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996). The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51% owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a

non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance's preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City's expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting." *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the

MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be “cursory,” Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City’s Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer’s log. The court found Mr. Macklin’s testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin’s testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City’s “standard requirements warn [would-be prime contractors] that discrimination will be deemed a ‘substantial breach’ of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due.” Like the Supreme Court in *Croson*, the Court stated the district court found significant the City’s inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court's conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of "extremely low" membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must "link [low MBE membership] to the number of local MBEs eligible for membership." *Id.* at 601.

The City's expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race

in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors’ critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City’s evidence was its expert’s calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court’s view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the “neutral” explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors “willing” to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be “willing” to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black

firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court’s suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City’s Procurement Office, accounted for their low participation in the other construction contracts

awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market “was a close call.” *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the “fit” between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made “necessary” by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City's program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire

minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502 . Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia’s program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court’s findings that the Council’s attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council’s sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race-neutral or less burdensome to non-minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-

neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a “strong basis in evidence for its conclusion that [the] remedial action was necessary.” *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not “merely the product of unthinking stereotypes or a form of racial politics.” *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

23. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994). The court considered whether the City and County of Denver’s race- and gender-conscious public contract award program complied with the Fourteenth Amendment’s guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. (“Concrete Works”) appealed the district court’s summary judgment order upholding the constitutionality of Denver’s public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance (“Ordinance”) to enable certified racial minority business enterprises (“MBEs”)1 and women-owned business enterprises (“WBEs”) to participate in public works projects “to an extent approximating the level of [their] availability and capacity.” *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC’s findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver’s summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver’s program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

Standing. At the outset, the Tenth Circuit on appeal considered Denver’s contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance’s constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated “injury in fact” because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance’s requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step

good faith requirement). *Id.* In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating “injury in fact,” Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver’s race- and gender-conscious contract program. *Id.*

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance’s race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id.* citing, *Croson*, 488 U.S. at 492, 509, The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* citing, *Croson* at 492.

A. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, citing *Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works (“DPW”) construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body’s strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver’s contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id.* at 1520.

Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

B. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id.* at 1520, quoting, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

C. Post-Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity before [it] may use race-conscious relief." *Id.* at 1521, quoting, *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

D. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond’s minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, *citing, Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments “must identify that discrimination ... with some specificity before they may use race-conscious relief.” *Id., citing Croson*, at 504. The court said that the Supreme Court’s benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation was whether there exists a “*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.” *Id., quoting, Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a “strong basis in evidence” that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, *citing, Wygant*, 476 U.S. at 292 (O’Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, *citing, Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

E. Evidentiary Predicate Underlying Denver’s Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid-

1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

(b) Denver's Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report's description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained "no information about the number of minority or women owned firms that were used" on these bond projects. *Id.* at 1525. However, the court concluded the Report's description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver's data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore "tainted" and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. "non-goals public projects." *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services ("DGS") contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19

disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. Nevertheless, the court concluded Denver's data indicated significant WBE underutilization such that the Ordinance's gender classification arose from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

Empirical data. The third evidentiary item supporting Denver's contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver's program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for

summary judgment. *Id.* at 1528. Although Denver’s data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted *Croson* impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion or request for a preliminary injunction. *Id.* at 1527 citing, *Contractors Ass’n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the “percentage of [MBE] availability or composition in the ‘population’ of Philadelphia area construction firms”); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented “detailed findings of prior discrimination”); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between “the total percentage of minorities involved in construction and the work going to minorities” shows that “the racial classification in the County plan [was] necessary”).

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstated “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms.” *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm’s precise “capacity” at a given moment in time belied quantification due to the industry’s highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, “although almost all firms contacted indicated that they were interested in City work.” *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver’s data should not be resolved at summary judgment. *Id.* at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall

Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from “financ[ing] the evil of private prejudice.” *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson*'s strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

24. Contractor’s Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993). An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the [contractors 739 F.Supp. 227](#), and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17-503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17-501(6). The percentage goals related to the total dollar amounts of

City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors' equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co.](#), 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id.* at 995, *quoting*, [735 F.Supp. at 1295–98](#). The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298–99](#). The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, [735 F.Supp. at 1299–1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. [Id. at 1268](#). On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged.” *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under [*Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, citing, [*Hogan* 458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, citing, [*Coral Constr. Co. v. King County*, 941 F.2d 910, 930 \(9th Cir.1991\)](#), cert. denied, [502 U.S. 1033 \(1992\)](#); [*Michigan Road Builders Ass’n, Inc. v. Milliken*, 834 F.2d 583, 595 \(6th Cir.1987\)](#), aff’d mem., [489 U.S. 1061\(1989\)](#); [*Associated General Contractors of Cal. v. City and County of San Francisco*, 813 F.2d 922, 942 \(9th Cir.1987\)](#); [*Main Line Paving Co. v. Board of Educ.*, 725 F.Supp. 1349, 1362 \(E.D.Pa.1989\)](#).

Application of intermediate scrutiny to the Ordinance’s gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. [*Cone Corp. v. Hillsborough County*, 908 F.2d 908 \(11th Cir.\)](#), cert. denied, [498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 \(1990\)](#). *Id.* at 1000-1001. The Court agreed with the district court’s choice of intermediate scrutiny to review the Ordinance’s gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* [735 F.Supp. at 1307](#). That standard validates the classification if it is “rationally related to a legitimate governmental purpose.” *Id.* at 1001, *citing* [Cleburne, 473 U.S. at 445](#). The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, *quoting*, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1002, *quoting*, [488 U.S. at 492](#).

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing* [488 U.S. at 502](#).

Ruling the Philadelphia Ordinance’s racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance “possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan,” *Id.* at 1002, *quoting*, [735 F.Supp. at 1298](#). As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia’s population, the Ordinance’s declaration it was remedial, and “conclusory” testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting*, [1295–98](#).

In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. [735 F.Supp. at 1295](#). The Court said this reading overlooked the statement in *Croson* that a City can be a “*passive participant*” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, *quoting*, [488 U.S. at 492](#).

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, *quoting*, [488 U.S. at 480](#).

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the

enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, quoting, [735 F.Supp. at 1296](#).

The Third Circuit held, however, given *Croson’s* emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, quoting, [Coral Constr., 941 F.2d at 919](#) (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” [Coral Constr., 941 F.2d at 919](#), the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre–Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post–Enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This

equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson's* evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [Cone Corp., 908 F.2d at 916 \(10.78 disparity index\)](#); [AGC of California, 950 F.2d at 1414 \(22.4 disparity index\)](#); [Concrete Works, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [Stuart, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [O'Donnell, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson's* reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the

statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian–Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian–American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian–American, Pacific–Islander, and “other” minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the “significant statistical disparity” . *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian–American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, quoting, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian–American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian–American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered

for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s fifteen percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, [488 U.S. at 507.](#)

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.* at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by

handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [Heller v. Doe, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court’s grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court’s grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

25. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9th Cir. 1991) In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city’s bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by

the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this subpart of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in

proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every

possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

26. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991) In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a "propelling government interest" for King County's adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-

minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE

participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

27. Kossman Contracting Co., Inc. v. City of Houston, 2016 WL 1104363 (S.D. Tex. 2016). Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston's Minority and Women Owned Business Enterprise ("MWBE") program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston's construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded. The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge’s observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge’s conclusion that the MWBE program is nearly tailored.

Native-American-owned businesses. The study found that Native-American-owned businesses were utilized at a higher rate in Houston’s construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston’s construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge’s recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston consultant’s opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a “hypothetical non-existence” of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge’s recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston’s construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston’s motion to exclude the Kossman’s proposed expert witness is granted; Kossman’s motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston’s motion for summary judgment is denied with respect to including the utilization goal

for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman’s proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter “MJ”) granted Houston’s motion to exclude testimony of Kossman’s proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation (“M&R”) by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert’s criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston’s past years’ records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those

parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant

statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court’s opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

28. 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 (4th Cir. 2010) In *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.* (“Rowe”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT’s MWBE Program “largely mirrors” the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589

F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith

efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina’s MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina’s MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina’s MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account “the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract.” *Id.* NCDOT would also consider “the annual goals mandated by Congress and the North Carolina General Assembly.” *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is “owner controlled by one or more socially and economically disadvantaged individuals.” NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather “encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT.” 589 F.Supp.2d 587. In determining whether the lowest bidder is “responsible,” NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these

subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F.3d 233 (4th Cir. 2010), discussed above.

29. Thomas v. City of Saint Paul, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009). In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff’s lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program (“VOP”) that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City’s work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City’s projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various “good

faith” requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff’s claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City “intentionally” treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of “racially discriminatory intent or purpose.” *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City “intentionally” rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority

contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

30. 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.

31. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004). The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Gutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the

award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

32. 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.

33. 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.

34. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001). Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, citing *Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court

concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution’s Fifth Amendment guarantee of equal protection and granted the plaintiffs’ Motion for Summary Judgment.

35. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000). Plaintiff Associated Utility Contractors of Maryland, Inc. (“AUC”) filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance (“the Ordinance”). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. (“MMCA”) opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment (“the December injunction”). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City’s 1999 numerical set-aside goals for Minority- and Women-Owned Business Enterprises (“MWBES”), which had been established at 20% and 3%, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff’s facial attack on the constitutionality of the Ordinance, concluding that there existed “a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action.” *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

Facts and Procedural History. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20% of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3% to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding

that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises...” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20% MBE and 3% WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20% MBE and 3% WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20% and 3% goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “injury

in fact' is the inability to compete on an equal footing in the bidding process ..." *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates "that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* at 616 quoting, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is "ready and able" to bid in this context, the party will have sufficiently shown that the set-aside goals are "the 'cause' of its injury and that a judicial decree directing the city to discontinue its program would 'redress' the injury," thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were "ready and able" to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City's set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City's set-aside goals required AUC members to "select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors" in order to bid successfully on City public works contracts for work exceeding \$25,000 ("City public works contracts"). *Id.* at 618. AUC claimed, therefore, that the City's set-aside goals violated the Fourteenth Amendment's guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 619, quoting *Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id.* citing *Croson*, 488 U.S. at 493-95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, quoting *Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, citing *Croson*, 488 U.S. at 492. The plurality of the

Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 619, quoting *Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a “two step analysis for evaluating a race-conscious remedy.” *Id.* at 619 citing *Maryland Troopers Ass’n*, 993 F.2d at 1076. “First, the [government] must have a ‘strong basis in evidence for its conclusion that remedial action [is] necessary....’ ‘Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ ” *Id.* at 619, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076 (citing *Croson*).

The second step in the *Croson* analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 quoting *Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, quoting *Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[I]logically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying *Croson*’s

evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, quoting *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

Preenactment versus postenactment evidence. In evaluating the first step of the Croson test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, quoting *Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE participation in City construction subcontracts, and for analogous reasons, the 3% WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for Croson “strong basis in evidence.” *Id.* at 621, n.6, citing *Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the Croson “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), cert. denied, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies Croson. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), cert. denied, 523

U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case, the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20% for MBEs and 3% for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20% preference is not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3% preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20% MBE and 3% WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

Holding. The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

36. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000). This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of

prior discrimination that can be identified with specificity.” *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County’s standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that “[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily

require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County’s argument that its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program’s gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present “sufficient probative evidence” of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County’s M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court’s opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

37. Associated Gen. Contractors v. Drabik, 50 F. Supp.2d 741 (S.D. Ohio 1999). The district court in this case pointed out that it had struck down Ohio’s MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant’s appealed this court’s decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co.*,

Inc. v. The State of Ohio, Department of Administrative, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state’s purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court’s decision related to construction contracts and the Ohio Supreme Court’s decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court’s decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a “blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio’s MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court’s holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio’s MBE program as applied to the state’s purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

Strict Scrutiny. The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

(1) Ohio’s MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

(2) a program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id.*

(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially “worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report.” *Id.* at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio’s program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

Narrow Tailoring. The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to “race-based quotas”. *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas”. *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from

the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court's prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court's order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

38. 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 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

39. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019. Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

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

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

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

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor’s discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor’s claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

40. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018). Note: The Ninth Circuit Court of Appeals Memorandum provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana's DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. See *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of

action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.),

Memorandum, May 16, 2017, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study’s analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and quoting, *Crososn*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to *Mountain West*’s case, it concluded that the record provides an inadequate basis for summary judgment in Montana’s favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

41. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9th Cir. 2013). The Associated General Contractors of America, Inc., San Diego Chapter, Inc., (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business Enterprise (“DBE”) program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans’ DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans’ DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of

discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be

expected to receive 13.5 percent of contract 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.*

42. 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 if it were a non-DBE subcontractor. *Id.*

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally,

evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana’s highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit “has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented.” *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans’ DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, “the Ninth Circuit held that California’s DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.” *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

43. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012). Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona’s former affirmative action program, or race-

and gender-conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182.* All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182.*

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183.*

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id. at 1183.* The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186.* Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

Plaintiff *Western States Paving Co.* ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id. at 988*. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting

industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race-conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington’s DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington’s transportation contracting industry. *Id.* at 997-98. “If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.” *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, citing *Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had “previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT’s program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau’s Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent “to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period].” *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State’s transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action’s component. *Id.* The court found that the State’s methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the

disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State’s argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress’s compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court’s grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State’s liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

45. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion). This case was before the district court pursuant to the Ninth Circuit’s remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff’s claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff’s claim for injunctive relief as moot. The court found “it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*,” and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving’s claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT’s unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the “State defendants.” Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification “who averred that they had been subject to ‘general societal discrimination.’”

Third, the court dismissed plaintiff’s 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff’s 42 U.S.C. §2000d claim to proceed against WSDOT because it was not

similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that “a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI.” The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT’s DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff’s claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff’s §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff’s race when calculating the annual utilization goal. The court held that since the policy was not “facially neutral” — and was in fact “specifically race conscious” — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT’s program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT’s Motion for Summary Judgment on the §2000d claim.

46. Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004). This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states’ implementation of the Federal DBE Program were narrowly tailored, and the state DOT’s implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment’s Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads (“Nebraska DOR”) under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT’s and Nebraska DOR’s implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong

basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-

conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state’s failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court’s narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent

of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like *Sherbrooke*, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*.)

47. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001). This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court’s vacation of the Tenth Circuit’s dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government’s challenge to the district court’s grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause (“SCC”), which employs race-conscious presumptions designed to favor minority enterprises and other “disadvantaged business enterprises” (“DBEs”). The court’s evaluation of the SCC program utilizes the “strict scrutiny” standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id.* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

“Compelling Interest” in race-conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O’Connor explicitly states: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that “remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions” (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that “the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry’ by allowing tax dollars ‘to finance the evil of private prejudice.’” *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as “remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups.” *Id.*

Evidence required to show compelling interest. While the government’s articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The “benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation [i]s whether there exists a ‘*strong basis in evidence*’ for [the government’s] conclusion that remedial action was necessary.” *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, citing *Concrete Works*, 36 F.3d at 1520–21.

After the government’s initial showing, the burden shifted to Adarand to rebut that showing: “Notwithstanding the burden of initial production that rests” with the government, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* at 1166, quoting, *Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, citing, *Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166–67 citing, *Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O’Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be

justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program.

Id. at 1167, quoting, *Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government's evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to "old boy" networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors' unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government's evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to

bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government's evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 1172.

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government's evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court's decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government's review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." *Id.* quoting, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

The court said that it was mindful that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 1172, quoting, *Croson* at 501-02. But the court found that here, it was unaware of such "special qualifications" aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that "[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion," and the court here said it

did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, *citing, Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting, Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, *quoting, Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing, Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Adarand’s rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176.

Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* "Race" the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O'Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government's initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court's finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, quoting, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O’Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, citing, *Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.” 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O’Connor’s majority opinion in *Croson* added a further factor to the court’s analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because “there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, quoting, *Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, quoting, *Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); *see also*

49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 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

48. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017).

Plaintiffs, Orion Insurance Group (“Orion”), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise (“DBE”) under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation (“USDOT”) and the Acting Director of USDOT, (collectively the “Federal Defendants”) move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises (“OMWBE”), (collectively the “State Defendants”) moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he “embraced his Black culture.” *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a “Negro,” who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these

racial groups, “the presumption of disadvantage has been rebutted,” and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) “Discrimination under 42 U.S.C. § 1983” (reference is made to Equal Protection), (C) “Discrimination under 42 U.S.C. § 2000d,” (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: (“[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE,” and a declaration the “definitions of ‘Black American’ and ‘Native American’ in 49 C.F.R. § 26.5 to be void as impermissibly vague,”) and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff's application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State*

Department of Transportation, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and race 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.*

49. 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.

50. 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.

51. 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.

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. (“AGC”) against the California Department of Transportation (“Caltrans”), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans’ DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans’ motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans’ DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans’ implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest “in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives.” Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id.* at 56.

The court held that because “Caltrans’ DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional.” Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans’ DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

53. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010). Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that

the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT

contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only “when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal.” *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must “undertake an as-applied inquiry into whether [the state’s] DBE program is narrowly tailored.” *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs’ argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff’s expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant’s determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs’ argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT’s expert identified “prime contracting” as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the “relationship of the numerical goals to the relevant labor market.” *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western*

States Paving, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

54. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009). Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in

the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that “perhaps more importantly, NJT’s DBE goal was approved by the USDOT every year from 2002 until 2008.” *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT’s adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that “critically,” plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT’s DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT’s adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the

disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff’s Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff’s claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT’s Motion for Summary Judgment was granted as to that claim.

55. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008). Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County’s implementation of the Federal DBE Program and Broward County’s issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court’s consideration of the merits of plaintiffs’ claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, “whether compliance with the federal regulations is all that is required of Defendant Broward County.” *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County’s implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington’s DBE program is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington’s DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state’s program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT “appears not to be of one mind on this issue, however.” 544 F.Supp.2d at 1339, n. 3. The district court stated that the “United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the ‘opinion of the United States’ as represented in *Western States*.” 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the “state would have to have evidence of past or current effects of discrimination to use race-conscious goals.” 544 F.Supp.2d at 1338, quoting *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, “concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states’ compliance with the federal regulations.” 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit’s approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then reaffirmed in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state’s role in the federal program is simply as an agent, and insofar “as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.” 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT’s program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v.*

Farris, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that “where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations.” 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that “the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program.” 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County’s actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is “simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations.” *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

56. 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.

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

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part,

by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff’s claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson’s* strict scrutiny standard. The court held that the “Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program.” *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, “relieves the state of any burden to independently carry the strict scrutiny burden.” *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

58. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003). The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved

the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

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

59. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 107 F.Supp. 3d 183 (D.D.C. 2015). In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third

parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id.* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id.* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id.* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id.* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id.* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term "social disadvantaged" does not provide for preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id.* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id.* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id.* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id.* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id.* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id*. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id*.

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id*. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id*. Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id*.

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id*.

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are

not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

60. *Rothe Development Corp. v. U.S. Dept. of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008). Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004)). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327

(Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting

evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting *61 Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures,

discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5)

the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the

racial classification.” 545 F.3d at 1039, quoting *Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 quoting *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by *Rothe*, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does

not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

61. Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016). Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of

Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. See *DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. See *DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic’s* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other’s expert witnesses. The court concludes that Defendants’ experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe’s motion to exclude Defendants’ expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff’s experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants’ motions to exclude plaintiff’s expert testimony.

In addition, the court in *Rothe* agrees with the court’s reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff’s motion for summary judgment and grants Defendants’ cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. See 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that *DynaLantic* had failed to present credible, particularized evidence that undermined the government’s compelling interest or that demonstrated that the government’s evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, citing *DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions

were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants’ expert evidence. One of Defendants’ experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a “logit model” to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants’ expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe’s contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert’s response to Rothe’s critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert’s reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants’ additional expert’s testimony as admissible in connection with that expert’s review of the results of the 107 disparity studies conducted throughout the United

States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to

minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common

understanding that the “narrowness” of the narrow-tailoring mandate relates to the relationship between the government’s interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government’s racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

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

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic

Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 quoting 15 U.S.C. § 631(f)(1)(B)-(c); see also 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; see 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. See 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. See *Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at *3-4; 13 CFR 124.501(b).

Plaintiff's business and the simulation and training industry. *DynaLantic* performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at *5.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at *9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at *9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to *DynaLantic* to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate.

DynaLantic, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court

again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that *DynaLantic* did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that *DynaLantic* could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the

evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress

had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the

government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

63. 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.

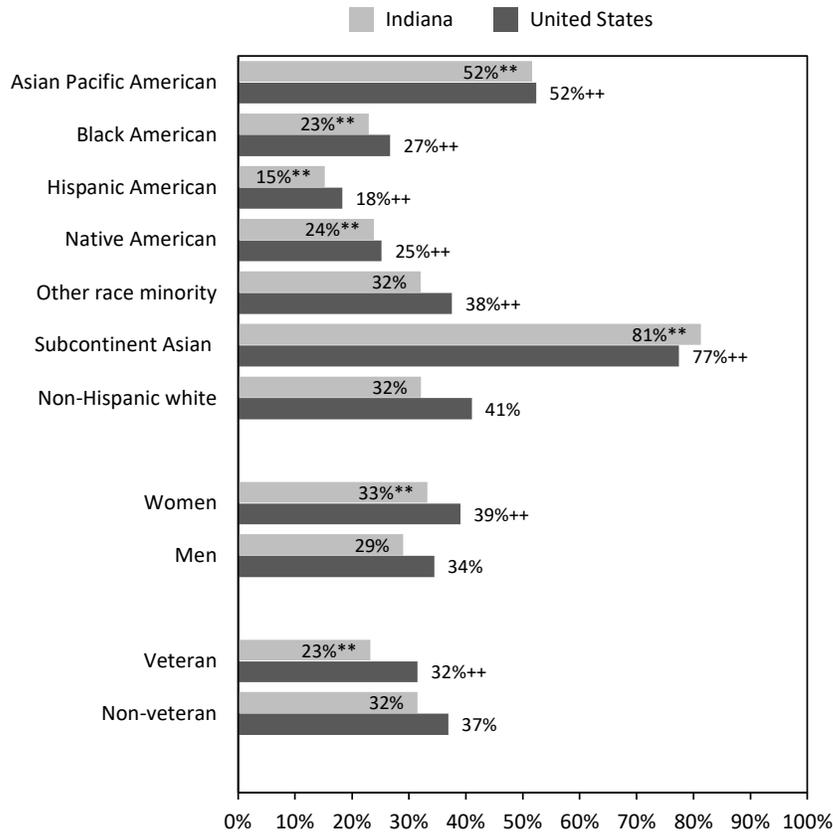
Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted extensive quantitative analyses of marketplace conditions in Indiana to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the local construction, professional services, and goods and other services industries. In addition, where data were available, the study team conducted analogous analyses for veteran-owned businesses, because they are also presumed to be disadvantaged by the Governor’s Commission for Supplier Diversity. The study team examined local marketplace conditions in four primary areas:

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

Appendix A presents a series of figures that show results from those analyses. A subset of those results along with information from secondary research are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a
four-year degree in Indiana and the United States, 2014-2018

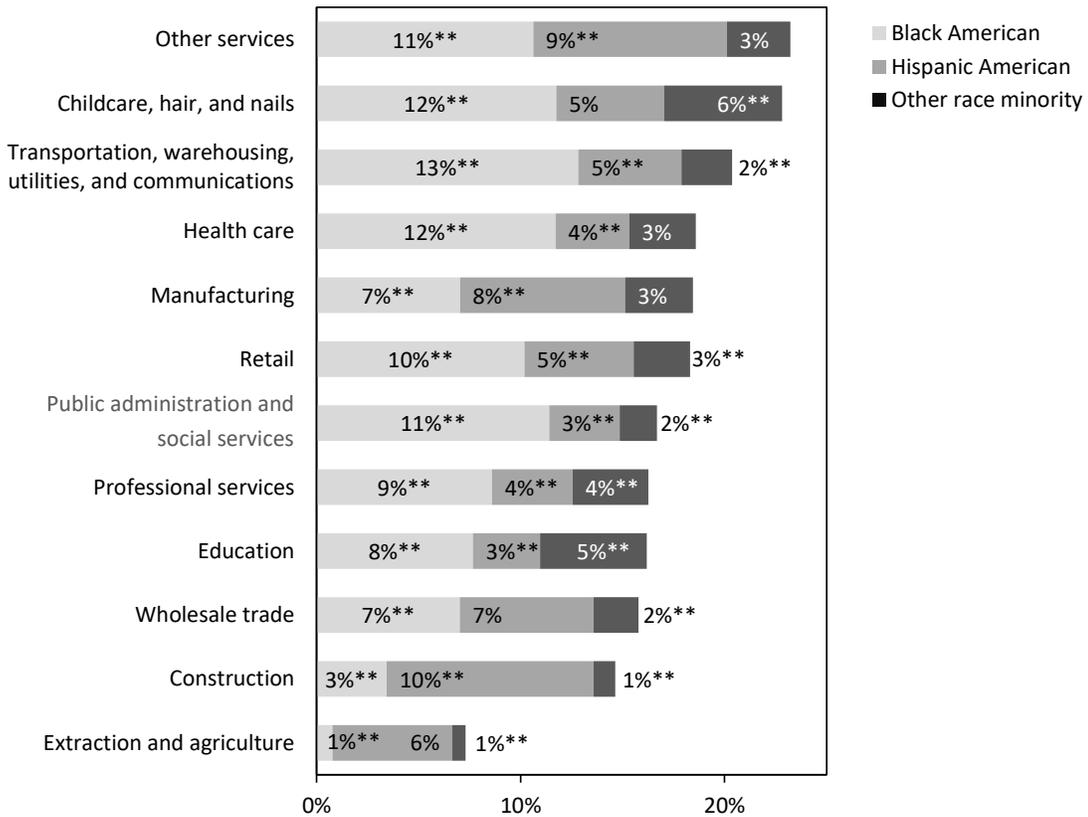


Note: **, ++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men or veterans and non-veterans) is statistically significant at the 95% confidence level for Indiana and the United States, respectively.

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

Figure C-1 indicates that, compared to non-Hispanic white Americans working in Indiana, smaller percentages of Black Americans, Hispanic Americans, and Native Americans have four-year college degrees. In addition, a smaller percentage of veterans than non-veterans have four-year college degrees.

Figure C-2.
Percent representation of minorities in various industries in Indiana, 2014-2018



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

The representation of minorities among all Indiana workers is 9% for Black Americans, 6% for Hispanic Americans, and 3% for other race minorities.

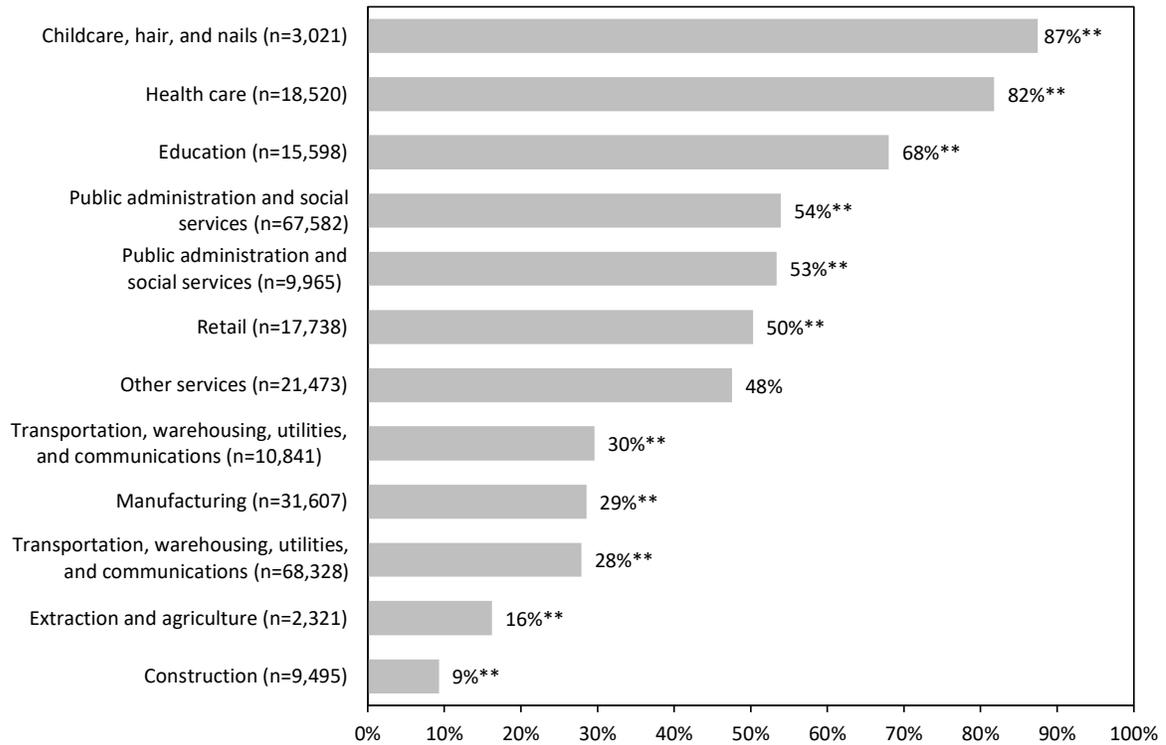
Other race minorities include Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and minorities of other races and ethnicities.

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

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

Figure C-2 indicates that the industries in Indiana with the highest representations of minority workers are other services; childcare, hair, and nails; and transportation, warehousing, utilities, and communications. Industries in Indiana with the lowest representations of minority workers are wholesale trade, construction, and extraction and agriculture.

Figure C-3.
Percent representation of women in various industries in Indiana, 2014-2018



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

The representation of women among all Indiana workers is 47%.

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

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

Figure C-3 indicates that the industries in Indiana with the highest representations of women workers are childcare, hair, and nails; health care; and education. Industries in Indiana with the lowest representations of women workers are transportation, warehousing, utilities, and communications; extraction and agriculture; and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and
all industries in Indiana and the United States, 2014-2018

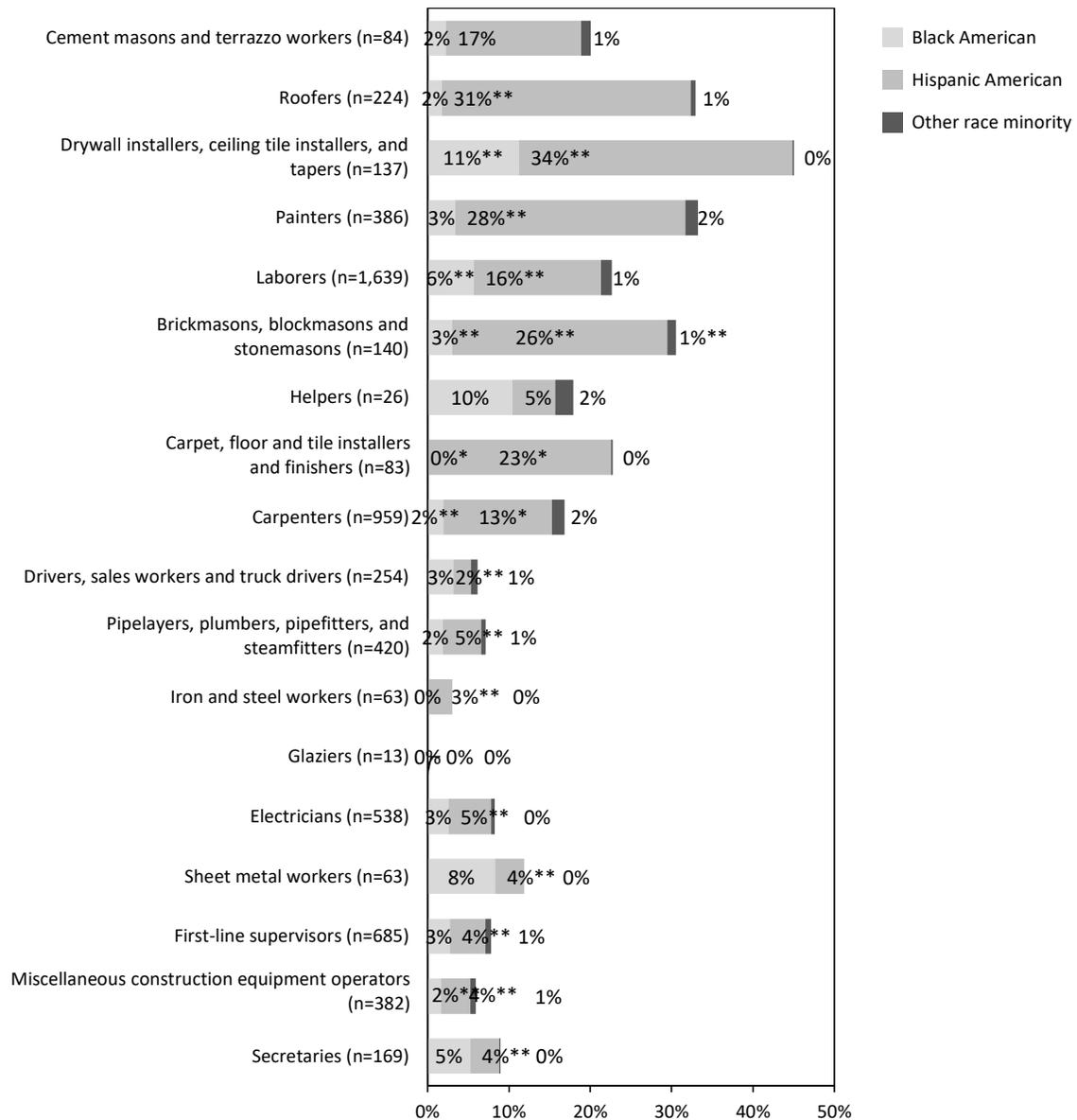
Indiana	All Industries (n= 162,754)	Construction (n= 9,495)	Professional Services (n= 8,234)	Goods & Other Services (n= 9,991)
Race/ethnicity				
Asian Pacific American	1.7 %	0.3 % **	2.1 % *	1.3 % **
Black American	9.3 %	3.4 % **	9.8 %	10.8 % **
Hispanic American	6.1 %	10.1 % **	4.0 % **	6.8 % *
Native American	0.6 %	0.5 %	0.5 %	0.5 %
Other race minority	0.1 %	0.1 %	0.2 %	0.1 %
Subcontinent Asian American	0.7 %	0.1 % **	2.4 % **	0.3 % **
Total minority	18.6 %	14.6 %	19.0 %	19.7 %
Non-Hispanic white	81.4 %	85.4 % **	81.0 %	80.3 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.4 %	9.3 % **	47.8 %	37.5 % **
Men	52.6 %	90.7 % **	52.2 %	62.5 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	5.5 %	7.8 % **	5.4 %	6.3 % **
Non-veteran	94.5 %	92.2 % **	94.6 %	93.7 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
United States	All Industries (n= 7,743,859)	Construction (n= 472,930)	Professional Services (n= 580,595)	Goods & Other Services (n= 536,543)
Race/ethnicity				
Asian Pacific American	4.9 %	1.8 % **	6.7 % **	4.4 % **
Black American	12.5 %	5.9 % **	10.2 % **	13.5 % **
Hispanic American	17.0 %	28.0 % **	10.5 % **	20.7 % **
Native American	1.2 %	1.3 % **	0.9 % **	1.0 % **
Other race minority	0.2 %	0.2 %	0.3 % *	0.3 % **
Subcontinent Asian American	1.5 %	0.3 % **	4.7 % **	1.5 % *
Total minority	37.3 %	37.6 %	33.2 %	41.4 %
Non-Hispanic white	62.7 %	62.4 % **	66.8 % **	58.6 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.2 %	9.4 % **	44.3 % **	37.1 % **
Men	52.8 %	90.6 % **	55.7 % **	62.9 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	5.3 %	6.3 % **	5.9 % **	5.9 % **
Non-veteran	94.7 %	93.7 % **	94.1 % **	94.1 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: *, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries considered together is statistically significant at the 90% or 95% confidence level, respectively.

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

Figure C-4 indicates that compared to all industries considered together, there are smaller percentages of Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and women working in the Indiana construction industry. Similarly, there are smaller percentages of Hispanic Americans working in the Indiana professional services industry than all industries considered together. Finally, there are smaller percentages of Asian Pacific Americans, Subcontinent Asian Americans, and women working in the Indiana goods and other services industry than all industries considered together.

Figure C-5.
Percent representation of minorities in selected construction occupations
in Indiana, 2014-2018



Note: *, ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% or 95% confidence level, respectively.

The representation of minorities among all Indiana construction workers is 3% for Black American, 10% for Hispanic Americans, and 16% for other race minorities.

Other race minorities include Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and minorities of other races and ethnicities.

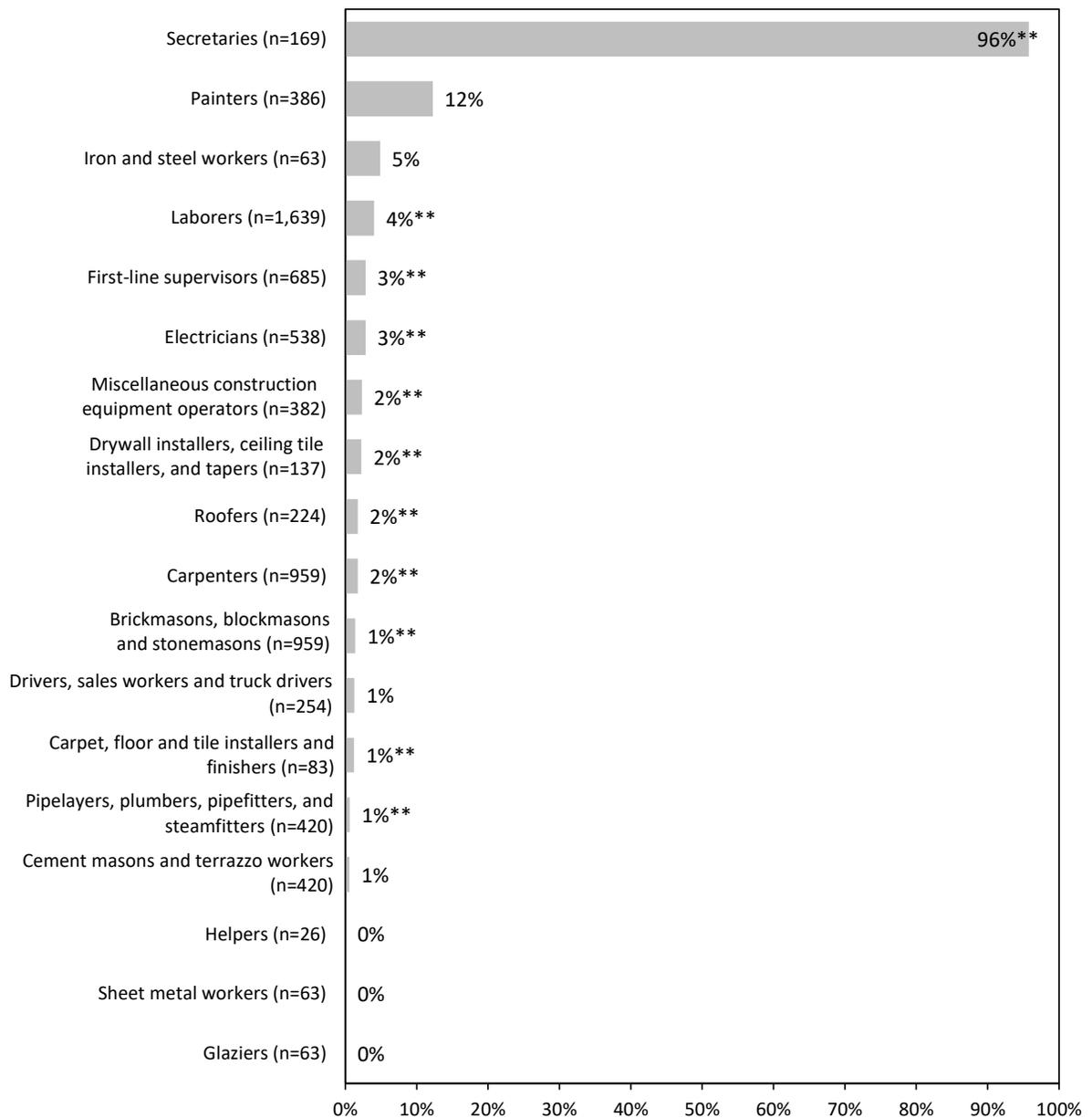
Plasterers and stucco masons are not depicted, because none were found in the study area sample.

Crane and tower operators; dredge, excavating, and loading machine and dragline operators; paving, surfacing, and tamping equipment operators; and miscellaneous construction equipment operators were combined into the single category of machine operators.

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

Figure C-5 indicates that the construction occupations with the highest representations of minority workers in Indiana are cement masons and terrazzo workers; roofers; and drywall installers, ceiling tile installers, and tapers. The construction occupations with the lowest representations of minority workers in Indiana are first-line supervisors, miscellaneous construction equipment operators, and supervisors.

Figure C-6.
Percent representation of women in selected construction occupations
in Indiana, 2014-12018



Note: ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of women among all Indiana construction workers is 9%.

Plasterers and stucco masons are not depicted, because none were found in the study area sample.

Crane and tower operators; dredge, excavating, and loading machine and dragline operators; paving, surfacing, and tamping equipment operators; and miscellaneous construction equipment operators were combined into the single category of machine operators.

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

Figure C-6 indicates that the construction occupations in Indiana with the highest representations of women workers are secretaries, painters, and iron and steel workers. The construction occupations with the lowest representations of women workers in Indiana are helpers, sheet metal workers, and glaziers.

**Figure C-7.
Percentage of
workers who worked
as a manager in
study-related
industries in Indiana
and the United
States, 2014-2018**

Note:

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

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

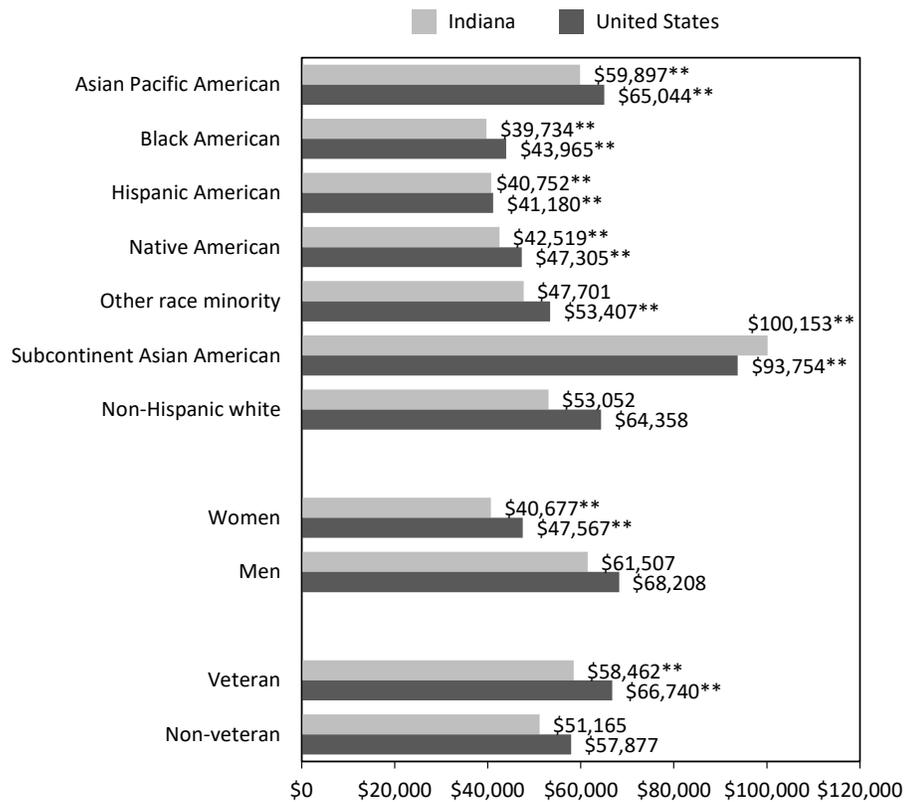
Source:

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

Indiana	Construction	Professional Services	Goods & Other Services
Race/ethnicity			
Asian Pacific American	14.3 %	1.5 % **	3.3 %
Black American	3.4 % **	3.6 %	0.9 % **
Hispanic American	2.7 % **	1.0 % **	1.7 %
Native American	3.5 % *	1.1 % **	2.8 %
Other race minority	0.0 % †	14.4 % †	0.0 % †
Subcontinent Asian	20.8 % †	8.8 %	0.0 %
Non-Hispanic white	7.8 %	4.6 %	2.5 %
Gender			
Women	4.5 % **	3.8 % **	1.3 % **
Men	7.4 %	5.0 %	2.8 %
Veteran Status			
Veteran	8.6 %	3.9 %	1.3 % **
Non-veteran	7.0 %	4.5 %	2.3 %
All individuals	7.1 %	4.4 %	2.2 %
United States			
Race/ethnicity			
Asian Pacific American	9.3 % *	4.7 % **	2.7 %
Black American	4.4 % **	3.3 % **	0.8 % **
Hispanic American	3.2 % **	3.7 % **	1.0 % **
Native American	5.4 % **	5.3 % **	1.6 % **
Other race minority	5.5 % **	5.2 %	1.9 % **
Subcontinent Asian	11.8 % *	7.7 % **	2.4 % **
Non-Hispanic white	9.9 %	6.1 %	2.9 %
Gender			
Women	6.9 % **	4.2 % **	1.2 % **
Men	7.7 %	6.6 %	2.8 %
Veteran Status			
Veteran	9.7 % **	6.5 % **	2.9 % **
Non-veteran	7.5 %	5.5 %	2.2 %
All individuals	7.6 %	5.6 %	2.2 %

Figure C-7 indicates that smaller percentages of Black Americans, Hispanic Americans, and Native Americans than non-Hispanic whites work as managers in the Indiana construction industry. Similarly, smaller percentages of Black Americans, Hispanic Americans, and Native Americans than non-Hispanic whites work as managers in the Indiana professional services industry. Finally, a smaller percentage of Black Americans than non-Hispanic whites work as managers in the Indiana goods and other services industry. A smaller percentage of women than men work as managers in the Indiana construction, professional services, and goods and other services industries.

Figure C-8.
Mean annual wages in Indiana and the United States, 2014-2018



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

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), and from non-veterans (for veterans) at the 95% confidence level for Indiana and the United States as a whole, respectively.

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

Figure C-8 indicates that, compared to non-Hispanic whites, Black Americans, Hispanic Americans, Native Americans, and other race minorities in Indiana have lower mean annual wages. In addition, women in Indiana exhibit lower mean annual wages than men.

**Figure C-9.
Predictors of annual wages
in Indiana, 2014-2018**

Note:

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

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, male for the gender variable, high school diploma for the education variables, all others for the disability variable, non-veteran for the military experience variable, and manufacturing for industry variables.

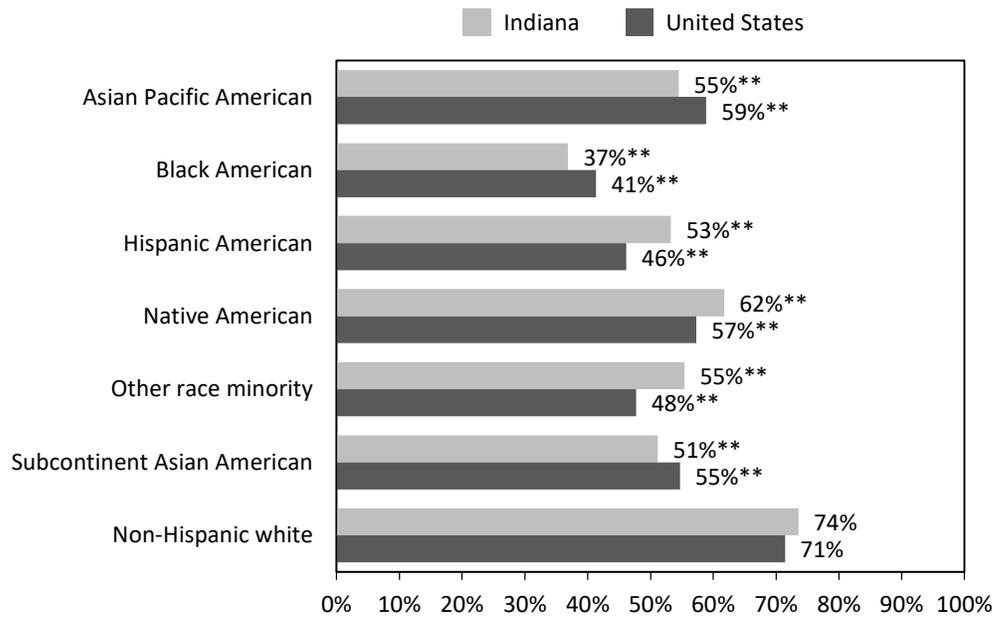
Source:

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

Variable	Exponentiated Coefficient
Constant	9319.072 **
Asian Pacific American	0.968
Black American	0.863 **
Hispanic American	0.958 **
Native American	0.861 **
Other minority group	0.843
Subcontinent Asian American	1.094 **
Women	0.745 **
Less than high school education	0.857 **
Some college	1.187 **
Four-year degree	1.610 **
Advanced degree	2.229 **
Disabled	0.807 **
Military experience	0.979
Speaks English well	1.384 **
Age	1.045 **
Age-squared	1.000 **
Married	1.137 **
Children	1.021 **
Number of people over 65 in household	0.880 **
Public sector worker	1.079 **
Manager	1.300 **
Part time worker	0.366 **
Extraction and agriculture	0.898 **
Construction	0.957 **
Wholesale trade	0.966 **
Retail trade	0.725 **
Transportation, warehouse, & information	1.003
Professional services	0.976 *
Education	0.641 **
Health care	1.008
Other services	0.685 **
Public administration and social services	0.758 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in Indiana, being Black American, Hispanic American, or Native American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.86 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man.

Figure C-10.
Home Ownership Rates in Indiana and the United States, 2014-2018



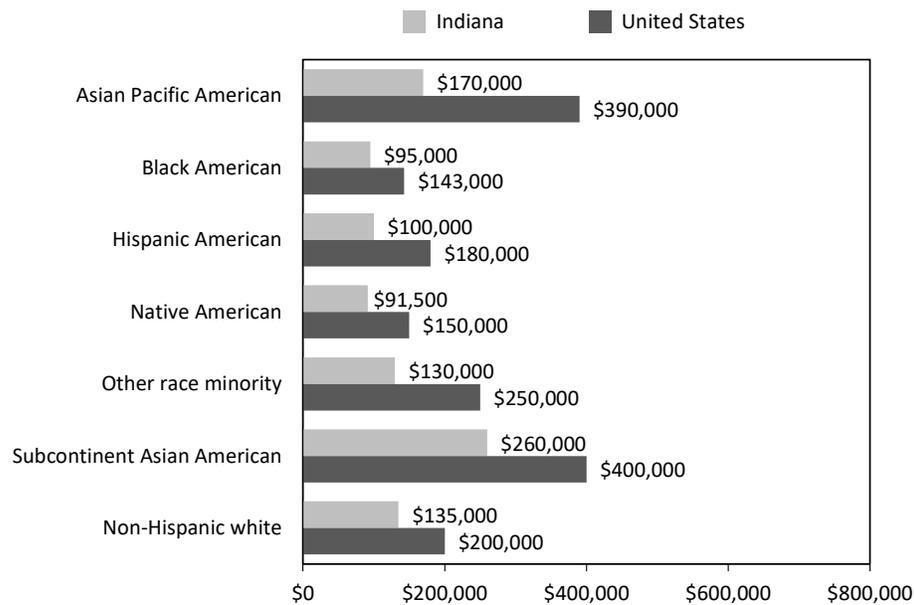
Note: The sample universe is all households.

**, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for Indiana and the United States as a whole, respectively.

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

Figure C-10 indicates that, compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race minorities own homes in Indiana.

Figure C-11.
Median home values in Indiana and the United States, 2014-2018



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

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

Figure C-11 indicates that Black American, Hispanic American, Native American, and other race homeowners in Indiana own homes of lower median value than non-Hispanic white homeowners.

Figure C-12.
Denial rates of
conventional
purchase loans for
high-income
households in
Indiana and the
United States 2017

Note:

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

Source:

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

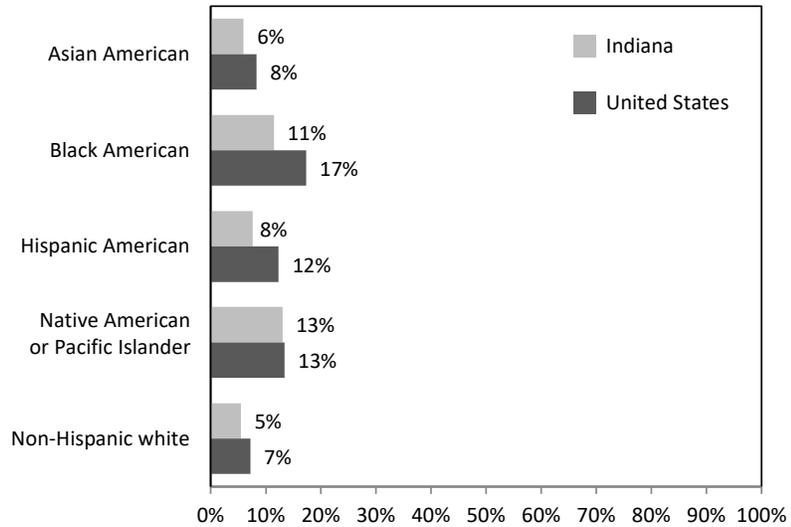


Figure C-12 indicates that Black Americans, Hispanic Americans, and Native Americans or Pacific Islanders in Indiana were denied conventional home purchase loans at higher rates than non-Hispanic whites.

Figure C-13.
Percent of
conventional home
purchase loans that
were subprime in
Indiana and the
United States, 2017

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

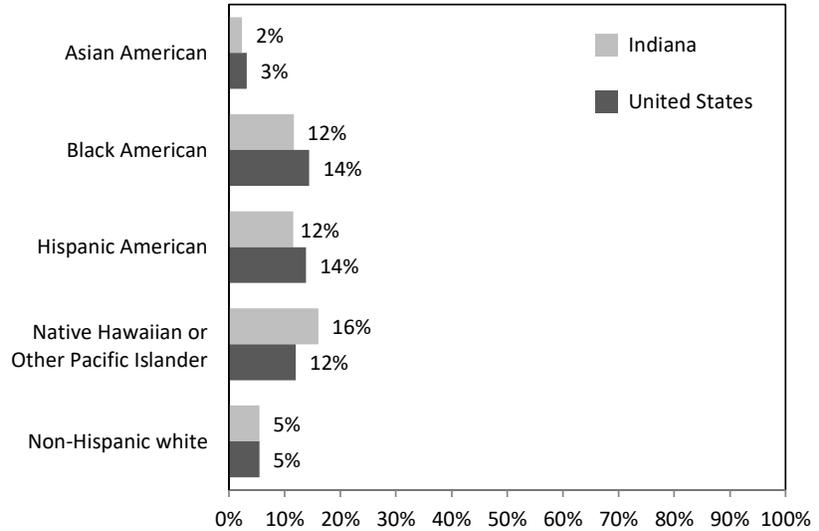


Figure C-13 indicates that Black Americans, Hispanic Americans, and Native American or Pacific Islanders in Indiana were awarded subprime conventional home purchase loans at greater rates than non-Hispanic whites.

**Figure C-14.
Business loan denial
rates in the East
North Central
Division and the
United States, 2003**

Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The East North Central Division consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

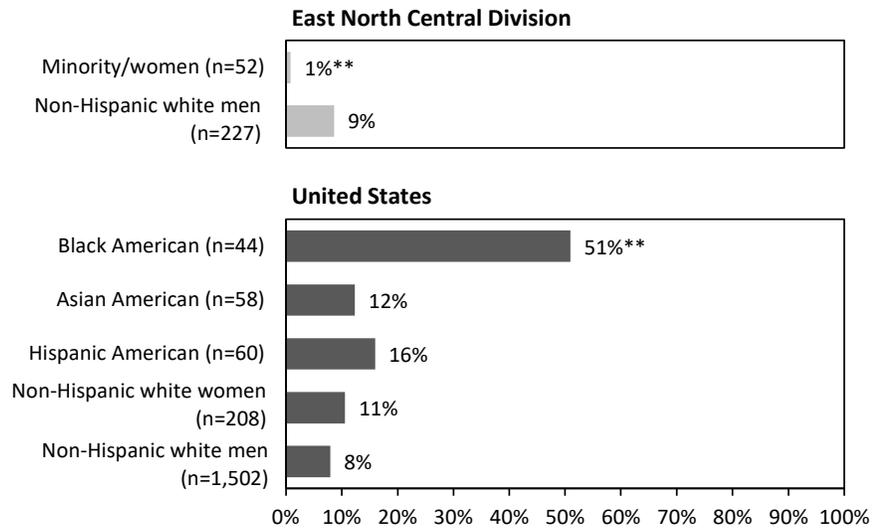


Figure C-14 indicates that in 2003, minority- and woman-owned businesses in the East North Central Division were denied business loans at a lower rate than businesses owned by non-Hispanic white men. In the United States as a whole, Black American-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

**Figure C-15.
Businesses that did not apply for loans due to fear of denial in the East North Central Division and the United States, 2003**

Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The East North Central Division consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

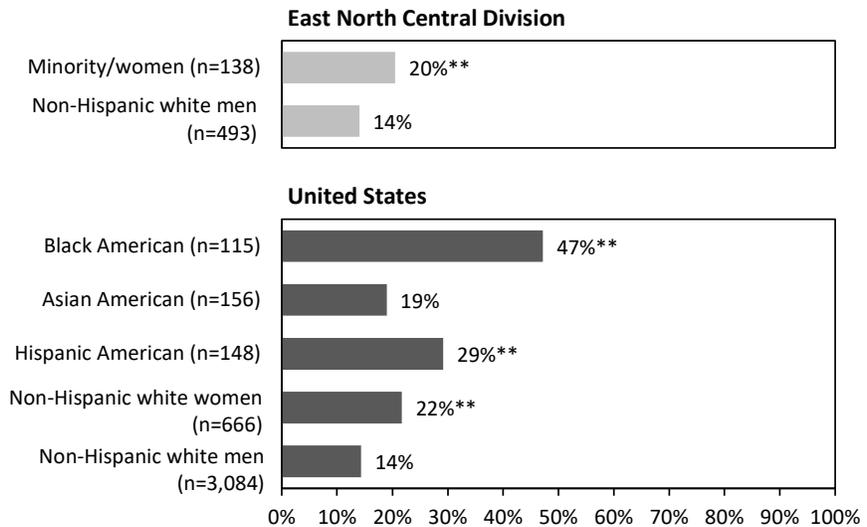


Figure C-15 indicates that in 2003, minority- and woman-owned businesses in the East North Central Division were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial. In addition, Black American-, Hispanic American- and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-16.
Mean values of
approved business
loans, East North
Central Division and the
United States, 2003

Note:

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

The East North Central Division consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from
 2003 Survey of Small Business
 Finance.

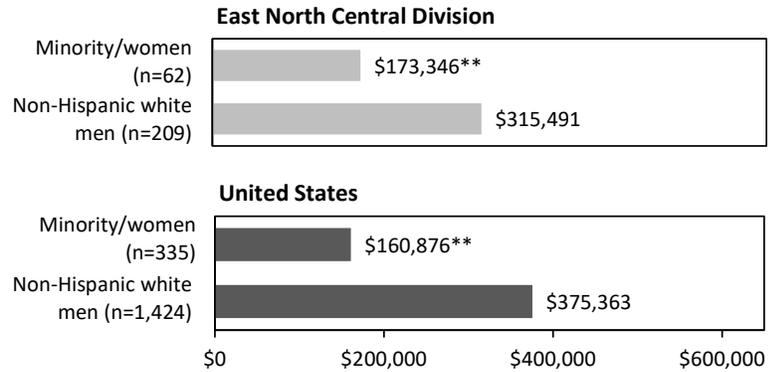


Figure C-16 indicates that, in 2003, minority- and woman-owned businesses in the East North Central Division and the United States who received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

Figure C-17.
Business ownership rates in study-related industries
in Indiana and the United States, 2014-2018

Indiana	Construction	Professional Services	Goods & Other Services
Race/ethnicity			
Asian Pacific American	15.3 %	7.3 % **	11.0 %
Black American	17.5 %	5.8 % **	5.5 % **
Hispanic American	24.4 %	7.1 % **	10.9 % *
Native American	38.3 % *	9.5 %	5.7 %
Other minority group	9.1 % †	11.4 % †	0.0 % †
Subcontinent Asian American	28.3 % †	6.4 % **	16.3 %
Non-Hispanic white	22.4 %	13.6 %	7.4 %
Gender			
Women	18.1 % **	10.6 % **	8.1 %
Men	22.9 %	13.7 %	7.1 %
Veteran Status			
Veteran	24.5 %	19.4 % **	9.1 %
Non-veteran	22.3 %	11.8 %	7.4 %
All individuals	22.4 %	12.2 %	7.5 %
United States	Construction	Professional Services	Goods & Other Services
Race/ethnicity			
Asian Pacific American	22.7 % **	10.4 % **	11.3 % **
Black American	16.9 % **	8.4 % **	6.9 % **
Hispanic American	17.8 % **	10.2 % **	9.7 % *
Native American	18.8 % **	14.2 % **	8.5 % **
Other minority group	24.9 %	11.8 % **	15.5 % **
Subcontinent Asian American	21.2 % **	7.0 % **	23.5 % **
Non-Hispanic white	25.6 %	17.5 %	9.4 %
Gender			
Women	16.2 % **	13.6 % **	9.1 % **
Men	23.4 %	15.8 %	9.6 %
Veteran Status			
Veteran	26.2 % **	18.1 % **	9.4 % **
Non-veteran	22.5 %	14.6 %	9.9 %
All individuals	22.7 %	14.8 %	9.4 %

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

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

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

Figure C-17 indicates that women working in the Indiana construction industry exhibited a lower rate of business ownership than men. Similarly, Asian Pacific Americans, Black Americans, Hispanic Americans, and Subcontinent Asian American working in the Indiana professional services industry exhibited lower rates of business ownership than non-Hispanic whites. In addition, women working in the Indiana professional services industry exhibited a lower rate of business ownership than men. Finally, Black Americans working in the Indiana goods and other services industry exhibited a lower rate of business ownership than non-Hispanic whites.

**Figure C-18.
Predictors of business
ownership in construction
in Indiana, 2014-2018**

Note:

The regression included 8,404 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, men for the gender variable, and non-veteran for the veteran variable

Source:

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

Variable	Coefficient
Constant	-2.6238 **
Age	0.0609 **
Age-squared	-0.0004 **
Married	-0.0874
Disabled	0.1395 *
Number of children in household	0.0688 **
Number of people over 65 in household	0.0901 *
Owns home	-0.0925
Home value (\$000s)	0.0005 **
Monthly mortgage payment (\$000s)	-0.0169
Interest and dividend income (\$000s)	0.0033 **
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.0296
Less than high school education	0.1303 *
Some college	-0.0696
Four-year degree	-0.0881
Advanced degree	-0.1131
Asian Pacific American	0.1856
Black American	-0.0849
Hispanic American	0.1427
Native American	0.5765 **
Other minority group	-0.6024
Subcontinent Asian American	0.4410
Women	-0.2350 **
Veteran	-0.1047

Figure C-18 indicates that being a woman working in the Indiana construction industry is related to a lower likelihood of owning a construction business than being a man, even after accounting for various other personal characteristics.

Figure C-19.
Disparities in business ownership rates for
Indiana construction workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	18.0%	25.2%	72

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-19 indicates that non-Hispanic white women own construction businesses in Indiana 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).

**Figure C-20.
Predictors of business
ownership in professional
services in Indiana,
2014-2018**

Note:

The regression included 7,405 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, men for the gender variable, and non-veteran for the veteran variable

Source:

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

Variable	Coefficient
Constant	-3.2195 **
Age	0.0136
Age-squared	0.0001
Married	0.0613
Disabled	-0.0793
Number of children in household	0.0194
Number of people over 65 in household	0.0908
Owns home	-0.0136
Home value (\$000s)	0.0005 **
Monthly mortgage payment (\$000s)	-0.0039
Interest and dividend income (\$000s)	0.0049 **
Income of spouse or partner (\$000s)	0.0009 **
Speaks English well	0.7569 *
Less than high school education	0.0955
Some college	0.2481 **
Four-year degree	0.3899 **
Advanced degree	0.4359 **
Asian Pacific American	-0.3908 *
Black American	-0.3074 **
Hispanic American	-0.0390
Native American	-0.1774
Other minority group	-0.0856
Subcontinent Asian American	-0.5180 **
Women	-0.1326 **
Veteran	-0.0447

Figure C-20 indicates that being Asian Pacific American, Black American, or Subcontinent Asian American working in the Indiana professional services industry is related to a lower likelihood of owning a professional services business than being non-Hispanic white American, even after accounting for various other personal characteristics. In addition, being a woman working in the Indiana professional services industry is related to a lower likelihood of owning a professional services business than being a man, even after accounting for various other personal characteristics.

Figure C-21.
Disparities in business ownership rates for
Indiana professional services workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	6.2%	13.2%	47
Black American	5.0%	8.7%	57
Subcontinent Asian American	6.4%	14.2%	45
Non-Hispanic white women	12.4%	14.8%	84

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-21 indicates that Asian Pacific Americans (47%), Black Americans (57%), and Subcontinent Asian Americans (45%) own professional services businesses in Indiana at rates that are lower than that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Similarly, non-Hispanic white women own professional services businesses in Indiana at a rate that is 84 percent that of similarly situated non-Hispanic white men.

Figure C-22.
Predictors of business ownership in goods and other services in Indiana, 2014-2018

Note:

The regression included 8,873 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, men for the gender variable, and non-veteran for the veteran variable

Source:

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

Variable	Coefficient
Constant	-3.7097 **
Age	0.0389 **
Age-squared	-0.0002 *
Married	0.0733
Disabled	-0.0496
Number of children in household	0.0589 **
Number of people over 65 in household	0.0051
Owns home	0.0148
Home value (\$000s)	0.0008 **
Monthly mortgage payment (\$000s)	-0.0857
Interest and dividend income (\$000s)	0.0072 **
Income of spouse or partner (\$000s)	0.0010
Speaks English well	0.6432 *
Less than high school education	0.1127
Some college	0.2033 **
Four-year degree	0.1219
Advanced degree	-0.1203
Asian Pacific American	0.5869 **
Black American	-0.0782
Hispanic American	0.4707 **
Native American	0.0166
Other minority group	0.0000 †
Subcontinent Asian American	0.5882
Women	0.1041 **
Veteran	-0.1081

Figure C-22 indicates that being a minority, a woman, or a veteran is not statistically related to lower rates of owning goods and other services businesses in Indiana after accounting for various other personal characteristics.

Figure C-23.
Rates of business
closure and expansion,
Indiana 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.

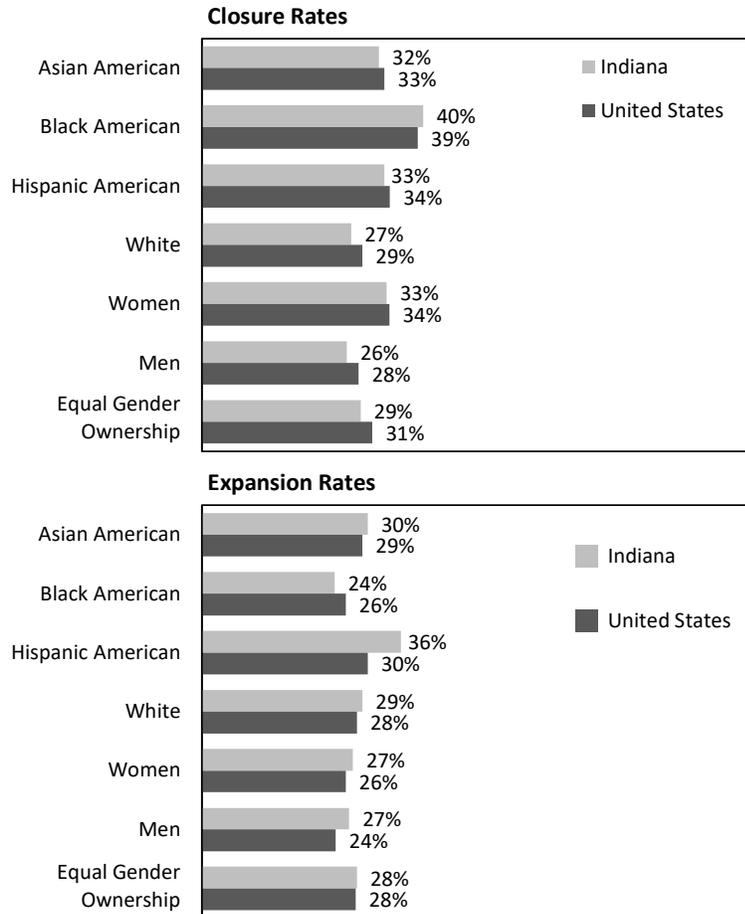
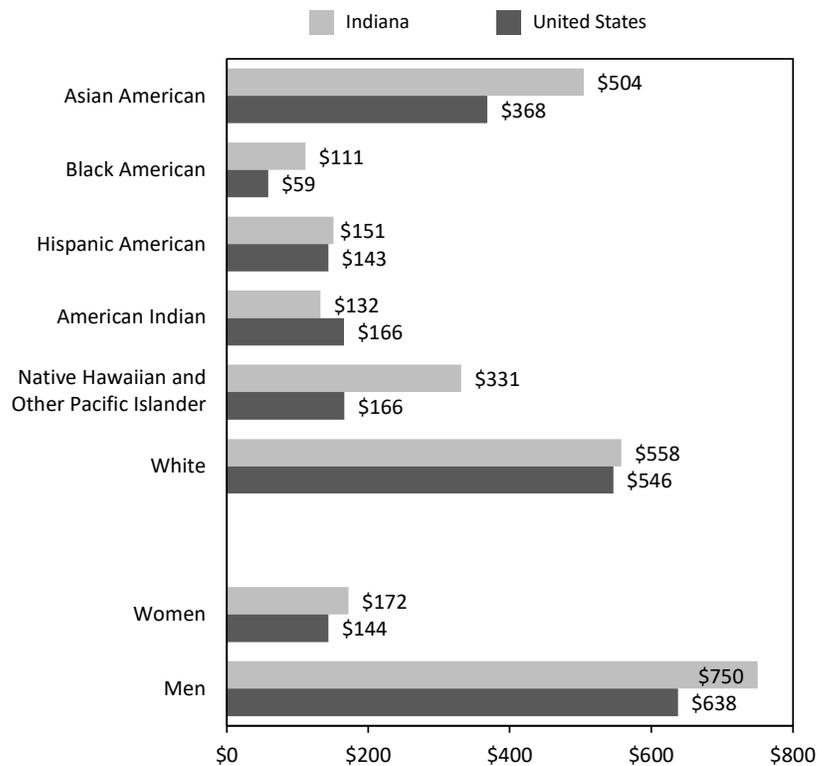


Figure C-23 indicates that Asian American-, Black American-, and Hispanic American-owned businesses in Indiana show higher closure rates than white American-owned businesses. Woman-owned businesses in Indiana show higher closure rates than businesses owned by men. In addition, Black American-owned businesses in Indiana show lower expansion rates than white American-owned businesses.

Figure C-24.
Mean annual business receipts (in thousands)
in Indiana and the United States, 2012

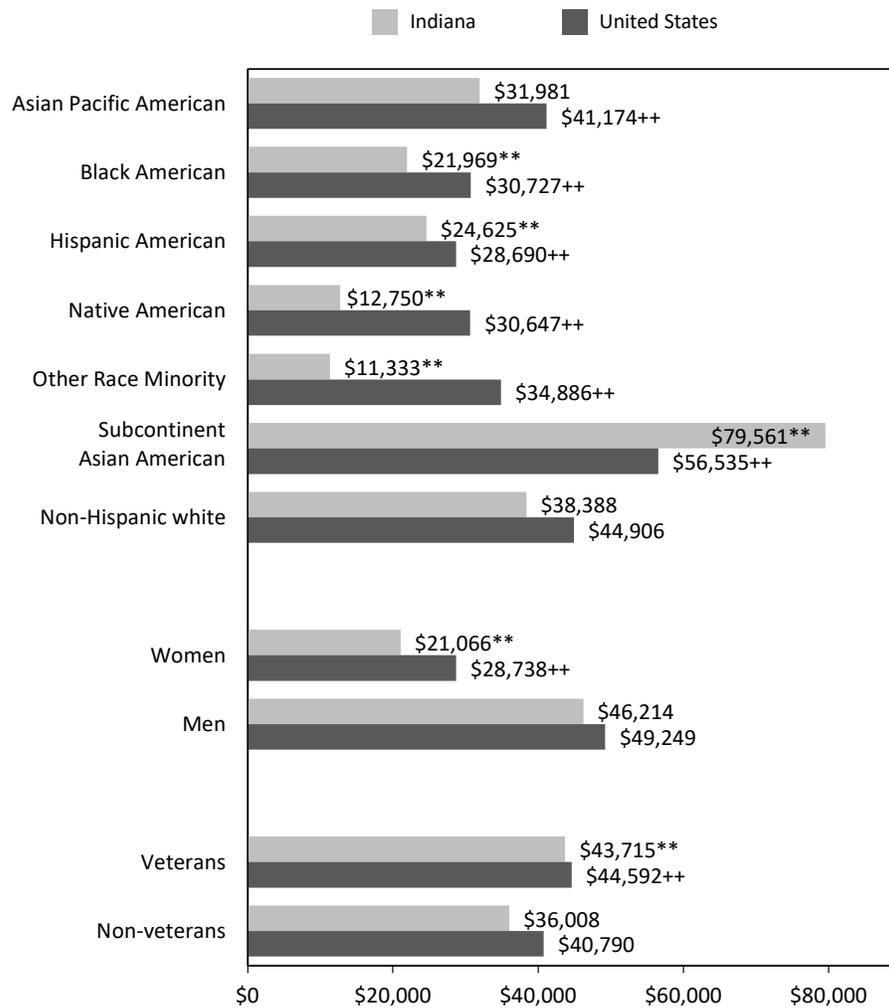


Note: Includes employer and non-employer firms.
 Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.

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

Figure C-24 indicates that in 2012, Asian American-, Black American-, Hispanic American-, American Indian-, and Native Hawaiian- and other Pacific Islander-owned businesses in Indiana showed lower mean annual business receipts than non-Hispanic white-owned businesses. In addition, woman-owned businesses in Indiana showed lower mean annual business receipts than businesses owned by men.

Figure C-25.
Mean annual business owner earnings in
Indiana and the United States, 2014-2018



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), and from non-veterans (for veterans) at the 95% confidence level for Indiana and the United States as a whole, respectively.

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

Figure C-25 indicates that the owners of Black American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, and other race minority-owned businesses in Indiana earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Indiana earn less on average than businesses owned by men.

**Figure C-26.
Predictors of business owner
earnings in Indiana,
2014-2018**

Note:

The regression includes 7,365 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, men for the gender variable, and non-veteran for the veteran variable.

Source:

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

Variable	Exponentiated Coefficient
Constant	744.712 **
Age	1.146 **
Age-squared	0.999 **
Married	1.354 **
Speaks English well	0.924
Disabled	0.542 **
Less than high school	0.720 **
Some college	0.875 **
Four-year degree	1.057
Advanced degree	1.524 **
Asian Pacific American	0.890
Black American	0.759 **
Hispanic American	0.921
Native American	0.377 **
Other Race Minority	1.297
Subcontinent Asian American	2.269 **
Women	0.453 **
Veteran	0.973

Figure C-26 indicates that, compared to being the owner of a non-Hispanic white owned business in Indiana, being the owner of a Black American-owned business or a Native American-owned business is related to lower business earnings, even after accounting for various other business and personal characteristics. Similarly, compared to being the owner of a business owned by men, being the owner of a woman-owned business is related to lower business earnings.

**Figure C-27.
Predictors of business
owner earnings
(regression), United States,
2014-2018**

Note:

The regression includes 440,023 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, men for the gender variable, and non-veteran for the veteran variable.

Source:

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

Variable	Exponentiated Coefficient
Constant	744.712 **
Age	1.146 **
Age-squared	0.999 **
Married	1.354 **
Speaks English well	0.924
Disabled	0.542 **
Less than high school	0.720 **
Some college	0.875 **
Four-year degree	1.057
Advanced degree	1.524 **
Asian Pacific American	0.890
Black American	0.759 **
Hispanic American	0.921
Native American	0.377 **
Other Race Minority	1.297
Subcontinent Asian American	2.269 **
Women	0.453 **
Veteran	0.973

Figure C-27 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being an owner of a Black American- or Native American-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. In addition, being the owner of a woman-owned business is related to lower earnings than a business owned by men.

APPENDIX D.

Anecdotal Information about Marketplace Conditions

Appendix presents anecdotal information that BBC Research & Consulting (BBC) collected from business owners, trade association representatives, and other stakeholders as part of the 2020 State of Indiana 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 minority-, woman, and veteran-owned businesses, certification processes, and business owners' experiences with the State of Indiana's certification program;
- 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 minority-, woman-, and veteran-owned businesses;
- F. **Doing business with state agencies** describes business owners' experiences working with or attempting to work with Indiana state agencies and state educational institutions (SEIs) and identifies potential barriers to doing work for them;
- G. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in Indiana and what it takes for businesses to be successful;
- H. **Barriers or discrimination based on business ownership** describes barriers and challenges businesses face in the local marketplace and details if and how race, gender, or veteran-status affects business outcomes;
- I. **Additional information regarding effects of race, gender, and veteran status** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects minority-, woman-, or veteran-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 Indiana;

- K. **Insights regarding race-, gender, and veteran-based measures** includes business owners' comments about current or potential race-, gender-, or veteran-based programs; and
- L. **Other insights and recommendations** presents additional comments and recommendations for state agencies and SEIs to consider.

A. Introduction

Throughout the study business owners, trade association representatives, and other stakeholders had the opportunity to discuss their experiences working with the Indiana Department of Administration (IDOA), the Indiana Department of Transportation (INDOT), SEIs, and other organizations in the region. That information was collected through one of the following methods, which the study team facilitated between November 2019 and October 2020:

- In-depth interviews (76 participants);
- Availability surveys (435 participants who submitted anecdotal information);
- Focus groups (Five participants);
- Oral or written testimony during a public forum (26 participants); and
- Written testimony via fax or e-mail (four participants).

1. In-depth interviews. From February to September 2020, the study team conducted 76 in-depth interviews with owners and representatives of Indiana businesses. The interviews included discussions about interviewees' perceptions of, and experiences with, the local contracting industry, IDOA's certification program, and businesses' experiences working, or attempting to work, with other public agencies in Indiana.

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 Indiana.

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-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), or Veteran-owned Business Enterprise- (VBE-) or other certified business.

2. Availability surveys. The study team conducted availability surveys for the disparity study from February to September 2020. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the Indiana marketplace. A total of 435 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, one for prime contractors and one for subcontractors and suppliers. During the focus groups the study team asked participants to share their insights about working in the Indiana marketplace and with public sector and private sector organizations. Comments from the focus groups are denoted by the prefix “FG.”

4. Public forums. IDOA and the study team solicited written and verbal testimony at three public forums for the disparity study held in Gary, Indianapolis, and Evansville, Indiana. The meetings were held on November 12th, 13th and 14th of 2019. The study team reviewed and analyzed all public comments from the three meetings and included many of those comments in Appendix D. Those comments are denoted by the prefix “PT.”

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 Construction, Professional Services, and Goods and Services Industries in the Indiana Area

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, they were from well-established firms to newly established firms, and worked on small-to-large contracts in the Indiana marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 30 construction firms, 23 firms providing professional services, and 23 firms supplying goods and services.

Thirty firms worked in the construction industry. [#1, #4, #6, #8, #9, #10, #11, #14, #15, #16, #17, #25, #31, #32, #35, #37, #40, #44, #48, #54, #56, #57, #58, #60, #61, #68, #69, #72, #73, #74]

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "traffic control, the pavement, the barrier" [#1]
- The non-Hispanic white male owner of a construction firm stated, "Plumbing and remodeling." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Actually, the majority of our business is excavation. We're listed as mechanical and we do mechanical work, but the majority of our company is

excavation. We're excavating to install utilities, like steam, chilled water, install and repair and replace utilities." [#6]

- The Native American male owner of an MBE-certified construction firm stated, "We build federal facilities, generation distribution and transmission. Power houses. Hydro, solar, natural gas." [#9]
- The female representative of a WBE-certified construction firm stated, "We do all the plumbing and sewer maintenance. Mainly what their job is to go into the homes, and they do a lot of remodeling and leak detections and things like that, and fixing pipes. And then we have our laborers, and they're the ones that do a lot of our sewer work." [#10]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "We are reinforcing steel erectors. We are a union company, and we tie the reinforcing steel on projects." [#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We have commercial and residential carpeting." [#15]
- The Black American male owner of an MBE-certified construction company stated, "I'm a painter." [#16]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "Heavy highway. We specialize in bridge work but any type of concrete work, in general" [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "I operate a plumbing and sewer contracting business." [#32]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "We're electrical contractors, low-voltage contractor as well." [#35]
- The non-Hispanic white male representative of a construction company stated, "Plumbing and heating installation and repairs, both commercial and residential." [#40]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Construction, electrical contracting." [#44]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Civil engineering. We work with private sector developers on site development projects. We work with municipalities and counties. We do urban planning and we also do – we do grant writing and grant support and market analysis and economic development." [#48]
- The female representative of a majority-owned construction company stated, "We're a general contractor, a union general contractor. We mostly deal with carpentry remodels." [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, "We're a general contractor that mainly focuses on the utility companies. We overhaul turbines, steam turbines. It's called open, clean, and close, which means we open them, clean them, do not make repairs." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "putting up drywall." [#68]

- The Black American male owner of an MBE-certified construction company stated, "transporting goods, palettes, anywhere they need to be transported to" [#69]
- The Black American male owner of an uncertified MBE construction company stated, "Trucking and transportation." [#72]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Trucking." [#73]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Heating and cooling." [#74]

Twenty-three firms worked in the engineering and professional services industry. [#3, #5, #19, #20, #21, #22, #23, #24, #27, #34, #38, #42, #47, #59, #62, #63, #64, #65, #66, #67, #70, #71, #76, #FG1, #FG2]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "So when we first started growing the company, it was IT staffing, IT staff argumentation. And so it was a little bit opportunistic. I had always spent my time in technology, but the conversations I had with people was where are your constraints? How can we help? Where is your pain? Where are you going? What do you anticipate needing in the future? And so there was some diversity, but the common denominator that everyone was trying to get their arms around was data. And so where I saw this concentration of skills in the data space. I've put messaging around that and built up a data analytics practice so that we could market that to other customers. And then, that started bearing fruit. If I was to give you a 30-second pitch, what do we do? We align business and technology and then deliver the solutions and the expertise to make data accessible. Great software development, platforms to manage that data. Reliable, most people don't trust their data, so you have to have it architected well for it to be reliable, and then engaging. We've got a team that builds data visualizations [and] puts that into dashboards, right? Mobile apps to, again, put it in the hands of end users, because if you're getting good data out, you're going to be compelled to put good data in. And then you have a system that's successful." [#3]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "advertising specialty." [#5]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "Energy consulting. But my emphasis and focus is strictly on energy. Not other aspects of consulting." [#21]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "We offer physical therapy and occupational therapy services" [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "We are a staffing company. I train welders, forklift operators, certified nursing assistants, and I taught qualified medication aids. It's all about getting jobs. Everything I do is workforce development." [#23]
- The non-Hispanic white male owner of a professional services firm stated, "We provide a full range of advertising services for clients. We provide everything from television

commercials and outdoor boards to online advertising and analytics, TV commercials, those sorts of things.” [#27]

- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Consulting engineers" [#34]
- The Black American male owner of an MBE-certified professional services firm stated, "I am a registered civil structural engineer. That means for all buildings, roads, bridges. Primarily everything that deals with those areas, I can design from an engineering standpoint. Also, again, with so much experience being able to not only manage staff but manage the projects themselves for the owners or the clients. So, project management. The big things for my company are obviously the design aspect, putting the document together for a bid and for permitting. And the second step is to manage the projects through the construction phase for the owner or the client or whomever." [#38]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Marketing and advertising." [#47]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We do electronic security access control" [#59]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Architecture, interior design, urban planning services." [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'm a registered architect. We do architecture, interior design, and planning, and strategic planning." [#63]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "I would say computer services, educational and online platform, computer services. I'm not sure of the technology." [#65]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Engineering and architecture." [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "We are a strategic branding and marketing company." [#67]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We do health care staffing." [#70]
- The Black American male owner of an MBE-certified professional services firm stated, "We're a architecture and design, so architecture, interior design, urban design, planning, preservation, consulting, and why don't we say construction, administration and project management." [#71]
- A respondent from a focus group of prime professional service consultants stated, "Architecture interiors combined. We also do graphic branding and signage way finding." [#FG1]
- A respondent from a focus group of MBE-certified professional services firms stated, "We just do, basically, photography, videography, graphic design, web design, basically anything a business needs. As far as digital marketing, we pretty much handle it for them." [#FG2]

Twenty-three firms worked in the goods and services industry. [#2, #7, #12, #13, #18, #26, #28, #29, #30, #33, #36, #39, #41, #43, #45, #46, #49, #50, #51, #52, #53, #55, #75] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "We are a distribution company. We buy product and we sell product, that's in essence what we do." [#2]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "printing So, I do a lot of self-publishing books for ministers. I mean every one of them I've dealt with has been a minister." [#7]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "fundraising business, we actually do four different businesses." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We do print and mail and web fulfillment. So, like getting promotional products and graphic design and web to print stores. So basically, it's a one stop shop. Once you come to us, we can help you with all your marketing needs" [#13]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "elevator division" [#18]
- The Black American male owner of an MBE-certified goods and services company stated, "We are security guard services where we offer off-duty police officers unarmed and armed security guards for a variety of events and businesses throughout the state of Indiana." [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "We are a registered security guard company that provides security guard and patrol services here in the State of Indiana." [#28]
- The Black American male owner of an MBE-certified goods and services company stated, "We were a manufacturer of chemicals." [#29]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "Promotional items. Basically, anything that can be imprinted, so signage, apparel, promotional items like pins, stationery, envelopes, business cards. Basically, anything that can be imprinted, and I'm a pass-through company, so I have approximately 3,400 vendors that I use. I outsource everything." [#33]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Kitchen exhaust cleaning." [#36]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "A little bit of everything – office furniture, pool furniture, we do churches, daycares. I mean, a little bit of everything." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "commercial cleaning" [#41]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We sell uniforms and accessories, that can include shoes." [#43]

- The male representative of a majority-owned goods and services company stated, "Office interiors, business furniture." [#45]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "Retail for healthcare. I sell medical scrubs and equipment. So when I say equipment, I mean stethoscopes, thermometers, blood pressure cuffs, badges. So small accessories, not large stuff like bedrails and things of that nature. I also sell chef ware, you know, chef coats, aprons, hats, things of that nature. The only thing I don't sell in the medical field is shoes." [#46]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "Fire protection. Fire sprinklers, fire extinguishers, fire alarms." [#49]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "We're an audiovisual integration and production company, so we install electronics that enable people to have live meetings and have conferences with audiovisual support. We also maintain and manage those live meetings and support, as well as the production company where we record live events for streaming and for live, whatchamecall it, live LED board purposes." [#75]

Years in business. Thirty businesses reported their date of establishment. The majority of firms (#44 out of 65 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Twelve out of the 65 businesses had been in business for between five and ten years. Nine firms were newly established, having been in business for less than four years.

Nine firms reported they had been in business for fewer than four years. [#4, #17, #22, #23, #37, #65, #69, #72, #FG2] For example:

- The non-Hispanic white male owner of a construction firm stated, "Last February I started my own business." [#4]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I started that company in October of '17, I think is when it's registered." [#17]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "We started actually three years ago, 2017." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "I started the staffing company, I believe in 2016, I believe. And that was when I started the staffing, but I had the training companies prior to that." [#23]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Theoretically four, but practically maybe one or two actively using it." [#65]
- The Black American male owner of an MBE-certified construction firm stated, "A little over two years, actually. About two years and three months" [#69]
- The Black American male owner of an uncertified MBE construction company stated, "I start[ed] in June of 2020." [#72]

- A Black American male respondent from a focus group of MBE-certified professional services firms stated, "about two years now." [#FG2]

Twelve firms reported they had been in business for five to ten years. [#7, #9, #10, #16, #36, #38, #42, #44, #48, #70, #71, #73] For example:

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Since 2013." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "Seven." [#9]
- The female representative of a WBE-certified construction firm stated, "They incorporated 9/6 of 2011." [#10]
- The Black American male owner of an MBE-certified construction company stated, "I've been in business a long time but established about six years." [#16]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "I'm going on my fifth year." [#36]
- The Black American male owner of an MBE-certified professional services firm stated, "I have been in business as the current company, RM Consulting and Engineering, since 2014. Since June of 2014." [#38]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Since 2012." [#44]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "I have been in business for six years." [#48]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "2011." [#70]
- The Black American male owner of an MBE-certified professional services firm stated, "six years." [#71]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Five years." [#73]

Forty-four firms reported they had been in business for more than ten years. [#1, #2, #3, #5, #6, #11, #12, #13, #14, #15, #19, #21, #24, #26, #27, #28, #29, #31, #32, #33, #34, #35, #39, #40, #41, #43, #45, #46, #47, #49, #59, #60, #61, #62, #63, #64, #66, #67, #68, #74, #75, #76, #FG1] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I've been in business since 1984, but with this company since 2005." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I started my company in 2006. I acquired the majority ownership of another company and merged our companies together in 2010, the beginning. And so the history goes back a little further." [#3]

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "19. I have been in place for four. I've owned the company for the last four." [#6]
- The non-Hispanic white male owner of a majority-owned construction company stated, "been doing it for 15 years" [#11]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "We've been in business since 2002, but I've started in businesses myself since '96." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "'86 or something That would be 34 years this year." [#13]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "Yeah, my dad started the business in 1955, and my brothers joined him in the early 80s, and I joined him in '85. That's when we kind of shifted from a small residential contractor to a commercial contractor, industrial contractor." [#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We've been incorporated since 1986." [#15]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I got licensed in 1990 and started my own office in 1996." [#19]
- The female representative of a Native American-owned MBE- and WBE-certified professional services firm stated, "So the other company and this one combined is at about 12 years." [#24]
- The Black American male owner of an MBE-certified goods and services company stated, "We started in 1998." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "the company was founded in 1979." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I've been in business about 20 years. June of 1998." [#28]
- The Black American male owner of an MBE-certified goods and services company stated, "we started this company in January of 1994. According to the state the date of origin is January 11th, 1994." [#29]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "We've been in business 48 years. 1972 but they got incorporated in 1973." [#31]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "I've owned the business five years. It actually started in 1943. I'm sorry, 1947." [#33]
- The non-Hispanic white male representative of a construction company stated, "The company has been in operation for 55 years." [#40]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "A total of 20. We incorporated as an LLC initially. In 2008, we changed the name and changed that incorporation to an S-Corp. So, a total of 20 years." [#41]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Since 1953." [#43]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "The company has been in business for 11 years, for almost 12. I bought it a year-and-a-half ago." [#46]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "73. 1947, so March of 1947." [#47]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "Since 1989, that would be what, thirty-one years, I think." [#49]
- The female representative of a majority-owned construction company stated, "He's been in business over 30." [#60]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, since 1977. But not in this entity. I've had a few other previous lives. You know, I've worked for several firms here or in – I've had a couple firms. But I've been in business here since '76." [#63]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Probably about 25 years." [#68]
- The male non-Hispanic white partner of a majority-owned professional services firm consultants stated, "About 35 years as an architect and 28/29 years with one firm now, about half of that time as a partner in the organization." [#FG1]
- The female non-Hispanic white partner of a WBE-certified professional services firm consultants stated, "We've been in business for almost 40 years now." [#FG1]

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. [#1, #3, #4, #6, #7, #9, #10, #12, #15, #16, #19, #21, #22, #23, #26, #27, #28, #29, #31, #32, #33, #34, #35, #37, #38, #39, #40, #42, #45, #47, #49, #61, #63, #67, #69, #70, #75] This experience helped founders build up industry contacts and expertise. Businesspeople were often motivated to start their own firms by the prospects of self-sufficiency and business improvement. Here are some of the founder stories from interviews:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I worked for a state Department of Transportation in 1978. I always wanted to own a business and I had opportunity to get a lot of traffic control information when I worked because we were doing bridge deck testing. And so, we would go out on these jobs and we would get all the information, the contract information, and see what they were paying for traffic control and I thought I could do that. So, in 1984, I left the DOT and started the traffic

control company I had that company until 1999. I sold it to a public company, and then I worked for them for three years. There were only two companies in Indiana, and one of them was a pretty good company. The other one was really poor service, and I didn't really know that initially, but I suspected it just from what I've seen. And so, I had the opportunity, and I went to the chamber of commerce. The chamber of commerce had this thing called the retired executives counseling service. So, I went to them and told them I need help. I want to start this business. I don't know anything about starting a business, nothing. So, I put on my best suit, went in his office and we spent about three hours together and he liked me. And I said, you know, what can I do to help you? Do you need, you know, I can do whatever? I said, just give me some contracts, I'll show you what I can do. And so, he did, he gave me two little contracts for \$6,000" [#1]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I started a company in 2006. It was a time when I had a couple of little kids and just wanted a little bit more flexibility. Well that was right before the economy kind of tanked. And so, I was in a pretty good spot doing IT staffing. My history had been in IT consulting and I had started as a software developer, started my career as a software developer. And so, it was a good place to be and I wasn't in a bad spot, but everyone else was feeling the pinch. And this other company that I ended up merging with in 2010 was going to shut its doors. And so that was, I tell people sometimes the best mistake I ever made. It's very difficult to have a business partner, but it was what I needed to be able to push myself to say, 'I'm accountable to this person. I've said I'm going to do something; I'm going to do it.' And so, at that point I started really selling more. He was recruiting talent. That worked really well. And because the economy had softened, I thought this would be a good time to get certified as a woman-owned business. So, I had to take those classes as part of my MIS concentration. And I had had an internship at Motorola where I was writing macros to automate spreadsheets and things. So, I kind of was wired for that. What I wasn't so wired for was sitting in a cubicle by myself all day. Right? So then when I, two years later, went to work for a consulting firm, an IT consulting firm, rapidly expanding, I found where I was supposed to be." [#3]
- The non-Hispanic white male owner of a construction firm stated, "Been in the plumbing business for 30 years. So, I just decided that I worked for a restoration company and I just decided that I can make a little bit more money and then be a little bit better off doing it on my own. just kind of stuck in the rut of everyday life and then the company I work for you weren't getting raises and stuff like that and I just saw how much money they were making off of what I was doing for them." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Well, I'd worked for a mechanical contractor and they started... Well, I had a couple of account with them, that I just, I more or less stayed at those places. And then they kind of had some management changes at the top and they started pulling us out of the places where we were working, and I knew those places were making money. Those customers were calling me like, 'Hey, where you at? Are you coming back?' So anyway, I went around asking, 'Hey, if I go into business, would you guys use me?' They said absolutely, so..." [#6]

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Yes. Well basically I worked as customer service and operator for a small business, and we had a very large account. It was owned by a man and woman, and they were approaching retirement. Then Obamacare happened and we lost our largest customer, which is a couple of million dollars a year that we were doing for the customer. So, with all the new regulations and everything, it took away the ability for us to be their supplier, because being with healthcare, there were all these restrictions and everything. And our company wasn't large enough to invest the money that they needed us to invest to retain them as a customer. So, the owners decided to retire, and they gave the company to my partner and me." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "Well I was working for a company that was a billion-dollar company and they sold to some Indians and went out of business probably less than a year later. And so, I took what I knew and found a minority partner and started the business with a minority partner. And we just road it from there." [#9]
- The female representative of a WBE-certified construction firm stated, "So, he worked days at one plumbing company and then, when he would get off work, he had [Firm Name] Plumbing. And it was to get this up and going. And then as soon as they felt they could financially hold on without him working at the other place, they started just doing this company." [#10]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Well, I worked for other people first. I've been doing fundraisers since 1989. Yeah. I was working for a company in Frankfort, and that was a great company at first. I never wanted to have my own business. My dad had his own business and both my grandpas had their own business, and I saw how much they worked, and I didn't want that responsibility, because I mean, they worked all the time. I saw that, and I wanted to work for somebody else. I was perfectly happy doing that. Then, [another firm] bought him out. Well, long story short, that guy was an idiot. He got enough stock in the company. I first met him, and he came up to me and he's like, says, 'The fundraising division,' he says, 'I think you guys don't do things the right way.' And I'm like, well, what do you mean, you don't do things the right way? He says, 'Well, I think you should use imitation cheese.' Like, why would we use imitation cheese? I said, 'I will lose more than half the customers if do that.' Says, 'I think you should deliver by common carrier, too.' I'm like, 'Again, I'd lose all my customers. Why would you do that?' And he's like, 'Well, these other people are doing that.' I mean, he just said completely moronic things, and the guy's in charge of it. So then not long after that, he ends up taking over the board, puts them in charge, and then he's coming to me, telling me he's going to do all this stuff. So that's when I started my own company. Their stock price went from \$9 a share down to pennies. They lost everything. Their fundraising division, we were only about 10% their sales, but we were more than 50% of their profit." [#12]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "It was owned by my father originally and he incorporated in 1986. My father started in the flooring business and putting in ceramic tile and stuff in 1960." [#15]

- The Black American male owner of an MBE-certified construction company stated, "I was a younger painter, and they would never let me work. They had all kind of excuses for not letting me work. I feel like painting, so I started my own business. I would only work a couple months out of the year. Different companies, they'd find excuses for letting me go. I was always at work and always on time, never missed a day." [#16]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Actually, I was working for a construction company over in Carrollton, Kentucky. I got my architect's license, and they immediately fired me, because they just said, 'Well we can't afford to pay architect wages. You're going to find a job somewhere else. See you.' They fired me. I was working as a scheduling engineer. I think at the time; interest rates were around 18 or 19% on mortgages. Nobody was building anything. Nobody was doing anything. I went to work as a scheduling engineer and as the economy improved, interest rates came down and things got better, I got to the point where I can no longer afford to go to work. I just stepped down a bit. I couldn't afford to go to work anymore because I was doing so much work on the side. I was picking up work, picking up jobs and at that point, I just couldn't. I couldn't keep up with my side work, so I just quit my real job and stepped into the realm of being a proprietor and sat there in my basement for 10 years or so. Happily plugging away. I love the company I work for out of Scotland. I do that for 40 hours a week, and then I run my business for another 40 or 50 hours a week doing those local jobs." [#19]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "Part of it is personnel basically, and family, and part of it is educational background and what have you. It's the usual factors that got into placing somebody somewhere." [#21]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "I was working full time physical therapist with this company that owns several field nursing facilities. To tell you the truth, when I decided to go for this degree, actually it's because of the notion of helping people and giving them the best quality of care to get back to their feet. And give them the best life that they can get. I'm not generalizing but most of the... cause I've been to several nursing homes and we do give them the best quality and the fastest way to get them up and going again. It's just that it's limited. My knowledge as a physical therapist, I know I can do more and being a full-time physical therapist in a nursing home facility setting, my knowledge is not being used." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "I wanted to go to AmeriCorps, and I was like trying to figure out how to get money to go to school. And then I kind of looked into it, and then I saw it had Horizon House as one of its providers. And that dealt directly with homelessness. And so, I went, and I became a homeless street outreach person for Horizon House. And why tell that story is because I think it's so important. It was really what drives me, is one, when I had my Horizon House time, and Horizon House built this building where all of these different services, and still there, where all these different services are going to be under one roof, where a person who's dealing with homelessness could come in and receive services, and Goodwill Industries was doing the job portion. Well, nobody at Goodwill wanted to [do the work] and police wanted to come over to and serve the homeless. I was 18 out of my AmeriCorps time, and I applied for the job, and got the job. And then that's when I realized the power of work

in our people, putting barriers in place, and certain people don't want to work with them. And so that started my career. And then I ended up working with Goodwill. Goodwill had the Work One, and I stayed in the Work One system. I stayed in that Work One system for 13, 14 years. And so, I realized that many of the folks that I was trying to help find jobs did not have the skillset that the employers were looking for. And then I saw in the Work One system, we were paying for job training. So, I got myself on the other side of the desk and my firm, started off, I made a partnership a leader here in central Indiana, [who does] welding and gases and supplies. And I made a partnership with them. And we provide welding training and forklift training, and it was going really, really well. And then I bought nurse aid training because I had something that was kind of male dominated, but I didn't have anything that were more open towards female. Not to take away that we have female welders or anything, but I bought nurse aid to try to stay in program, to get to be more diverse in the programs that are offered, is just a better way of saying it my vision is to be able to train a welder and place a welder. Train a forklift operator, place that forklift operator. Train a nurse, place that nurse." [#23]

- The Black American male owner of an MBE-certified goods and services company stated, "We started in 1998 doing this work from a previous background along with the military. Basically, over the years, a variety of things that I've witnessed, including guard services that didn't have the professional look and presence that I thought customers were paying for, meaning uniforms, grooming and appearance. And I figured this stemmed from being in the military and having a crisp appearance. And so, I decided to start the business and transition away from the police department." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "Well, [our founder] was a partner at another advertising agency in – actually, it was in Brazil, Indiana. He decided to part ways with that agency. He has deep roots in Terre Haute and didn't want to live anywhere else. He still lives in Terre Haute. So, really, there weren't a lot of opportunities for him at an advertising agency there, because it was such a small market. So, he created his own." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I am ex-police officer in the State of Michigan. When I got out the military, I went back to my hometown in Michigan, where I applied for a position as a police officer. I just have an extensive background in law enforcement. And I just decided to – just to branch out on my own, to open up a security guard company since I had the background. And that is something that I just wanted to maintain in my life as a business owner, owning my own business. That was one of my goals that I set when I got out the military." [#28]
- The Black American male owner of an MBE-certified goods and services company stated, "We were a manufacturer of chemicals. And so, when I moved to this city, Indianapolis, a big part of our business was distribution. I was in sales at that time, having first worked at the plant in and out of the Cleveland area, at the tech center, and two research centers in the Cleveland area. In sales in this area Indiana that I covered, about 50 percent of our business was through distribution. And so that made it nice for what I'm doing now in that I knew those companies from the lobby all the way to the loading docks. And with my technical background that was a blessing, as well. At that time, I was not thinking about competing with my customers. And so, you asked to hear the real story. The real story is this. I had an

offer from a company in Michigan. And I would've made about three times what I had ever made in my life. The offer was \$300,000.00 plus commissions to be their president. And so, a little old lady on the West Side on Rader Street, 29th and Rader, called me and said take them out there to dinner. Said take 'em out there to dinner. I took 'em to dinner. Had the offer in my pocket. I was gonna say, 'Pray about this.' That was gonna be my request when I got her home. But before we got home, we were heading back east from Red Lobster on West 38th Street. And she said, 'Pull over.' We pulled over. And so, we prayed for about 30 seconds. And she said, 'God said don't take that offer. Start your own business.' I hadn't told her I had an offer, no – nor anybody else at her house. Felt like my hair stood up on my head when somebody tells me, 'God said don't take an offer. Start your own business,' who you hadn't even told you had an offer. But having said that, you asked how I started the business. That's how. I didn't have money I went and talked to several of my customers that I had had in my previous jobs. And all three of them mentioned the same person. They said, 'Man, if you and [my future partner] get together,' they said, 'Nobody will be able to stop y'all in the chemical distribution business.' And I had only talked to [my future partner] one time in my life. It was about 30 seconds. And we met, and we met at Outback. And we talked about starting a business. He said, 'Let's get the bosses together.' We got the bosses together, which was the wives." [#29]

- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "I've been the president since 2017. I worked prior to that for several years but myself and my business partner purchased the stock in 2017. I started out as a laborer in the firm. It's a family business. My grandfather and father started it. I worked for it in high school as a laborer and then just continued to work. I have my degree in engineering and then worked part-time when my children were small. And then, started doing accounting and administrative work. That's the same thing I do now is just administrative accounting. He had worked for a different contractor and broke off and formed his own company." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "For starters, I actually started in business after I had completed a tour of duty with US Steel as a manager. And when they got involved with technology and started to downsize, I was able to retire early." [#32]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "I bought the business after I left my position at the local newspaper, and this was an easy transition because I was in ad sales at the newspaper, and this is kind of the same thing. I was able to deal with my same clients that I had at the newspaper, so it was a nice transition." [#33]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "It started three gentlemen and then two of them – or one resigned. Then the other one, we split, and I bought him out back in – let's see. We started in 1994. I got on my own in 2000 and been operating on my own since then." [#34]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "I've been in the trade for 25 years now. Worked for about three large – one of the largest contractors in the Chicagoland area. Been through every facet of the trade as far as apprentice, all the way to division manager. I felt that I was already topped-out and that's

something that I could not move forward without making a decision for myself. So, that's when I eventually started to go into business for myself." [#35]

- The Hispanic American male owner of an uncertified-MBE construction company stated, "Well, I was working as an electrician in a type of RV company, which is not an RV. It's really an automotive company. I was also working on 120 volts on all the stuff, and I started trying to learn how to become a certified electrician. I studied by myself, the code, and that's how I could get my license, and was able to go through all that, study by myself, and get my certification. Then, I started working, like part time, in my own company." [#37]
- The Black American male owner of an MBE-certified professional services firm stated, "I graduated Perdue University 1990, May of '90 as a civil structural engineer and started working at a firm in Chicago as a junior level engineer, and progressed to a senior level engineer, and eventually moved on to jobs in the Indianapolis area at an architectural firm, two different firms. So, from that, obviously, I gained my experience as an engineer, a civil structural engineer, working various projects. And it was spring of 2014, the company I was working at, at the time, they decided to remove all of the civil structural engineers in my department. And at that point, I was the department head. So, that mean they cut the department. I decided to start my own firm. And I started it alone. I didn't bring any of the staff members. I mean, I was pretty much on my own when I started. You know, at that time, I had been working more than 20 years and had quite a few contacts within the industry to be able to find and do projects on my own without being affiliated with the company that I was working with before. So, the reason was to continue to do what I had been doing for more than 20 years, but as my own company." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I had worked for another furniture company and they went out of business. An opportunity arose for me to actually open and start mine." [#39]
- The non-Hispanic white male representative of a construction company stated, "It was originally started by two gentlemen. They started the company. Upon their death, the daughter took it over. And about five years ago, she sold the business to the general manager at the time" [#40]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We started out as a web development agency, and my husband and I started this company in order to just meet the needs of small business owners and other organizations that were serving small business owners. We felt that web development and marketing solutions could be more affordable and more accessible to small community organizations and owners. actually, it wasn't our first company, so it was a pretty smooth start for us. We knew what we were doing going into it." [#42]
- The male representative of a majority-owned goods and services company stated, "He was in the furniture industry. He had done manufacturing and sales, and then decided just to branch off on his own" [#45]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "He – my great-grandfather was always in – he was in advertising and had clients between Chicago and Indianapolis and Detroit. So, he started his own firm and left

Chicago, picked Warsaw because it was, you know, the geography of it. And that's how we became here" [#47]

- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "He had worked in this industry all of his life." [#49]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I started with a generating station, as a janitor, in 1970. And when I was 26, I was promoted to be master mechanic at that power plant, and I had roughly 200 people under me. And at that time, it generated 1,000 megawatts power. That's with all units running on time. And in 1998, the company sold off their division, and my part was one of the branches that they bought, and they contracted me out to be a consultant for them. And that's how I was able to afford to start my company." [#61]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, I had a much larger firm until 2001. And we were running into some – well, it was some company challenges. And we had too many highly compensated people in the firm, and somebody needed to leave. And, well, I was pretty much the lead marketing person and project person. I really felt like we needed to turn a corner. And while we looked at other options, I just decided that I like being an architect more than an administrator and a marketer. So, I decided to leave and start this firm." [#63]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "we all met at another job and we decided to go off on our own many years ago." [#67]
- The Black American male owner of an MBE-certified construction firm stated, "Well, what led me was back in I want to say 2018 I was driving – actually, I was putting together RVs, FedEx, and UPS trucks. And I wanted to branch out, so I started a transportation where something like RV drivers, picking up RV drivers, especially from O'Hare Airport, picking them up individually – individuals, not individually – but just providing a service where I can go ahead and pick them up from the airport and taking them back to their destinations basically, and just making sure they're safe, making sure they're getting there on time so they can get back out on the road and make money and be as safe as doing it. Then I proceeded to go ahead and, as far as transporting people, I got out of transporting people and then I started transporting goods, pallets, whatever they needed to go, whether it's deadbolts, doors, or whatever they have on the skid for me to take. Took skids, and just rent a van, take it where it needs to go, and basically go ahead and go from there." [#69]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Well, I'm a doctor in physical therapy, and so the company started as an independent contracting company, like on my own. And then, now we structured last year – I mean, we changed the model of the business, basically, last year, to include other specialties in addition to therapy services. So that led to a major growth. And also, we registered with the federal – got our CAGE codes and everything, so we are ready to do some federal work right now." [#70]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "Had an opportunity. Had experience in the low-voltage and electronic fields through being in the union, and just saw that there was more opportunity to make money

on my own, and a little bit more fairness in working for yourself, and decided to start a company to install low-voltage communications.” [#75]

Other motivations. There were also other reasons and motivations for the establishment of interviewees’ businesses. [#2, #5, #13, #14, #17, #30, #36, #41, #43, #44, #46, #48, #65, #68] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Retired from the military after 28 years and opened up the business. Just said, "This is where I want to be," and we opened it up as a chemical distribution business. Initially we were just going to be doing primarily chemicals. I don't have a chemical background but we thought there was a soft spot for it with government contracts, and got a relationship with another minority chemical distribution company They were going to mentor us, mentor, protégé kind of thing, and help us get things ... We did that for quite a long period of time, and that's a great relationship, but the chemicals that they specialize in was not ... Did not have that much of a demand in the federal government space, which is where I had a preference. We started moving in other directions where there were economic opportunities.” [#2]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "I was in the radio broadcasting business and I met a guy from Texas. At the service stations I was pumping gas and he was [there.] I was much younger of course and anyway he had a Texas license plate, and I had an uncle that lived in Kirkville, Texas who had a range down there. And so, you never know if somebody might know him. So, I asked him where he was from and he told me he lived in Dallas, Texas. So anyway, he didn't know my uncle of course but he said he was up here to train some salespeople for the promotional products business. And he worked for a company there in Dallas [but] they're not in business anymore, I don't know what happened. But they were good to work for. But anyway, we talked awhile and there were two things that he said that really drew my attention. And he said number one you'll be your own boss. Number two, you had unlimited earning potential. Just strictly up to me. On how much work and effort I'd want to put into it. So, I liked those two suggestions and like I say I been doing radio broadcasting and selling advertising for the radio stations. And anyway, I decided I'd give it a try and he gave me a catalog, an order forms and basically all the information is pretty much in the catalog, the supplier catalog. And so, I tried it on a part time basis and I think after about three or four months I told my wife, I said, 'I think I can make a living at this.' So, I left the radio business and started selling promotional products and that's, started my own business after one of my managers, who was a former marine as well, came up with cancer at a pretty young age and ended up dying. And so I really missed him and I thought well, I enjoyed working for him, I think I'll start my own. So I went to the customers that I'd been dealing with and I asked them if, I said I'm thinking of starting my own business. I just wondered if you'd buy from me. And they said, 'Well we're buying from you now.'" [#5]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I worked for a company for nine and a half years before that? And while I was there, I was the customer service manager, but I also handled all of their literature inventory, and all of their mailings that went out. And I tried to do all that and handle my customer service job

that had 14 people in it. And so, I started to look for a service like ours, and they kept telling me that my mailings of 3000 pieces were too small and that they didn't want to fool with them. So, I started my company and what I did was talking to our competitors and literally saying, 'These small mailings that you have and don't want, we would love to do them for you.' And they would actually reverse in the beginning until we started to grow as big as they were, and they didn't like that. And what we found was that a lot of people that started off the 3000 piece of mailing they would try you out on that and test things. And then once they tested them, back in 1986, you could say you would have a one to 2% response on everything, even a non-targeted list. And you could just count on that. So, once they got at work in and they would just get more names and more names and keep on mailing." [#13]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "We moved to North Vernon when I was three, my brother had just been born and my dad worked at the railroad. North Vernon was a big railroad town. He worked like 25 years from the railroad, but in the late 60s ... he worked second shift in the evening, so it allowed him to have some time during the day, and he started doing some light handyman contractor work. It kind of started growing from there, and then in the late 60s the railroad kind of was reducing, and changed his job, or his job moved, and he could have went to another area with the railroad- pretty much settled in North Vernon and just decided to stay there, start doing construction full time. So, he would do ... when we joined him, he was just doing about a quarter of a million dollars a year in construction work as a residential contractor, purely as a residential contractor." [#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I worked at a major car company as a senior industrial project engineer for 36 years. I retired in '18 from there. And right before I retired, I went ahead and started my little own LLC, not sure what I was going to do with it. You know, thought maybe I'd do some consulting or whatever." [#17]
- The Black American male owner of an uncertified MBE goods and services firm stated, "We purchased the initial company under another name, rebranded the company and then created our current company." [#30]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Actually, I was downsized working with a cell phone company in the advertisement world for 14 years. Then, after being downsized, I couldn't find anything that matched up, and ended up purchasing our company." [#36]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "My background is sort of military/law enforcement investigative. But my husband was in construction. I had worked for the attorney general's office as an investigator and I left there and went to an insurance company. So, I went from being a field person to a little-bitty cube with a lot of files. It was like being in a tomb, to be honest. My husband called me up one day and said, 'Hey, I'm going on a new construction job and there's a cleaning contract attached to it.' My first response was, 'I don't do that.' He said, 'Well, it's about \$40,000.00 and it's just a 6-month job. That will give you the opportunity to figure out what you want to do next.' I couldn't just quit because (a) that's not responsible, but (b) I made the most money and I carried the insurance. So, to be honest with you, after a lot of prayer and trying to determine what I was supposed to do, I incorporated, gave a 60-

day notice, and here I am. Started the business. I think I put approximately \$3,500.00 on a credit card to buy buckets and brooms and mops and all that stuff. That was our beginning.” [#41]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Well, 1953. Jews couldn't get jobs just about everywhere, so a lot of people started businesses. So, there was a family member in the business; it started as a bowling shirt company, selling shirts to bowling companies." [#43]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "I was in between accomplishments. I had sold a company that had nothing to do – it was a plastics manufacturing company. I was a partner and I had enough. I had a check, and I was sitting there not enough to retire but I had to figure out to do something. I got into construction, and as I got into construction in the early days, like I said, 2012-2013, we realized that if we did not have our MBE, we weren't going to be able to apply and compete on certain areas. It's a very crowded field and so that's why we decided to do that. So, I got started because I needed something to do because I needed a job and I started this company. I bought the company from someone else who was a non-minority." [#44]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "Well, I own an antique shop in that particular strip mall. And not to get too personal, but I wound up closing that. The lady heard through my landlord that I was closing, and she sent a message through my landlord that I come down and speak with her. And as it turned out, we knew each other. She was actually my nurse years ago when I was taking allergy shots. And unfortunately for her, she was going blind through retinal detachment and knew she was going to have to close her store, and she asked me if I had any interest or knew of anybody that wanted to buy her store. It was in a 740-square-foot end at the end of the strip mall. And I kind of observed it for a couple of days, I wanted to see what kind of traffic she had and look at her books, and I saw absolutely really no growth for the last three years. And I could understand why; she was in 740-square-foot, it was so packed in there you couldn't shop it, and I decided that I could do better for her – for me. So, I bought it." [#46]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "We just saw a need in the market for integrated urban planning and civil engineering services" [#48]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "I'm a doctor and I wanted to build a platform to share educational resources with everyone else." [#65]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I got terminated out at the mill and then, I planted trees for about a year and my sister was looking in the paper one day and called me and says, 'Drywaller needed. No experience necessary.' And I called them and I probably – within a week, they called me, and I went out and tried out and been doing it ever since." [#68]

3. Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

Businesses reported working on contracts as small as several hundred dollars to contracts approaching one billion dollars. [#1, #2, #3, #5, #6, #7, #9, #10, #13, #14, #19, #27, #30, #31, #33, #38, #39, #41, #44, #45, #47, #48, #49, #60, #61, #64, #65, #67, #69, #FG2] However, most firms reported an upper threshold for contracts at around \$5 million or less. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Sometimes we'll do stuff under \$1,000. our biggest contact was about 700,000." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "We provide probably a five, six, \$700 order to a hospital two or three times a month, that's a low order. We provide a high order to people like big engineering firms, and that could be \$8,000 a month. It depends on the project" [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "it varies greatly. probably around \$25,000. It's not highly profitable work for us, but it helps us to really understand where they are and help them, which I love to help people, and I truly believe there's lots of opportunity beyond that. If we were to implement a new software package for them, build some custom software, depending on if it's just a customer portal where we're building a front end and plugging some things in, that might be a \$200,000 job. If we are building out all of their custom software, we did another project last year. I think it was \$1.8 million, and we did a platform to manage all of their data. And then there was a customer portal piece to that and some visualization. So, that's a larger project." [#3]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Well they vary everywhere from a couple hundred dollars up to a few thousand dollars. There's no set fee because, like I said, I deal with a lot of different businesses, small and large. Small businesses, like I say, might be a couple hundred, two or three-hundred-dollar order. And a couple of larger business might be four or five thousand or more." [#5]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "About 2 million and down." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "About \$4,000. I've had some invoices would be as high as \$8,000 okay. So, it really just depends. I mean with printing, there's so many variables that you've got to consider. The cost of each piece, the cost of the paper, the cost of the time involved to put it together. And how much are you paying going to pay to have the printing actually performed. I mean you have click charge because a lot of stuff are on digital, so you figure it's a click charge plus the paper plus finishing time." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "I mean depends on the customer. It depends on what kind of contract. We have a motto that's one customer ten times, not ten customers one time. So, we'll bid anything for them that they need done that's in our skillset. Then it ranges from 100,000 to 2 million and 3 million. " [#9]

- The female representative of a WBE-certified construction firm stated, "Our largest contract, for the rental homes up here in Howard County. And I would say that we're probably dealing with over a hundred homes with that contract." [#10]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Well, we do anything from 100 or say 1000 pieces up to millions, 50 million. We do millions for people as well. We have contracts that we're working on all year long." [#13]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "We always say no contract's too small, so we'll do small work. When you make the larger contracts that we've had, we have gotten contracts in a joint venture mode, and I guess hundreds of millions of dollars; but we've also done contracts by ourselves in the \$40, \$50 million range." [#14]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Last year I did a \$5 million job. I'm very capable of handling a multi-million-dollar contract. I've done \$500 jobs, typically I like for a lot of my contracts to stay four to \$6,000 jobs, which is like a week's work or something a little bit less than a week's work, maybe spread out over two weeks. That's the sweet spot that I've been experiencing jobs that pay more. The fee on that \$5 million building I think was over 200,000 and to me, that was like a three month, four-month job. I had consultants to pay out of that too, but it's a great job and I maintained a really strong production rate. I like \$20,000 jobs, \$30,000 jobs. Usually every year I do a \$30,000 fee job." [#19]
- The non-Hispanic white male owner of a professional services firm stated, "Our ideal client provides about \$250,000.00 in revenue to the agency. So, we have some clients that are smaller than that and some that are larger. But that's kind of our sweet spot in terms of a client that we're most effective for." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Currently we will bid on anything up to a couple million bucks." [#30]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "We bid on all of our work and it's anywhere from small, subcontract agreements from \$50,000 up to probably \$5 million in a single contract." [#31]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "It ranges. For instance, if someone is ordering ink pens, they'll order 1,000 of those. The largest apparel order I've done is 500 t-shirts. It just basically depends on the need of the client. My vendors that I use can do large and small orders." [#33]
- The Black American male owner of an MBE-certified professional services firm stated, "It varies. I mean, you know, starting a company, you have to – and I've known this for some time, even before I started the company. You're gonna have to pretty much take what you can get. So, I really wasn't very choosy in the beginning, and still not so much. But, the size, it goes up – the biggest projects I've done is in excess of \$100 million. And some of the smallest can get down as low as, you know, \$2000.00 to \$5000.00 as far as the contracts are concerned." [#38]

- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "we had some contracts as small as \$10,000.00, to where we had some that were \$2.6 million." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "So, the largest – well, they vary. In the beginning, as I said with that initial contract, it was a final clean on construction. Those are by far the quick and most substantial contracts. We were on one last year. We were given a hotel across from Conseco Field House. That was about \$45,000.00. It was two months, maybe three months we were down there doing the final clean on that. Our other clients are commercial housekeeping and janitorial, evening time janitorial. So, I don't have figures in front of me. I don't have any of that with me. But typically, I think our receipts, if that would help you, with all of our clients – and we have 11 or 12, I would say, last year – was somewhere around 306,000." [#41]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "We can do jobs up to \$1,000,000.00 because of our bond" [#44]
- The male representative of a majority-owned goods and services company stated, "I mean, we do small projects from \$5000.00 to we just finished a \$2 million project earlier this – at the end of last year. But our average size is probably in the \$50,000.00, \$60,000.00 range." [#45]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "Anything from \$50,000 to several million a year." [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "It ranges anywhere from \$1,000.00 to we've had a large contract of \$1.4 million." [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "It could be anything from a hundred dollars to a million." [#49]
- The female representative of a majority-owned construction company stated, "Usually from \$1,000.00 all the way up to \$250,000.00. Or it could be up to a million." [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, "They vary tremendously. As an example, our highest one was – let's see, in 2009, and that was an \$8 million year for us, \$7 something, close to \$8. We did two turbine outages, major turbine outages, for an energy company, and, yeah, I had a spring outage on unit three and a fall outage on unit four. And then other work, because the outages are seasonal, other work would be like working for the steel mills on smaller turbines, like a lot of the glass furnace blowers, they're run by small utility turbines. So we get one of those, you're looking maybe \$100,000.00, somewhere in that range. So that's what I'm saying, it varies from year to year." [#61]
- The male representative of a majority-owned professional services firm stated, "They'll range anywhere from a couple thousand dollars to a million dollars." [#64]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "It's a subscription model. It's, like, \$1,000.00 per institution" [#65]

- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "We do everything from – you know, when you live in a small town sometimes you do work for local businesses, which would consist of just helping somebody with a brochure or something. But the majority of our business is business-to-business, with customers all over the country. We also do international work. And so we have pretty big jobs that can take months to do and are pretty sizable, because we do branding, strategic branding and planning. And so those jobs can go over the course of a year at a time, with planning and then fulfilling those projects, everything from websites to brochures to research to everything. So it can be – like I said, we've done stuff for small jobs, just because we're part of a community, but the majority of our business has been long-term with our customers that can get to be pretty big projects." [#67]
- The Black American male owner of an MBE-certified construction firm stated, "I've been called to numerous jobs, but it's never a contract or anything; it's a company that called me just because they need some Amazon trucks out and they feel like I can follow five guys up to Chicago and bring them back for probably \$75.00-\$80.00 apiece. That would be a contract, like a day contract for me to just go ahead and get out there, just follow five guys because they've got to get back out on the road and so forth" [#69]
- A Black American male respondent from a focus group of MBE-certified goods and services firms stated, "roughly about 60,000 a year... to half a million, about 560,000" [#FG2]

Most firms reported working on contracts solely in Indiana. [#1, #4, #6, #10, #11, #12, #15, #16, #17, #26, #30, #31, #38, #41] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Primarily just Indiana." [#1]
- The non-Hispanic white male owner of a construction firm stated, "I travel all over the four surrounding counties of Marion county." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Indianapolis and the surrounding counties, central Indiana. Central, southern Indiana. We don't go north into like, South Bend or anything like that. It's just too hard" [#6]
- The female representative of a WBE-certified construction firm stated, "We rarely go out of Howard County. If we do, it's to a community that is very close to the Howard County line. And then we always charge a service charge or a trip charge to go there. Like we go to Peru. It is in Miami County. And we've charged a \$50 trip fee to go up there." [#10]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Central Indiana. I am in Greenfield today, so on the opposite side of town." [#11]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Everywhere except Indianapolis and the surrounding area. I have the rest of southern Indiana, basically" [#12]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We try to stay within a 50-mile radius of Evansville." [#15]

- The Black American male owner of an MBE-certified construction company stated, "If I get a project in Marshall or Dublin or whatever, I'll even drive up into Indianapolis to get on the list for people" [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I think depending on the size of a project, I can see us going as far south... I wouldn't even say south. I think Indi's reasonable, with 69 now. You know, I think Terre Haute is reasonable. Vincennes. Evansville might be a little far. Down almost to Louisville might be a little far, just because there's not a good... especially Louisville, there's not good travel space for us to get down there." [#17]
- The Black American male owner of an MBE-certified goods and services company stated, "If it's something long-term, and like I said, long-term is somebody that's going to stay nine months to a year on a project. We may go, you know, two or three hours, from one end of the state to other end of the state. Typically, we stay within a county or two, just because we have to go out and recruit somebody to work that area that's not a typical area we work in. But like I said, we find something we can partner on long-term and then we'll definitely go out and make that connection. We kind of stay close to the Indianapolis region area of the county, donut counties." [#26]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Normally we focus on the state of Indiana, Marion County specifically, but we do other sites shipping US ground, UPS ground." [#30]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "100-mile radius but the farthest we've ever worked is Indianapolis or all the way to the Ohio line." [#31]
- The Black American male owner of an MBE-certified professional services firm stated, "Primarily, I've been fortunate enough, once I started the firm, I was doing quite a bit of work in northern Indiana. You know, Gary, East Chicago, Hammond, Hobart area, South Bend. And so, I had quite a few contacts up there. And I've even done work down in Vincennes, Evansville. Pretty much all over the state of Indiana. I am registered in other states, but I have not had to do work in those other states since becoming my own company. But as far as Indiana, all over the state, from north to south." [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "We've gone as far as Greenwood, south; Crawfordsville, West; Muncie – we were in Muncie last summer on a job – North; and probably not much South of 465 in Marion County is East. That's probably as far East as we have gone. So, we're willing to travel, providing that it's profitable for us to do that." [#41]

Several firms reported working in the Indiana marketplace and with clients outside of the state.

[#2, #3, #5, #7, #9, #13, #14, #19, #21, #27, #33, #39, #47, #48, #49, #60, #62, #63, #67, #70, #72, #FG1] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We focus on Central Indiana. We have CAD operations in Raleigh, North Carolina had an office there for a while, had a handful of clients and made the... it was difficult to manage both offices. I say that and I'll tell you as well, that we've done work I think in seven different States, that has always been by invitation of a local customer. And

then if we're traveling, we're gathering requirements and we're doing it back here, or we're hiring somebody for a period of time in that market." [#3]

- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Well I deal all over the country to be honest with you. But the majority of the sales of course are here in Indiana. I don't know, say within about 100-mile radius of where I'm at." [#5]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "But I'll be delivering the job locally to their Indianapolis office. And then I've got customers down in Louisville, and I've got customers in Michigan. And then sometimes, like the customer I'm going to be working with today, I have to send sometimes to New York and to Texas for them. So, I don't try to limit, but the majority of my customers is basically central Indiana. I physically deliver to central Indiana, ranging from Plainfield to Oak Landon to Zionsville, Carmel, Indianapolis, of course" [#7]
- The Native American male owner of an MBE-certified construction firm stated, "They have offices in Arizona, New Mexico, Indiana, and Washington. They're satellite offices, but the corporate office is here in Indiana. Anywhere the Indian Nations are at, we are." [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We started out just around a 60-mile radius to 120 miles. But a lot of our customers they like moved to another state. They worked for a company and this radius and they would move to another state, and then they would just call us up, and say, "We want you to handle this company now that I work for." And so, we have a lot of national customers as well as local. So, we have as many national customers, if not more than our local area" [#13]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "we work pretty much all over North America because we do a lot in the retail markets." [#14]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'd probably go a hundred miles to do jobs in person. I do jobs in North Carolina and South Carolina, job in Florida and I do job in Georgia." [#19]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "For about the same time for I would say since roughly since about the same time I registered my business in Indiana, I have been involved in international work. Less so since 2015." [#21]
- The non-Hispanic white male owner of a professional services firm stated, "You know, it's – the furthest away that we have a client is Nashville, Tennessee. But we – the vast majority of our business is within the State of Indiana and all the way down to – from the Ohio River up to Lake Michigan." [#27]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "I can actually do all over the United States. Once I place an order with the vendor, I work directly with the factory to make sure the order is correct, and then they can direct ship right to my client." [#33]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Pretty much the Midwest, but we'll go anywhere. But the Midwest area." [#39]

- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "I mean, I've got clients in Florida, California. I would say continental U.S. I've got a client in Geneva, Switzerland. But, primarily, I would say within 150 miles of Warsaw, we'll go after anybody." [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "far as California" [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "I say in the Midwest, mainly Indiana." [#49]
- The female representative of a majority-owned construction company stated, "We like to stay in Indiana, but since it's been pretty scarce, we are looking further out of Indiana from the Merriville region, the Northwest. Illinois. Ohio. We just haven't found anything yet to bid. But that's what he's willing to be." [#60]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Well, with the advent of the computer, we can do business nationally. Our typical projects are within a 100-mile radius, but we've, you know, done stuff in California, done things in New York, so." [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I do work anywhere here in Indiana and also in Ohio. I'm registered in both of those states, currently." [#63]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "The majority of our business is business-to-business, with customers all over the country. We also do international work." [#67]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We do business in almost 38 to 39 states. We are registered in other states, but we do not have physical locations there." [#70]
- The Black American male owner of an uncertified MBE construction company stated, "Multi states because I'm just trying to go – try to do my business within the 48 states, you know I'm saying? What the contracts allow. Because I'm not trying to just limit myself due to if I get a contract and they need me to go from Kentucky to California, from California to Philadelphia, you know? So, I don't want to limit myself." [#72]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "We primarily practice throughout the Midwest, but we are branching out slowly to other States" [#FG1]

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 (50 of 58 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 (40 of 58) of businesses had 1-10 employees. [#2, #4, #5, #7, #9, #15, #16, #17, #19, #21, #22, #23, #26, #31, #32, #33, #34, #36, #37, #38, #42, #44, #45, #46, #47, #48, #59, #60, #61, #62, #63, #64, #65, #67, #68, #71, #72, #73, #74, #75] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "We have three employees, trying to grow to five. We got a couple independent contractors as well." [#2]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "I'm a distributor so at this point I don't have too many, zero. Me. I got part time a couple of people that help from time to time." [#5]
- The Native American male owner of an MBE-certified construction firm stated, "Now we have three. But we run about thirteen usually." [#9]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I have about four full time and then we've got other guys we call in for other jobs that have worked for us before. Or if we have to work weekends and these guys aren't working on the weekend will go in. They all have to be union and they all have to pass all the tests and everything. You know, that pee in the cup test." [#15]
- The Black American male owner of an MBE-certified construction company stated, "I can't really say I have any. But I do have people that I can call, and normally there is anywhere between eight to 10 people I can [get for] work." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "All three of the guys are firefighters. They're all on the same shifts; so, they work one day for 24 and then they're off for two days and then on and off some part time things, maybe two more people." [#17]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's just me. If I have a need for extra help, CAD guys or anything like that, I have guys that do that, and I have engineers that I consult with. With the computer age and everything, it makes that all doable" [#19]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "As of now, I do not have any employees of my own. Energy consulting is very much a subject matter focus. What happens is that it is more difficult and expensive to maintain [a number] of employees. A group or a staff to do that. What happens you see, especially if you are talking about small scale or highly specialized is for basically energy consultants to come together to perform a certain assignment." [#21]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "Right now, there's two full time and several part times. We called it BRN. We call them if we need them." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "As we speak today, I'm decimated, I'm down to one person that actually works for me, in the actual business side, on the administrative side... I brought that up like 10-22 'employees' actually working right now. I don't have any employees on the training side right now. I 1099 my instructors. So, I don't have employees." [#23]

- The Black American male owner of an MBE-certified goods and services company stated, "It fluctuates. At our peak, when we're doing a lot of traffic control, we have about 35 to 40 but now we're down to about 10 to 8. We just do a lot of traffic control stuff right at this moment." [#26]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "We have seasonal employees; but we have seven foremen and probably 25 seasonal employees that return every year. We have probably about 30. They're all hourly employees except for my business partner and I. And they're also union members except for my business partner and I. They are full time in the regard that when the weather allows, they're working. All seven of them we try to keep busy most of the time, the foremen. Most of that 20 to 25 stay busy at least nine, 10 months out of the year. They file unemployment when they're off which is just how most union guys do." [#31]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Currently, including myself, about ten people." [#36]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "I just manage only me. Once, we were three. But, at this time, it's only me" [#37]
- The Black American male owner of an MBE-certified professional services firm stated, "Currently, it's just me and it's been me since the beginning. I know you're saying, 'Wait a minute. How can he do so much work if it's just him?' Well, actually, I've got quite a few contacts in the business and depending on the size of the project, I'll bring people in as consultants." [#38]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "One other. So two total." [#46]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Currently, one. We've had up to eight." [#59]
- The female representative of a majority-owned construction company stated, "The total – well, he hires people from the Hall, so basically, he has only four employees that are here constantly. The other ones are depending on the job; we'll hire from the Hall. So, it can range from definitely we have the 4 to 14, 15 depending on the job itself." [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Typically, permanent employees are about three, but we contract craft labor. So, if I'm doing a [big job], it can range up to 60, 70 people." [#61]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "One at this point. I have teams that I put together, but I don't have employees on payroll" [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Just three of us" [#63]
- The male representative of a majority-owned professional services firm stated, "We currently have ten." [#64]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Just one. Just me." [#65]

- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Currently there are three of us, but we have had up to 15. As we are approaching retirement we are winding down." [#67]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I actually retired. I get a big enough job; I get a little bit of help here and there. I mainly do it myself." [#68]
- The Black American male owner of an MBE-certified professional services firm stated, "Full time or part time? Well, basically it would be four." [#71]
- The Black American male owner of an uncertified MBE construction company stated, "No employees, just myself as of now." [#72]
- The Hispanic American male owner of a uncertified MBE and VBE goods and services firm stated, "Right now it's just me, during this corona virus part." [#75]

Eight interviewees reported that their businesses had 11-25 employees. [#6, #10, #12, #28, #35, #39, #40, #41, #FG1] For example:

- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Depends on the time of year, but anywhere between five full-time and up to as many as eight part-time, in addition to those five full-time." [#12]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "Presently because of a layoff we only have about 15 workers on our staff. But we normally average between 20 and 30 employees." [#28]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "We've got 12." [#35]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I have about 14 employees." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Approximately 18." [#41]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "20 people about. So, a small to medium sized firm." [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "Our firm is about 25-person firm." [#FG1]

Two businesses had 26-50 employees. [#1, #70] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "It varies. Very seasonal, but in the office, we have one, two, three, four, five, six, seven of us. 35 or 40 [in the summer]." [#1]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Right now, 32." [#70]

Five businesses had 51-100 employees. [#3, #13, #18, #24, #66] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We have, right now, probably just shy of 70." [#3]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We have 84" [#13]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "Just out of the Indianapolis branch, we manage and service over 3,500 elevators and escalators. We've got 49 field personnel. So those are just technicians. And then we have roughly, I'd say maybe 14, 15 people in the office." [#18]
- The female representative of a Native American-owned MBE- and WBE-certified professional services firm stated, "We have temporary associates working. We have almost a hundred of those working right now." [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "In Indiana, we have 60." [#66]

Three interviewees indicated that their firm had more than 100 employees. [#14, #29, #49, #FG1] For example:

- The Black American male owner of an MBE- and DBE-certified construction company stated, "We have about 90 professional people, which are accountants, and project managers, project manager's assistants, and that type; and then we're all union contractors, so we usually employ about ... in the summertime, we'll get up to 350 to 400 people in the field." [#14]
- The Black American male owner of an MBE-certified goods and services company stated, "in total we have approaching 200 employees. At this location, our headquarters, we've got about 41, 42 employees." [#29]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "It fluctuates, 250." [#49]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "We've grown from 15 people in my time to now about 180" [#FG1]

5. Growth of the firm. Business owners and managers mentioned the growth of the firm over time. [#1, #2, #6, #7, #9, #13, #16, #26, #27, #28, #29, #30, #31, #32, #33, #34, #35, #36, #37, #38, #39, #40, #41, #42, #43, #44, #45, #46, #47, #48, #60, #62, #63, #66, #67, #70, #71, #75] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I'm probably a little above average. When I sold my company in '05 we had built this customer base where... the interesting thing about the highway industry is once people get in it and get with a company, sometimes they stay for a long time, sometimes they move on. So, but they always move on within the industry. So, we have these relationships we've built for 35 years and we know that very few people we don't know." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I don't know of any other minority that's in this space, per se, that has this

same kind of footprint. I will tell you it's profitable. It will hurt if I can't keep my primes because of that INDOT decision. We'll work through that." [#2]

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Our load varies a little, but it does not change a lot. It just doesn't. We know who the customers are out there that have [the type of] systems [we work on]. There ain't that many of them. unless I wanted to put on more plumbers or something like that, and I just wanted to get into the competitively bidding business on the mechanical side, I'm not going to... I doubt we get much bigger. I think we'll stay right around where we're at." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Consistent. Like any other company, it has busy periods and slow periods." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "We've not quite doubled. We target three years and increasing in size, and then we take a year or two to vet through the hurdles and we try to grow again. Our target now is 5 million this year where we did 4 million last year. So, we try to grow to a million, a million a half a year." [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We've typically grown every year since I've been in business, but now as large as we are, we have to work really hard to keep growing more, and everything is supposed to replace direct mail. But what we do is direct mail in conjunction with email, direct mail in conjunction with digital, direct mail and these multilevel facets of mailing and coupling those things together because we're really good at data, that has really made a difference for us. And like I said, we do tax statements for the state of Indiana. So, we did 52 counties in the state of Indiana this year. And again, do water bills, utility bills and things like that. So, we're working to get more and more of those as well" [#13]
- The Black American male owner of an MBE-certified construction company stated, "I haven't had any work, and for the last year, I haven't made any money." [#16]
- The Black American male owner of an MBE-certified goods and services company stated, "I would say a little less than average, mainly because we haven't been pushing it as well. And like I said, being smaller, we're not going to have the resources to do some of these complicated bids, which keeps you out of that growth rate that you'd like to be in, just because you're split in so many different directions." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "We have been on a steady growth pattern since probably 2011, something like that. But what tends to happen with advertising agencies is that there are periods of growth and periods of, you know, retrenchment. So, - that has happened with us over the years. There have been times that we've had to lay off staff because we lose a big client and there are other times when we gain a big client, and we have to add staff. I would say it's kind of a fickle business because if you look, for instance, like in the Book of Lists that IBJ publishes at agencies that were here like 15 years ago, there's a whole ton of them that no longer exist. So, it can be a challenging industry." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "Well, we haven't grown a lot at all." [#28]

- The Black American male owner of an MBE-certified goods and services company stated, "First five months, didn't have a sale. It didn't start until May of that year, so in the fifth month. In that year we ended, though, I think about \$1.8 million. And the second year I think we were \$6.7 million. Then we jumped up to about \$10 and a half million and then \$13 million and \$20 million. And we just continued to grow to the highest year we've had was about \$250 million. There was a lot of inflation in our business back around the 2009. One of our biggest products, it went from selling \$50.00 a ton to selling \$700.00, \$800.00 a ton. So those numbers were skewed." [#29]
- The Black American male owner of an uncertified MBE goods and services firm stated, "At this time we would be smaller than because we're reduced, semi-retired." [#30]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "It's so hard to tell with public works because it's all low bid, so it's just year to year. That's the biggest complaint we have is uneven work." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "It's been the same struggle from day one till now. The growth has not been. I've been able to – what we call small businessmen is a glorified employee of my own company. Struggling, working without pay. A CEO of a company, some of 'em make millions, right? But not me. I own my company, and I can't even get a paycheck. I struggle to just pay the few guys that I can employ, and just keep the light and gas on at the house." [#32]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "It pretty much rides the same way, I believe. As businesses are in a slump, they tend not to buy extra promotional items, for the majority. Some look at it the opposite way, 'If I'm in a slump, I need to get more of my information out on the street.' It kind of rides the same wave as the economy." [#33]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Oh, we've had as many as 22 employees, back around 2000. 2000, 2001 we had about 22. Typically, we're around 11 or 12. Since the – we've kind of hung at eight or nine since the last two years. It's cyclical. We had hard times in 2008, a little bit, when – you try to – you've got residential private work. We've got commercial private work. We have governmental engineering. Then we have industrial. You try to balance it. I mean at one point, we had 80 percent of our business back around 2000 was governmental. We were doing well. I was nervous because you say the wrong thing to the wrong politician, or an underling to a politician, and that work's gone. I wanted to keep a balance. Then, when some people had all their eggs in the residential market before 2008 and all of a sudden, they lost all their work. That's why I was always happy that we try to keep a balance. It's always a scary thing." [#34]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "This is our third office, third location. Reason being, it's because we – every other year we're seeing that we're growing from – I was sending out of 25 guys at the one time. Contracts change and technology change. It's always about what else can you do. Then we always adapt to those changes. So, again, there's always a growth every year. Now, I'm in a two-acre location with an office and plenty of yard space. I already out-grew that." [#35]

- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "At that point, we had one truck and two guys. Now we're up to four trucks and ten guys. We've grown very consistent and very aggressive" [#36]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "To create the company really was very easy. I have a friend that is in accounting, so we were able to do the LLC easy. I already had my license, electrical license, so that was not a problem. I didn't have enough jobs, so I was just doing what I could, but I had another job." [#37]
- The Black American male owner of an MBE-certified professional services firm stated, "Well, I mean, as far as dollars and cents, that's the best to put a growth on it. It's grown. You know it started out very meagerly, not – total revenue didn't even top over, you know, \$50,000.00 that first year. But it's been steadily growing over the last six years. And we're gonna top over – well, I just put this in numbers the other day – over \$100,000.00 this last year. I would say, because the way I've done things is being very careful not to grow too fast, I would say it's probably a little slower. You know, even though I've done really well as far as, I would think, for my size and types of projects that I can get into and get out of, I would say it's a little slower because I've been very careful about the projects that I select and I have not made that decision to bring on full-time staff members. So, I would say the growth rate for this firm is probably a little bit slower than the industry based on the types of projects I've been able to be involved with over the last six years." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Well, we started 20 years ago, just me. I did everything, from sales to install, you name it. I did my own marketing. I did everything, to where now we've grown. We have space planners, I've got a nice staff for installation, I have some attorneys onboard that look out for our company, so we've grown. We have a box truck, we have equipment, and a lot of other things that have helped us grow to the next level. It's a little different because I'm a smaller shop, so it's a little different. A lot of the other companies have grown to million-dollar, where, again, I've focused on my strengths and stay at a steady pace." [#39]
- The non-Hispanic white male representative of a construction company stated, "During the 2008 period, when the Great Recession hit, it was – it dipped quite a bit, but then it slowly built back up to where we are now, which is right now we're at the highest level since we've been in business." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Well, I don't know what industry averages are for growth and decline. But I can say that our company grows in keeping with the clients that we have and new clients that we pick up. If we don't have additional clients and we cannot keep them – and so it is with construction projects. If we pick up a final clean, that would typically require us to try to hire additional workers because our existing staff are all plugged into permanent assignments and maybe not even available for the additional work during the times that the work requires." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We had a fairly slow start in terms of financial growth. We were able to maintain the company with just two employees for the first three years, and we were

servicing primarily small nonprofits and small businesses, and then we made a shift in our company to focus on community health and creating innovative solutions to address health disparities. At that point, we increased our revenue sevenfold, and we were able to bring on three new employees. In the last two years, looking at expanding to hire two more within the next six months.” [#42]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "It's been – well we've been pretty, I would say, fat. That doesn't mean bad, you know what I mean? But not a lot of growth. I think unfortunately the things that I complain about are adding to the fact that we're not getting growth. I mean there has been growth over the last, you know, X number of years, and a lot of that business is going elsewhere.” [#43]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Very good, actually, knock on wood. We bought the company. We were doing about a million a year. Our best year was 2017. We did over \$4.5 million.” [#44]
- The male representative of a majority-owned goods and services company stated, "I think in our industry it is typical due to the fact that other companies, hopefully, are growing and outgrowing their current facility and will either need to expand or move. And then that's where we come in.” [#45]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "The first year I didn't see a lot of growth. I kind of maintained steady, but unfortunately, I had to expand the business getting more relative inventory. So, didn't see a whole lot of increase. I had budgeted for a lofty 30-percent increase, and that was a little dumb on my behalf. So, I really struggled that first year. And so, the second year came around and I picked up – so this would be January – this year, actually, 2020. And I had started to pick up – was actually October/November I started to pick up. I was picking up clients, I was picking up accounts, people finally found me, they were responding to Facebook and Instagram, and I was getting a pretty good following. There are three of us here in my county: not to toot my own horn, but it's the only way I can tell the story. Based on my customer service, if you look on Yelp or Google or Facebook, Instagram, any of those, you'll see nothing but a glowing review. And not so much for the other ones. So they may be bigger than me, but I'm definitely putting a hurt on them to the point where one of these companies – I will remain that nameless – approached me just before COVID-19 because he's down 30-percent and he knows it's me. And he invited me for breakfast and wanted to know if I was interested in selling. I'm hurting him in my first year. Which I will take that feather in that cap all day long.” [#46]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "The average in the industry at our level are going out of business, and we are hanging on.” [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "I think that we're doing somewhat better I think that we're more responsive than other firms and pretty client centered.” [#48]
- The female representative of a majority-owned construction company stated, "I think we do pretty good. I mean, this year has been not so good, but all the previous years we did pretty well.” [#60]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Not so well. I would say we might get, I don't know other than to compare myself to another firm. The growth of my firm has not kept up with the growth of my industry, that I can tell you. I'm trying to quantify this for you. Typically, a firm in 21 years' existence would have at least maybe 10 to 15 employees. You have to understand that our industry, in particular, is directly related to capital funding, and the crash in '08 altered our industry, in particular for minorities and smaller firms. It did it for everyone, but the recovery rate has not been what it should have been." [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Oh, mine is smaller than the majority of firms, I believe. You know, we really don't want to be large. So, that's kind of a choice on our part. I don't want to be an administrator personality. So, you know, that was one of the reasons I'm doing what I'm doing now. I just prefer to stay relatively small. I've been up to eight or nine people in my company's history. But that was too many." [#63]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've never really looked at it that way because we measure ourselves against the other firms. It's probably been average. I mean the growing economy, everybody's been growing. So, we've been on a nice, steady growth for the last few years" [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "We have maintained – we had our growth spurts. I feel like we were always growing, always changing, always evolving. So, we felt we had a very good run as far as our company growing. We went from four people up to 15 or 16 people working in the industry, so I felt we always experienced good growth for many years and that we were busy. I felt we did pretty good on the growth spectrum." [#67]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Previously it was just me working as an independent sole proprietor and providing services. But last year we just changed that model to add more employees." [#70]
- The Black American male owner of an MBE-certified professional services firm stated, "So basically from '18 to '19, the business doubled in size, and then from '19 to '20, to date, it has increased by about 35 percent." [#71]
- The Hispanic American male owner of a uncertified MBE and VBE goods and services firm stated, "Yeah, well, we started with just me, and then at one point, in 2018, we were up to 8 employees. In 2019, we saw a little bit of a downturn, and then obviously, this corona virus at the end of 2019, everything pretty much ceased." [#75]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing. [#4, #6, #7, #9, #10, #13, #14, #16, #18, #31, #33, #36, #62, #63, #64, #65, #66, #67, #70, #71, #72, #73, #74] For example:

- The non-Hispanic white male owner of a construction firm stated, "Just basically through Facebook and word of mouth. I'm in the Better Business Bureau, but just by Facebook and really my work, I just send photos out of my work and... Like I did one basement in one neighborhood in Avon and she put out a good word and I've done three more basements and I'm actually finishing up a basement in the same neighborhood right now." [#4]

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, “We really don't promote ourselves much. People see us out in the street all the time, because we're always right downtown, but far as websites, fancy websites and promotional stuff, no. First off, what are we going to do if we get a bunch of work from it? We don't have the help for it. And then the next thing is that our customers know us, and we know our customers.” [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, “Basically it's word of mouth and customer service. I've done the Facebook page, I've done the website, I've knocked on doors, I've left business cards, I've done brochures, and I've even dealt with the Google and Yelp and all of that. None of that really worked. You would think that it does, but it doesn't for printing. For printing, it seems to be being in your customer's face, visiting them, giving them personal service, understanding their business. And then giving them the quality product, deal with any issues and make it right, and give good quality service to that customer. And then that customer will tell the lady that they're rolling out and having a smoke within the next office, and they'll say, ‘Oh, you know what? Hey, try this.’ Or like my minister says, ‘Oh, you know what? If you're going to do books, I've got a girl for you to call.’ And the word of mouth seems to be the best advertisement I have.” [#7]
- The Native American male owner of an MBE-certified construction firm stated, “We don't market at all. We have relationships inside the system that we mentor, and we would always look for other opportunities and target opportunities from the government websites. We pay a subscription [for that website]. We pay a subscription for it per month, and we get every opportunity that comes down the ballpark. If we want to see it, we can see it.” [#9]
- The female representative of a WBE-certified construction firm stated, “Our logo does a lot of that for us. That does a lot for us, and that's on all of our vehicles. And then about six months out of each year, we put up a billboard. We pick a different place in Howard County. And we pick a place that we want to have a great big billboard, and we put it up there for six months. And then at the end of six months, we take it down. And we do radio ads for the other six months.” [#10]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, “Well, we have a website, and we do direct mail. Just like we tell everyone to do. And then we also have digital marketing where we're buying Google AdWords and things like that. So just all the same things we tell our customers to do, we do ourselves. And then we do cold calling, our salespeople, we have seven salespeople, and they market all day long on the phone based on this customer is a really good customer. They look for like customers and marketing, who they enjoy working with” [#13]
- The Black American male owner of an MBE- and DBE-certified construction company stated, “At this point in time, our reputation kind of precedes us, but my dad when he was working, he never advertised. He just worked by word of mouth. He wanted to know how you got his name, and if he had a good experience with that reference, then he'd talk about doing the work, if he didn't, he'd probably move on. Then when we got ... my brother and I got involved with it, we started attending the trade shows and all the things, and we were both very active in the industry organizations such as ICI and AGC and BIC and things like

that. So, we were involved in the industry in terms of doing work and being involved with all the various organizations. Of course, on the website and stuff like that, we've updated our profile." [#14]

- The Black American male owner of an MBE-certified construction company stated, "I don't really have a system set up. I try to get on the radio here, and that was way back in November or even before that. Their excuse to why they didn't do it is because of the virus. You have to come in contact with somebody over at the [station]. But other than that, I have the money to put my name out there, but I feel like they cheated me too." [#16]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "So marketing, we do quite a bit whether that be just the local representatives that we have at every branch, making phone calls, doing site visits, which obviously with coronavirus, we are not doing site visits. We were actually supposed to be, all the sales reps were supposed to be heading back to the office here in July and they just pushed that back again, saying that was not going to be happening with some of the cases still occurring and Marian County going to the full-face masks. They said it's just not worth it yet to head back to the office, was their directives. But yeah, we have a lot of different professional organizations that we belong to, some of the ASSME, Boma's a big one that we continue to help. There's different outings and foundations and stuff like that that my boss sponsors" [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "Pretty much online through different websites and all." [#31]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "I belong to a local networking group in [my town], and that has helped because we do network and promote each other to other businesses. I have a page, Premier Advertising, on Facebook, and I speak to a lot of vendors who do tradeshow, anniversaries, customer appreciation, employee appreciation. [My town] is a fairly small town, and, since I worked in the newspaper for over 18 years, a lot of people know me from that, and my former clients at the newspaper are basically the ones that I market to. I do have a good relationship with the business owners in town." [#33]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "On Google and I'm in networking groups." [#36]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Networking, social media, on your website. We tried to put together a database to reach out to developers, but basically a developer is anyone who can finance a project So, you know, relationship building within the community with various businesses, business to business; we're part of the local chamber here. We're a part of the Chatham Business Chamber in Chicago, Chatham being a neighborhood." [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, for the most part, we have repeat clients. We also get some referrals from those clients occasionally. You know, that's pretty much it. I'm really not interested in trying to go out and compete like I used to. I don't need to anymore since we're a smaller firm. I don't know if that answers your question or not. I have a website. I don't think anyone's ever looked at it. You know, a lot of people in my business work by referral. Although they might

have some pretty nice websites, there are very few people that hire architects based on what they see on a website or that type of thing.” [#63]

- The male representative of a majority-owned professional services firm stated, “Word of mouth. We call lunch-and-learns where we go to clients and provide them with kind of a lunch type atmosphere, kind of like an open forum seminar where we discuss our services and provide them with information pertaining to our line of work, various scopes of services that we provide.” [#64]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, “Just online, with some social media. But mainly direct contacts and e-mails.” [#65]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “So, our primary methodology is customer service and contact of existing client base. That's as a result of – just slightly over 90 percent of our business is repeat business. The consulting engineering business isn't something you can double in size and overnight. We don't do a lot of paid advertising. We have a web presence, but we don't push very much on social media. We do a little bit on Linked In and that's it. We've been very fortunate in the niche of the AE industry that we've been able to grow in or establish ourselves in that pharmaceutical/industrial market.” [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, “We don't. We are like our worst client. So, I shouldn't say we don't. I guess we marketed ourselves by me; I was sales, going out, calling people, getting in front of people, going to events, being part of – you know, showing up at trade shows. Years ago, it was more on a personal level; when you went out you shook hands, word of mouth. We had a good reputation, but we were very active out in different shows and different events. People got to know us because we really worked hard in the hold days to get out there. We didn't have websites and we didn't have all of that. So, our marketing of ourselves was really on a personal level. And I think what really got us through was word-of-mouth. We had a really good reputation. In fact, we have a meeting tomorrow night with somebody that called and said, ‘I thought of you. I wouldn't have anybody else but you. I need a meeting. I need help with some strategy.’ So, I think word-of-mouth over the years. But recently we've had our website out there, you know, and social media. But we're at a point now where we're really not marketing ourselves anymore 'cause we have our following and we're happy with that. For a long answer.” [#67]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, “The marketing basically, like we work with several major health care systems. And also, we use a website and social media to market ourselves. And also, like cold calling.” [#70]
- The Black American male owner of an MBE-certified professional services firm stated, “Initially literally it was just all word of mouth, and I had a website over – Honestly, probably for the past month and a half I've been more active in terms of submitting or applying to the larger entity bid portals like Minneapolis Airport Authority, that was one, or the housing agency. So, I've actually been intentional about doing that, which I had not done

for years. I've actually been more intentional in terms of responding to RFQs, RFPs, requests for qualifications or requests for proposals, which again I had not done." [#71]

- The Black American male owner of an uncertified MBE construction company stated, "I plan on marketing myself, far as, you know, going to like other trucking events and trucking business events and – you know, reaching out to brokers, dispatchers, put myself in the newspaper, maybe a commercial if I'm blessed to, if I need to. The social media is real big, you know, because a lot of people they own and on their computers. So, I'm just going to get me a team of marketing – a marketing team and let them take care of that. If I'm – you know, like I said, that know more than me then that'll help me help myself to better myself, know I'm saying, due to the marketing." [#72]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I don't do that, I guess. There's an app. I go and look and see if there's any available local loads." [#73]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Mostly word-of-mouth." [#74]

C. Ownership and Certification

Business owners and managers discussed their experiences with IDOA and other certification programs. This section captures their comments on the following topics:

1. IDOA and other certification;
2. Advantages of certification;
3. Disadvantages of certification;
4. Experiences with the certification process; and
5. Comments on other certification types.

1. IDOA and other certification. Business owners discussed their certification status with IDOA, INDOT, and other certifying agencies, and shared their opinions about why they did or did not seek certification. For example:

Eighteen firms interviewed confirmed they were certified as MBE, WBE, or VBE. [#1, #2, #3, #6, #9, #13, #14, #16, #24, #26, #28, #31, #36, #38, #41, #44, #71, #FG1]

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "With IDOA, we're an MBE and an MBE with the city of Indianapolis. 15 years certified then roughly... We're [also] certified as a DBE with INDOT." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "We are MBE, and the DBE, and the Veteran... We started the business in 2007, [got certified] probably a year after that." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, " We've become certified by the WBENC. [With] INDOT, we are also a DBE." [#3]

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Minority and a woman-owned business. We're not registered with the city. We did state." [#6]
- The Native American male owner of an MBE-certified construction firm stated, "We've always been Native American. Now we just bought the old business partner out and a new one bought in. Now we're veteran and Native American. Yeah, we have our federal certifications and then I'm licensed in 13 different states to conduct work. The Native American is a self-certification requirement. We are going to enter the 8A this year with my old business partner. He had already graduated the 8A and was somewhat elderly. So now that he is exited for retirement and we're going to look at the 8A program with the small business and mentor that forward." [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Yes, WOSB [with] the state, it's just been two years. And then Women-Owned Small Businesses, and then also a WBENC, a national certification. The WBENC, it's been since 2009." [#13]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "We're obviously a minority business. We were part of the INDOT, we were involved in INDOT DBE program. We graduated in... I can't remember. It was probably in the late 90s or early 2000s we graduated from the program, so we participate in those markets more as an MBE versus a DBE. I think DBE is a highway term. They still use MBE with the state and the city as far as Department of Administration." [#14]
- The Black American male owner of an MBE-certified construction company stated, "Evansville, the city it's the same as the state. They accept what I have. I'm certified with the City of Indianapolis too." [#16]
- The female representative of a Native American-owned MBE- and WBE-certified professional services firm stated, "The company that [our firm] bought was a Native owned staffing company. And when we bought that, we absorbed their certificate as well. And then they stayed on as consultants to do a part of our division so that we still have that minority certificate within any company that we use under that umbrella." [#24]
- The Black American male owner of an MBE-certified goods and services company stated, "Yes, MBE. Over 20 [years with IDOA]. So '98 till now, so yeah, over 20." [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I am a veteran, but I'm not veteran-owned. I didn't seek that yet, but I plan to. I have MBE certifications with the State of Indiana I've been certified for approximately maybe ten years. I also have an MBE certification with the City of Indianapolis." [#28]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "At this time, we hold WBE and DBE with the State of Indiana." [#31]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "I know we have the MBE... [Well,] I think our MBE may have expired but I'm trying to get it back up and running, but DBE is current." [#36]

- The Black American male owner of an MBE-certified professional services firm stated, “[We are] certified as a minority business owner by the City of Indianapolis. I have been certified since – what was it? I want to say June of 2014.” [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, “The original certification I think I maintained as active for – I think your certification is for three years – I’m thinking – and I renewed it probably twice. So, maybe nine years the first time. Then I let that expire. I recertified again, probably, November of 2018 with the city.” [#41]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, “I am MBE with the State of Indiana and I am MBE with a private company in Illinois, the CMBDC. And my DBE for the State of Indiana is pending.” [#44]
- The Black American male owner of an MBE-certified professional services firm stated, “Yes, I am [certified as an MBE]. Well, this is actually my second company I’ve had certified. We were certified from the time we started it, so 2001 until I shut it down, which would’ve been in 2014. And this one’s been certified since 2014 till today.” [#71]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, “We are a women-owned business and have been since our founding 52 years ago. So, we’re one of the very earliest women-led design firms in the State, if not the first.” [#FG1]

Six business owners explained why their firm sought certification. [#3, #26, #30, #38, #39, #41]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “Because the economy had softened, I thought this would be a good time to get certified as a woman owned business. I had some relationships in state government by that point, just from my career history, getting to know people. And so, they were kind enough to say, ‘Hey, you need to go to these bidders conferences. And you need to be at those things.’” [#3]
- The Black American male owner of an MBE-certified goods and services company stated, “We thought that it would open a lot more doors to opportunity, so we did that. And it really has been disappointing that it didn't do as much as we thought it was going to do. And we've had bigger firms, and I see what they mean now, but before they would tell us, ‘Why did you waste your time even getting certified with that stuff? It's not going to do anything for you; it's a waste of time.’ And these firms, some of these are million-dollar firms and they do it on their own. And then some of them just are reluctant to have their financial data out there in the open atmosphere for everybody to peer through when it gets really, you know, the dollar amounts really don't matter as to what your revenue is. Yet ethnicity is a driving force, so why should my dollar amount be disclosed to everybody to see? So, a lot of people don't, I'd say, join and get certified. Like I said, we did, but it's kind of disappointing. And it's still disappointing those customers that owe us money now, but if the state could try to help us get it, then you don't have the resources, it's kind of pretty much like a losing battle sometimes.” [#26]

- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes, I at one time was certified with the IDOA and also with the City of Indianapolis. We chose to do it because there were contractual opportunities." [#30]
- The Black American male owner of an MBE-certified professional services firm stated, "Yes. Well, it was a scenario after talking with some other business owners, because I was fortunate enough to meet some other business owners in my similar predicament, and they said it was a good thing to do because that will give you a little bit more exposure, which I think it has, and give you another avenue to obtain valuable business information." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, " [We are a] certified MBE and small business. Well, I was trying to utilize everything that was available out there to help our business grow, and so I went and did some investigating and found out it would be a perk for us to be certified MBE. I didn't want that to be the focus of who we are, but anything that would help us I want to try to utilize." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I had probably attended a seminar and was told that having that certification would allow me to bid on certain projects, because many organizations and many companies, even non-state companies, have a portion of their money that they allocate to businesses with these certifications. So, that's why we certified. In fact, the very first job that I had, that one that I told you, that construction clean, when I made the transition from corporate to starting this business, there was an old painter on that job. I'll never forget him. Herman Walker. He told me then, 'Ms. Smith, you need to get certified. You need to get certified.' I remember him saying that to me over and over and over again." [#41]

Nine firms interviewed were not certified but were in the process of applying. [#15, #23, #32, #37, #42, #59, #70, #AV] For example:

- The non-Hispanic white female owner of a WBE-certified construction company stated, "We went up and took a seminar on it and everything, but after dad passed away, we had some problems with the taxes because a lot of things were still in dad's name as opposed to being in the company name or in one of our names. And sometimes there was a lot of talk of the... You know, we sent information to the state several times that dad had passed away. We sent certificates and death certificates and stuff. They still call here and want to talk to him. They insist on talking to him. I'm like, 'He's dead! You can't talk to him.' Because he handled that, some of the tax stuff himself. We are a woman on business. Well, 75% of it is woman-owned." [#15]
- The Black American male owner of an MBE-certified professional services firm stated, "I'm going to get certified now. I'm about to go hardcore with that, I hope that the state certification does help me to get to work. I get so many, to be honest with you, I get a lot of folks, they get it, but they don't necessarily... The guys down on the ground floor have not said great things about it. I got one person I know who makes a lot of money out of the state certification, that's the guy that owns [a construction supply firm]. He provides rebar for roads I'm sure you've heard of it, have you heard of Federal 8(a) program? that's what I want, that's why you called me, a friend of mine told me one of the best steps to do is start with the state, get certified with the state, go through you guys' process, your little culture

for AA3 certification , because I qualify when I look at the 8(on the initial eligibility. I'm about to, I want to start getting after that." [#23]

- The Black American male owner of an uncertified-MBE construction company stated, "I had, and let them get – I didn't keep up. But right now, I'm about to be MBE certified again, very shortly." [#32]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "Certifications with the state? I am applying for a minority." [#37]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We will be seeking minority-owned through the state, and queer-owned through a third-party provider. We need to restructure our company. I'm Caucasian, my husband is black, three of our employees are black, and we are going to be looking at giving our employees ownership in the company this year. We think it's an important part of their experience, of being able to own and feel responsible for the progression of the company, and, as such, that would make us a majority minority-owned business. When that takes place and we're able to make that restructuring happen, at that point we'll seek that formal certification." [#42]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "I was an MBE. We let that lapse, but I resubmitted to become a minority. So, we're kind of in between." [#59]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We do not yet, but we are in process of getting those." [#70]
- A comment from a Black American owned construction firm stated, "DBE Pending." [#AV]
- A comment from a Black American owned goods and services company stated, "In process of getting 8A certification . . . should be complete by June or July of 2020." [#AV]

Twelve business owners and managers explained why their firms had not pursued certification. [#5, #7, #9, #17, #21, #22, #33, #46, #47, #67, #72, #75] Many uncertified firms were unaware of the certification or its benefits. For example:

- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "I served in the Marine Corp. I don't know if I am or not, I don't know how you get in on that." [#5]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I don't know what you have to do to be certified. I didn't know that you should get certified with the state. I'm kind of learning as I'm going. I've never actually owned a business before." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "Well why [we] are not certified with IDOA has been because it hasn't been beneficial to us to do that. We weren't really targeting state opportunity as much as we will be now." [#9]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "So when you certified with the state, is that through INDOT? Is that how you certify, through that? ...I didn't realize there was a different certification. I guess that's good knowledge for

me to learn today because I knew I had the federal certifications to work through and I knew I had the process to go through INDOT to do that and the HUBZone thing, trying to figure that out. But that state certification piece, that's what IU would be looking at, right?" [#17]

- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "No, I am not. Frankly, I'm not even familiar with that. Maybe part of the reason is that for quite some time basically my emphasis has been on the international world when I first was contacted on the subject of your call, there was an earlier call, they did ask me as to whether I am a minority. And I told them that I didn't know. So basically, they asked me questions and they told me that yes, you are. I did not think about it or even cross my mind." [#21]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "No, actually I'm not aware of that certification." [#22]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "I didn't know anything about it. I would be glad to get certified if I knew more about it." [#33]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "I do not. Never even heard of that before, so that would be interesting for me to know more about it." [#46]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "We've got several owners, but the – the primary owner is female. We are not. It's on my list of things. To be honest with you, I don't know how to do it, and every time I start thinking about it, I run out of time or something else comes up." [#47]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "No, [we're not certified]. And we were sorry we never did that. But no, it was not – we never went through – we found it was a lot of paperwork to go through to get that accomplished." [#67]
- The Black American male owner of an uncertified MBE construction company stated, "I ain't get actually certified, I mean I just actually started my business. I start in June of 2020." [#72]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "I do not. Y'know, we started doing it, then it just, for whatever reason, we never get to the end process. It's probably more my fault than anybody else's. We're just really busy, and we never make it through the full process. [We could have] minority-owned business status and veteran-owned business status." [#75]

2. Advantages of certification. Interviewees discussed how MBE/WBE/VBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by certification. [#1, #2, #3, #6, #9, #13, #16, #24, #26, #28, #30, #31, #36, #38, #39, #41, #44, #47, #62, #71, #AV] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Because there are some jobs that IDOA requires a goal on, so we thought that was

good. The benefits are it gives you an opportunity to work with people you've never worked for. [For example, there was a] big contractor in Chicago. And they gave us a \$75,000 contract. Didn't know us, but we're a certified DBE and they gave us the job. So, they probably looked on our website too. But still, I think that gets your foot in the door. If you don't do a good job, you won't be doing it again. But it does give you an opportunity to get the first job." [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "My experience is you don't have the ability to compete because the playing field is [not level]. Because I don't manufacture products, and I don't buy products in a large enough quantity, I don't get ... I can't compete on price. More specifically, I mean, I did about \$1 million worth of work, I bought about a million dollars' worth of fuel through [a large supplier]... Before that I had bought a couple hundred thousand dollars and [the large supplier] had says, 'You can't get our best price 'til you get \$1 million.' We bought \$1 million worth of fuel to support a project in Ohio, and came back to them and they says, 'Okay, here's your price, and they're still like three cents higher than anybody else's. Nobody's going to pay you three cent unless they have to.' Of course the three cent, meaning I've got to make it five cent to make it worth my business, and I just ... The certification is required for you to have any opportunity." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It probably took us a year to win our first subcontract, maybe. After that, we started winning some additional work. Now, we have a reputation. We're known at the state. We have a positive reputation for the work that we've done. we have been invited to many other States with them to bid on work. That's one of the reasons that we are certified in so many States is that they've said, 'Hey, would you be interested in serving us in Rhode Island or in Maryland or... "' [#3]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "You would have to be a fool not to. We've been certified for like 15 years. I mean, wouldn't you? The bigger companies look for it. I think we do get some work just handed to us because of it. But for the most part, we are the ones out doing the work. We're not subbing, we're not just a big patch through company or anything. We try to be a legitimate company." [#6]
- The Native American male owner of an MBE-certified construction firm stated, "The competition is pretty limited when it comes to our skillsets. " [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We wanted to go after some of the healthcare business and they gave us points for that. So that's why we [got] certified." [#13]
- The Black American male owner of an MBE-certified construction company stated, "I would think I'd be getting work. But I haven't." [#16]
- The female representative of a Native American-owned MBE- and WBE-certified professional services firm stated, "It's been very helpful because we are a large contract for [a large car manufacturer] and they do require the minority certificate. And then we've got a couple other clients that we work with that we have been able to work with them because

we have that minority certificate. It's a requirement within their organization that they only hire through companies that have the minority certificate." [#24]

- The Black American male owner of an MBE-certified goods and services company stated, "The occasional inquiry as to you submitting a bid with it. That would be the overall benefit. Like I said, it hadn't landed very many successful contracts, and then the ones you do get you have to fight to make sure you get your payments on time." [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "There is a benefit, but the benefit doesn't go far enough. The opportunity is there, but once the opportunity comes, it's at a – at such a small level where it really doesn't make any changes. You don't get the percentage that they say that you're supposed to get. We just didn't have enough work – that was the problem – to make it viable or worth our while." [#28]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Opportunities to work with and bid on large contracts and contract with prime vendors." [#30]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "We have not seen as many benefits as we were hoping to as a prime contractor on our work. We know how much it is to find and meet the percentage quota. We were hoping that it would provide our other competitors in prime to meet their goals and it does, I think, help somewhat. But not to what we were expecting." [#31]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Actually one with one of my accounts, instead of making us a net-pay of 60 days, having the MBE made it a net-pay of 15 days." [#36]
- The Black American male owner of an MBE-certified professional services firm stated, "Some projects that I've received here in the last – some of the bigger projects I've received here in the last couple of years, that's what they were – they needed. They needed people like me in order to fill that checkbox on their project requirements. So, you know, it gave me an opportunity to get in the door. Now, one thing I am fortunate about, even though I got an opportunity to get in the door, they're bringing me back for projects where they did not need to check that box." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Well, getting put in front of companies that would probably not even give us a second glance to just get in front of. That's one of the things. The other thing is having the organization, having more eyes and ears out there in the corporate world to help us find businesses to go solicit and try to do work with, so it's a lot of perks." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "There's a perspective that if you have that certification, then that puts you in a position to bid on projects that require you to have that certification. Well, having recertified, the fact that I have the certification was a pre-requisite for me getting that job downtown last year. So, yeah, there was a benefit. The contractor had dollars allocated that had to be placed with either minority, veteran, or a woman-owned business. Because I have

that certification, I was able to procure that job. So, I mean, having the certification is one thing. Getting the job is something else.” [#41]

- The Black American male owner of an MBE- and DBE-certified construction firm stated, "I got into construction, and as I got into construction in the early days, like I said, 2012-2013, we realized that if we did not have our MBE, we weren't going to be able to apply and compete on certain areas. It's a very crowded field and so that's why we decided to do that. I bought the company from someone else who was a non-minority. But I found, as I said earlier, it was important to get involved with the minority aspects from the State of Indiana and the State of Illinois." [#44]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "Being able to help companies that require a minority business or a female business owner." [#47]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "The years that we were certified, it didn't help at all. Because we were joint venturing and going after work as a certified MBE, WBE, and didn't make any difference at all. Being a DBE, disadvantaged business entity helped us get work with the Gary Chicago airport" [#62]
- The Black American male owner of an MBE-certified professional services firm stated, "Well, my initial recertification was through, first it was Mid-States, and then IDOA. Candidly, since I do a good amount of low-income housing tax credit work, it is a competitive submission. And, being honest, they get points for MBEs. So it was one of those clients with whom I was working reached out to me when I shut down [my old firm], and he was just like – Well, actually, I had the Mid-States; I didn't have anything else. And he was like, 'Hey, can you get your state certification in IDOA? It gives me additional points in this.' And I said, 'Sure.' It has always been advantageous. I've always taken the position of 'Yes, we are an architecture/design firm that happens to be an XBE,' compared to 'We're an MBE firm.' What I mean by that, and you've probably – Some firms, they lead with like, 'Well, you have to hire me; I'm an XBE.' No. We're a good firm. We do good work. We have great employees. And we are an MBE. I've always taken that approach. When Bob and I are partners at [my old firm], that was always the approach that we took, and all of our clients, large or small, would always say, 'You guys are a really good firm.' And I was like, 'What's what we strive to be.' We're an MBE, but we are blessed that at that time, whenever there was any major project, people would always come and call us. And sometimes we would have to say no, 'cause we were asked to – Example. We worked on the airport, and we worked on a stadium. When the convention center came around, we had people asking us to team with them and work on that. When we talked to some of the politicals, they literally asked us not to go after the convention work, because they were like, 'We'd like to have the ability to spread it around to other XBEs.' So we didn't go after it." [#71]
- A comment from the availability survey stated, "Not sure of the benefits of being certified as a woman-owned business." [#AV]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#1, #2, #3, #26, #30, #39, #41, #43]. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We do pavement marking work, and we have an inventory. If I want to sell that material and get supplier credit, which we will... You know the difference between supplier and [a sub]? As a subcontractor, if we quote a job for whoever and we get the job, they can write us in for 100% towards the goal of what our quote was. If you're only supplying material, it's 60% Let's say I want to sell them \$100,000 worth of traffic paint to somebody. They can only use \$60,000 to meet the goal. They can't use it all like they would for a subcontract. They can only count 60% towards the goal. Let's say the contract that they're bidding on is \$3 million. That means they have to give 7% or \$210,000 to a minority company. If I quote them \$100,000, they can only use \$60,000 for that. Okay, it's the way that works. So, the way the federal rules are, I have to order the material, have it here in stock, and then ship it from here. In fact, the rules say I have to take it, I can't even ship it. I have to take it to the company. See that's not normal business. Normal business, if I sold a truckload of traffic paint to some guy, I just call a manufacturer who I always buy from and I have it shipped over there. Why bring it here and pay freight twice. But they're worried that I'm just being a broker, but I'm not a broker because I buy it for myself and inventory. But when I extend it over there, that's a problem with them. Because they don't want people skirting around the rules. They call it commercially useful function. I think that's a poor rule. I understand why they have it, I just think there ought to be a different way to handle it. If you can prove that you're really a supplier and you have an inventory of the product, you got to be able to drop ship. That's a problem because that really cut into our business. We can't do a lot of the things we would normally do if we weren't a minority. Because that's the way normal businesses would do it. Drop shipping's a disadvantage. There's a lot of paperwork to get certified and stay certified. But that's okay, I mean the benefit outweighs that. The disadvantage would be there's some things you can't do that you would normally do in the course business. For instance, let's say that we're going to set up a barrier wall on a job in Fort Wayne. We own concrete barrier wall. We have a yard about a mile from here, where our barrier wall is. So, we truck it over there and then we go to the job with our equipment to set the wall. Each piece weighs 4,500 pounds, it's concrete. So, normally in business we would call up our customer and say, 'Have you got an excavator on the job? We want to rent it from you because it's there.' And he'd say, 'Sure, it's 120 bucks an hour. And if you want an operator, it's 200 bucks an hour.' And so we'll say, 'That's a good deal because if we bring ours, it's going to cost us a lot more to drive it up there and back.' Or if we have a rental house, bring it to you and then we have them take it back. So you can't do that as part of the program. You can't use your contractor's equipment. And even if you rent it from them, you can't do that. It has to be [you're own] equipment. Which that's contrary to normal business practice. So there's a lot of things that are contrary to normal. Things normally done in business that you can't do because you're a minority company. I think there ought to be a way to solve that. Let us do some things. As long as you know that we're a viable company, we provide a commercial useful function, when we do, cut us some slack occasionally when we do something... Because you know we're not... We're the real deal." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "About three months ago they said, 'Because you don't deliver your own product you are a broker. Anybody who wants to use your services get 5% credit for using

your services instead of 60% credit for using your services.' I said to them, 'You know you're running me out of business.' All my big customers are saying, 'We can't use you no more.' INDOT has asked me to show them invoices to say, 'Here's what you actually charged, which means we're going to give everybody 5% credit.' I said, 'You might as well shut my doors.' It's an issue, it's a significant issue for me. There is no economic benefit for the product coming to me, being offload on my truck, me driving it to the site, and then unloading it. I call them, which is the exact same thing I do for 99% of all my other government customers. When the Navy calls me in Jacksonville, Florida and says, 'We need this, and this, and this, and this,' I don't have a truck in Jacksonville, Florida to go pick up anything. Let's just say logically ... Nobody does that, not in the 21st century. Somebody who was supposed to be promoting and creating opportunities has the reverse effect. I've always looked at them to say, 'Okay, take a look at what I'm doing and tell me how to polish it, or tell me what you think I need to do to fine tune it.' That's not what they said. 'You're a broker.' As recently as the bid that was due this week ... My primary contractor called me last week, he said, 'Unless you get this changed, unless we know that we're going to get credit for this we can't use you.' All of the equipment I bought, and to establish this footprint I have right here, this was done to do work in Indiana. This was done to be in a prime position to do work, infrastructure work, which is where INDOT got billions of dollars of federal funds to do it. I would not do this if I'd have known INDOT was going to be stepping on my neck. I've got all of this stuff here in the state of Indiana for the purpose of doing business in Indiana. Ohio don't require it, Jacksonville, Florida don't require it, Pine Bluff don't require it. I did this to do work here. This is probably going to be the only place you're hearing this ... If you're certified as a minority and you're certified as a veteran, the people that view your opportunities that's competing for the [MBE] piece may have a ripple effect, a negative effect, on your [VBE]. Case in point, you are a VBE, you compete just against veterans, and nobody looks at you to say, 'He's a minority, he's got this amount of business, we see him on the job site, that's not fair to us,' because you are competing exclusively in the veteran lane. When I show up they look at me and say, 'He's potentially competing in three lanes, let's look at him a little closer,' I don't necessarily know the split out, but what I'm saying to you is the visibility of [my firm] being on a job site may prompt ... Not may, sometimes prompt folks to say, 'Why are they here? Is that business that we, other minorities, women owned, da da da, could go after, should have been awarded?' Even if we're there as a V, they see our footprint and what I consider the political aspect of this, people say, 'Can you please explain how they got this work?' That is a level of attention that I think is [unfair]. The other subs could say, and then I think potentially cause additional scrutiny, which may have a bearing on why we are at this conversation now with INDOT saying, 'Because you don't deliver.' I didn't deliver in 2007, '08, '09, '10, '14, '15, '17, but now in '19 I'm going to be de-certified because I don't deliver? Part of that could be women owned, other companies, are seeing us on job sites and it's raising the attention." [#2]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "A disadvantage might be perception. You are showing up with some kind of entitlement that you belong on this project. You're a necessary evil versus a really value add partner. I'll tell you that perception varies." [#3]
- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, the main thing I think is just some people having their financial information out

there in the market when they don't think that it's really pertinent to the task at hand and being more inclusive in the inclusion and using a dollar amount to determine that is, like I said, is not really the driving factor as to your minority status or not." [#26]

- The Black American male owner of an uncertified MBE goods and services firm stated, "Slow pay." [#30]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Well, there are just a very few. Some, they'll sit there and see, 'Well, here's a minority. He don't have the capacity to do the work,' or they'll sit there and see, 'Well, they might not be a top-rate company,' or whatever, so it can play both here and there." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I let them lapse because they didn't seem to profit me any. I wasn't seemingly in the loop to receive information about opportunities to bid on. So, to go through the process of recertifying, as I said, I think I recertified at least twice after the initial certification. It just didn't seem to be beneficial. It didn't benefit me any way to have that certification. Again, I wasn't at the table. I wasn't in the room. I wasn't presented with those opportunities and I didn't know how to generate those opportunities. I didn't know how to pursue those opportunities." [#41]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I haven't seen the advantages yet because nobody makes it an advantage. There's no advantage to it. I mean if it's – you know, when you're sitting in a bid and they're telling you, even though you can handle a multimillion dollar project, that you have to be a sub-bidder on something where's the advantage? I can handle it. I don't have to go to a manufacturer to get an advantage. I don't have to be a sub, so what's the point of you being labeled – why did I pay all that money and energy and time to prove myself and then find out it's a zero. I think the only time it's ever done anything for me – and I'm not even sure it was really an overt thing is that sometimes when a particular group will complain that somebody's getting something and they're not getting it. And so you can say, 'Hey, I'm also a minority,' you know what I mean? But it's more like – it's not really been particularly advantageous." [#43]

4. Experiences with the certification process. Businesses owners shared their experiences with the certification process. [#1, #2, #13, #26, #28, #29, #31, #32, #34, #37, #38, #41, #42, #43, #44, #59, #62, #71] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "It's tougher and if you already have the IDOA certification, you can tell INDOT that you have that, and it helps. Plus just between you and me, it's easier to get certified with IDOA than is with INDOT. It's difficult, but that's okay. I'd rather it be difficult. That way not every guy with a pickup truck can just go get certified, you got to jump through some hoops. IDOA's middle of the road. INDOT's the hardest. IDOA's second, and City of Indianapolis is pretty much a piece of cake. I don't think it's that difficult. Of course, I've been doing it for so long. You kind of know all the ins and outs. It's daunting the first time. Lot of stuff. But if you're in business and you have a real viable business, the stuff they ask for, none of it's unreasonable. You got to have taxes, profit loss. If you're a LLC or whatever, you ought to

have that paperwork from the secretary of state, you ought to have tax IDs. Everything that they ask you for is stuff you would normally have if you were a viable business. So that's not a big issue. There are some things that are a little daunting to get together. They want resumes from all your people." [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I don't have a problem with that. I think it may be my lack of understanding the process, just give me sufficient notice and we'll generate the documents ... I think IDOA gets high marks for everything that they've done." [#2]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Because we were already WBENC certified it didn't take us as long and we got it done. Probably they ask us to hurry up and get it done in like a week and we did. So, we just worked night and day to get it done." [#13]
- The Black American male owner of an MBE-certified goods and services company stated, "I would say it depends on if you're a new startup, it's easy. If you're in business and you have to get recertified sometimes you may have to, I call it, rejustify some of the same stuff you had to justify when you started. Say, 'Okay, we'll go back and just look at the records, seeing, okay, this is how we started. This is a startup input money, blah blah blah,' 'cause, you know, 10, 20 years from now you'll be trying to figure out, 'Where did I get that last \$1,000.00 from? I only started with \$2,500.00.' You know, it's your own money and you scraped it up somehow, whether it was a relative loaned you some or whatever. Sometimes that can be disappointing, especially if you let our certification lapse. And we've done that before and we had to go back and get the stuff from ground zero, bring that in, the old stuff, the new stuff. So that part's frustrating. I think the certification – or the recertification window timeframe, just as a small business you get busy. You may let six months go by before you remember, 'Oh, I've got to be recertified.' So I think you need to have a window, you know, if you haven't been – if you drop more than say 18 months or 24 months you go through the process over, 'cause then you've got to start all over and that's when the headache starts. So that time when you're too small for a small business, a lot of time the small businessperson is working a lot of the sites themselves and running office and payroll and everything else. I think IDOA kind of mirrors the City of Indianapolis right now. But at one point the City of Indianapolis was a lot less streamlined – a lot more streamlined I guess really it is, than what theirs was. And I understand they was with their own criteria, all their little bells and whistles, but a lot of times you're answering the same thing and checking the same boxes. And I guess, you know, it's kind of hard to be able to make those standardized and share information. But it is what it is; but you're getting the same thing from both agencies gets you certified." [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "Well, initially it was – I had to come up with a lot of documents that I didn't have, actually. They wanted initially a three-year background on your taxes. They needed to know about your taxes, and they needed to know the number of employees that you had. But they waived all that because I was – when I first initially got certified, I didn't have any of that 'cause we wasn't – I had been in business for three years, but it wasn't viable. It wasn't – it was just skip here and skip there. And I was doing a lot of things on my own just to save money. And so we didn't have what initially what they needed to be certified. But it was a

nice guy. His name was Ralph. I can't remember his last name. He came out to the office in South Bend, and he said, 'Look, I'm gonna make sure that you guys get a fair shake.' And I liked that part it. And we got the – we went through the process, and we did get certified. So after that, the recertification wasn't hard at all, not with the state. I love their recertification. The process wasn't hard at all. It's just the recertification phase alone. All we had to do is submit the fingerprints and the background information, make sure you still didn't have anything on – obviously on your record that would – that prohibits you from doing this type of work." [#28]

- The Black American male owner of an MBE-certified goods and services company stated, "we had to complete the [State's] forms, meet their standards. And in essence the business has to really be minority controlled. It has to be – has – the minority has to own the majority of the company, 51 percent, and be able to make the decisions. It can't be just a fake business. And so we certainly met that qualification. The only standard that they took issue with us on is the sign. Because it says you have to have a sign that's visible from the parking lot. that was either in late '94 or early '95." [#29]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "It was pretty involved. Once you get it, though, then it's just a renewal process every year. We actually hired an attorney from Indianapolis to help with our qualification who had worked for INDOT and knew the ins and outs. But I could show you our – I think it was eight or nine volumes, our bound volumes – our application. But I think it's a good thing because, in the very beginning, I think a lot of companies just made an umbrella company with their wives' names and they weren't very involved at all where I think that's what they're trying to prevent, which I appreciate that. Even though it makes that hard, I think – I don't know anyone who's gotten qualified recently to know if it's similar." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "Oh, that's been, probably was in the '90s, I believe. it was interesting, to say the least. I thought there were some things that were not necessary to apply, but it was part of the order of the day, so they were dealt with. I ran into some decent people along the way. It was really an exciting experience, if I should say." [#32]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "No, other than I didn't have a taller, blonder person going to work for me. We did it ourselves. So, we weren't used to doing it and creating these sham companies. So, I guess, in that sense, it was a little harder for us. When you do it as a routine and – I never had my wife take classes to become a WBE. I never took classes to become an MBE. There's just so many scams going out there. I just can't believe the certification people would ask me some really tough questions thinking – just to make sure that we were real." [#34]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "I signed all the paperwork already, called the people there and they were friendly. They were able to answer my questions, even gave me recommendations of what to send, so it has been easy at this point. I haven't got an answer right now because of this, but it has been easy to work on. The paperwork is not complicated, really. The only thing that I could say, I don't know exactly how they call it, to be able to apply for that, I had to get a number. I'm sure you're aware of it. A number where you can find a type of jobs in the government that

are bidding. There is a name of that. I know there is a link, there is a website which I could find bids, but I really have not been able to understand well how that works. I need to do that, and I was really trying to find if there would be a seminar or something I could get into or go into somewhere, yeah, that can teach me how to use it better.” [#37]

- The Black American male owner of an MBE-certified professional services firm stated, "It's pretty straightforward. It's pretty straightforward. It's easy. I would say it's very similar. I don't know, maybe it's just because of the way I think and how I have to do my work. It just looks very similar. It's very similar to other agencies." [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "you're providing all your personal information; your taxes, your passport, your – it's just the work of going through the process of getting certified. The person comes out to your office to make sure you actually have an office, that you're actually in business. You know, from what I recall, the last time I certified with IDOA, I copied the information that I had from the city and I took it over there and dropped it off. I may have had to fill out another form or two. So, because I had already done the work for the city, it was just a matter of making copies of that and providing it to the state. I don't know if that's still the same case or not. But I just remember taking the envelope over there and dropping it off. They pretty much – I don't remember having to have someone – it's been a while. So, who knows what I remember? I don't recall having to do a lot of extra work because the work had been done with the city. I'll just say that." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "It's been a few months since we've looked at the materials, so it's not fresh on my mind, but I do remember it being a very straightforward process, and it didn't seem like it would be insurmountable or that there would be any roadblocks along the way." [#42]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Let's see, I have the City, Transportation, and the State. Those are the three I have. For us it was super-complicated, but I think overall our process was handled well. It was complicated because we'd gone from, you know, it was a longstanding family business and a lot of things had changed. I think we handled it pretty well. I thought it went pretty well. It was pretty accessible. I thought they were professional about it." [#43]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "You know, I got to tell you very candidly in the early days I thought they were roadblocks. But part of it was we just weren't put together the way we should have because most – and I don't think we were atypical. Most companies that get started, you know, they do all the stuff that they have to do with the state and with the federal for taxes and they think, 'Okay, we're ready.' And when it came to filling out the MBE requirements and everything else, we were a little haphazard because we weren't together. So the exercise made us get more organized and then we found that it was very helpful to have that information. So to answer your question, yes, the early stages was difficult, but it wasn't anything that the state or the feds were doing. It was that we weren't organized the way we should've been organized." [#44]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We filed an application. It was free. There was a lot of paperwork that was required. I just did it. I actually did it last week again because I needed to get recertified. It's tedious in terms of a lot of paperwork that's needed. That's what they require to prove that you're a minority or you own the company. It's tedious but that's what's required to vet out the business. The people in the MBE office were really good. During the interview, the lady was excellent and very professional. I went to the office yesterday and it was closed. They said you have to mail it in. I drove all the way down. That's not really Indiana's problem. That's just a sign of the times." [#59]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "It's a lot of documentation. It just takes time. So, from a time standpoint, yeah, it's time consuming. It's not difficult it's just a matter of putting all these documents together, which means that all of your accounting has to be accurate and to date. You know, you have to have copies. Now, there's a couple things where they want your original bank statement, like when you first opened your firm. And when – we've been in business since 1999, you know? I've moved once, I've re-designed my office. We could probably find that document somewhere, but at this point, it'd be a needle in a haystack. Those kind of things can be hurdles, but it's not so much that it's not something that can't be done, you know. It's just putting the book together, but that takes time." [#62]
- The Black American male owner of an MBE-certified professional services firm stated, "That was easy, for me. Again, I'm weird like that. I'm very anal, so I just took care of it. I know it's some people find it daunting or unwieldy, and my response – and I've helped people do it before – my response is always just, 'Read the application. Give 'em what they ask for. If you're not sure what they're asking for, just call 'em and ask 'em.'" [#71]

Eleven businesses owners described their experiences with the certification process in negative terms. [#6, #35, #36, #47, #67, #70, #76, #AV, #FG1, #PT1, #PT3] Their comments included:

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "The process when we were just WBE was absolutely ridiculous. They went through our shit with a fine-toothed comb and when [my wife] stepped in, it was just like, voila, there it is. Hey, no big deal, here you go." The Black American female owner continued, "it was a much easier process than what him and his mother had gone through. They rolled out the red carpet for me and were very willing to help me and any questions I had or something I needed, they helped. When my husband and his mother went in, they searched through them deeply. If you are white and trying to be a woman-owned business it takes them a lot more time and it's more difficult for them. My husband got to see it firsthand because he'd been through the process before and he was actually amazed at how much easier it was for me." [#6]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "As far as any minority or DBE certifications I do not have. We attempted to, many years ago, about six years ago, we attempted to serve a process but always found hurdles too high. It sometimes gets too complex for us because we're a small contractor. But we're always so busy that we don't have anybody that could really lend a hand to help us out with those

documents. Every time we kind of get to a certain point, we have to resubmit paperwork and it gets really cumbersome for us. We kind of put it on the backburner. Then a year passes by and so on. we are 100 percent minority. So, just something that we just haven't had the opportunity to complete our documentation. It's hard. Because really though all these the city won't assist you with any of those documents. The state - it's really - they just tell you, 'Here, go to this website and stuff like that and kind of figure out for yourself.' But there's really like some type of consulting firm that reached out from the State side. As far as the state level, I mean we haven't seen any support." [#35]

- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "It was a long process. I thought it was just way too long of a process. It is paperwork-intensive to say that I own my own company. I should be able to give you my I.D., my Social Security number, my documents of being in business. It's a lot of easy stuff that prove I own the company versus a 50-page questionnaire." [#36]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "I would say difficult because I haven't finished it yet. It's incredibly difficult compared to other things we have done." [#47]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "think when we were looking at the women-owned thing, that was very - we were going to have to devote like hours just to figure all that out. And sometimes a lot of that stuff just was not worth the effort, because it's very confusing. Maybe we were just lazy, I don't know, but we just didn't have time. We were a busy agency, and we didn't have time to sift through page after page after page to just bid on." [#67]
- Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process. [#3, #6, #14, #24, #25, #26, #32, #39, #41, #44, #59, #62, #70, #76, #AV, #FG1, #PT1, #PT3] For example:
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I don't know if the State of Indiana is now all online, but some of the other states, you can just upload your documents online, which is really nice versus a ton of paper." [#3]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "They need to diversify a little. I feel like to both people that own a company are white and the wife is going to be the primary shareholder of the company and then want to just be a woman-owned business, treat them... way. You know, that you would treat me as a black woman, as the primary shareholder of a company, owning the vast majority of a business, and I... get my certification. That's just how I see it. The whole point of this is to treat people equally, right? And diversify. Well, let's treat people equally across the board. Be you white, Hispanic, black, Indian, Chinese. I don't care. All of us have a disadvantage at some point in our life." [#6]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "The problem with the program, or one of the challenges with the program, is that they're very stringent on minority control. When you get certified, they go through you with a fine-tooth comb. They ask you more questions as a minority- or women-owned business than they would ask a prime contractor who is bidding on multi-million dollar contracts

with them. They don't ask them for tax returns, they don't ask them ... they have to submit the highway market prequals. But it's just a different game, and we talk about these goals, but at the same time, when you're a small contractor it's just the nature of the business. You get into business, or somebody helps you get in business. Somebody gave you that first contract, somebody helps you with this, or maybe pays you a little ahead of time. So, with things like that, it really allows in how people got into business. Well, when it comes to the DBE regulations and stuff like that, all that kind of stuff's kind of frowned upon. So really, minority and women owned contractors are a little more at a disadvantage in the market place because all the other people who play in the marketplace are playing ball that way, and we can't because if we play ball that way, then they want to call it a front. And it's not a front, it's the way the industry works." [#14]

- The female representative of a Native American-owned MBE- and WBE-certified professional services firm stated, "When I opened my business, it was myself and another female. So, it was two female-owned. And we went looking for assistance or help because we were a female-owned and we really didn't find anything at that time. But I have seen since then, where there's organizations up in Indianapolis, where you can come and everybody in the state of Indiana that's female-owned, let's come and support each other and share some. So, I think things like that would have probably been really good to go in and be able to network with them, to be able to open doors that maybe I wasn't able to open otherwise. Anything that would allow you to get your foot in that door. So, if you had a list of, 'Hey, these are companies that are looking to partner with companies that are minority-owned.' I couldn't find anything like that before. And that probably would have been helpful or at least something that I would have utilized as some sort of a tool. Or if they're looking for it and don't know which companies are minority-owned, that would be a networking way to partner them together. These companies are looking for vendors of whatever sort. I just have to be a vendor of staffing. But whatever those companies are, if you have a list of companies that are wanting to deal with minority-owned, or might have the minority certificate, partnering those together. So that if we're a vendor that offers that and we're minority-owned, we know which companies are looking for that." [#24]
- The Black American male representative of a construction trade organization stated, "There's a different side which is sometimes an XBE firm can simply become too large so to speak. That a lot of the XBE spend, minority support is designed to help small to mid-sized companies access part of the business. Sometimes, at least at the local level and I'm not sure what the state regulations are on this, but at the local level, at the city level, sometimes a [firm like] Smoot is too big to count towards XBE spend because they operate in multiple states, they've got offices all over the country. That then Smoot was started in Indianapolis but since the CEO lives in Cincinnati, [do] they count Smoot as an Ohio company or as an Indianapolis company? Right it's like well, you know Smoot, it's owned by a black man. If I were a construction company owner, my goal is to be as big as [that firm]. That I think at one point in time when Davis and Associates had an office in Atlanta, they were making more money in Atlanta than they were in Indianapolis just because Atlanta was building more at the time. So, but if Atlanta had the same rules as Indianapolis that Davis couldn't be counted towards XBE spend goals in Atlanta which would have basically taken them out of the market. So then to what degree does the state, and this would be, to what degree does the state have a program, have a policy, have a way of [treating] the likelihood that a

diverse firm could be the CM, the GC or the prime. I don't know if it's discrimination. I would say it's somewhat policy, right? So even the idea of XBE spend, even say something that says 27% which is an enormous amount on a big project, but that assumes that the prime or the CM or the GC is not an XBE. Right? If I speak unfiltered, the basic structure of the system is that we're assuming day one that the person to oversee this is a company owned by a white guy. So what we want to do to have some sense of decency is we're going to require the white guy to spend one quarter of the money on a cross-section of woman-, minority-owned, veteran-owned and disabled-owned organization. The idea that hey, we might actually award this to a woman-owned company, a diverse, a veteran-owned company, or a minority-owned company and they might be the ones to have the \$300 million project and then sub it out to a white guy. That isn't even what the system assumes. So, if you're a Smoot or a Davis or a Powers and Sons, these organizations, that your assumption, the best you can hope for is 27%. Not that it's racist, it just assumes that Batman is white, and Robin might be black or might be female, that's almost the assumption in the policy." [#25]

- The Black American male owner of an MBE-certified goods and services company stated, "I have long been an advocate for IDOA, even the City of Indianapolis, to put real teeth in the program. Because that's why a lot of people don't want to be certified and they say it's a waste of time— because it was a joke. Because if you don't have a way to hold people accountable, to really reach out and truly try to get people to join these biddings with them, it has no real teeth. So I would say – I would make a – they'd even make an MBE or whatever, some kind of czar that's over that, and have these primes when they e-mail, solicit out or whatever or bid, send a certified form to the people that they claim they reached out to at their mailing address and have them mail it back. Because we've seen that there are some companies that are dishonest. Let's say I reached out to these people, got nothing back, or I did this and really didn't. You know? And I'm sure that there's companies or there's bids out there that probably has our name on it, saying that, 'Oh, we reached out to them and they didn't respond.' 'Cause I've had a weird call one time about that and I was like, 'Never even heard of these guys. Who is that?' You know, so definitely never got anything and nobody's checking it. So now I've been held accountable to get these city and state contracts and not being inclusive." [#26]
- The Black American male owner of an uncertified-MBE construction company stated, "I haven't put all that under the microscope of late and looked at what you – crossed every T and dotted every I, but I don't think that it's got enough teeth in it to speak to the 'leaders' of cities, counties, states, or what have you, to make a difference. Again, it's like me going into a fight with a man who's got gun and I got a pocket-knife. Y'know, that puts me at a disadvantage. Y'know, there's an old saying that goes like this: It's not what you know, it's who you know. So, I've found this MBE piece to be very much in line with that. You could have all the certifications that you want – if you don't have some relationship with somebody that's got some money, you ain't got nothing. You just got a bunch of paper in your hand." [#32]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Well, a lot is just making companies be accountable for what they say and what they do talking about wanting to do more business with minority companies and stuff. There is nobody really out there checking to see how much business they're actually doing with

companies, who they're giving their contracts to, and making them accountable. They could sit there at times and say, 'Yeah, we do this and that,' and they point one company out, but then you look at the majority of the other companies they do business with, the majority of that money goes to those companies." [#39]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I will say that this time, which is some years later, it seemed like I am more plugged in. I do get emails telling me about opportunities coming up and things like that. That wasn't the case the first time. But this time, again, with the city anyway, I am getting a lot of information. I attended a networking event, not long ago, at the library on Meridian. The library hosted the meeting. The people from Women and Minority Development at the city were there. I connected with a lady that was supposed to send me some information on how to just transfer my things over to Department of Administration so that I could be in the 'state loop' as well. But you know, you have to pursue that work." [#41]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "We had bid on the job and we thought we'd have a good number. And we found out that that number went to a WBE organization that was doing the same thing we were doing. And after two or three times of losing to that person and we thought we had a good number, we realized that it was basically to join them than to ... if you can't beat them, you have to join them, so we decided that we needed to get our certification. I can tell you this. I know you're calling about MBE, but because of the MBE -- the information's there if you want it, and folks are helpful. The young lady in the State of Indiana, I can't think of her name right now. When we're done, I may find it and send it to you because she was very helpful in walking me through the process and getting me setup. And then Indiana does a pretty decent job of the MBE aspect of having regional meetings and quarterly meetings and bringing guests in and bringing people in to talk about the minority aspect and the minority participation. The DBE, on the other hand, is even more aggressive and I think that's because it's a larger group and I also think it's because it includes women, women-owned businesses, many of which are I think white women that are aggressive in the business world. So, the state is fantastic with DBE and very good with MBE" [#44]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "When we got it, we thought we'd have a bunch of bids to do and would get a bunch of business. It's valid for three years. We got it in 2015. We got one job out of it. I'm redoing it now just because I see things slowing down. It might open up opportunities." [#59]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Keep this mind, there are only two African American licensed women architects in the state of Indiana. And it's been that way for years, yeah. The minority firm that they pick is typically a male-owned firm, and the women-owned business firm they picked is typically not a minority firm. Yeah, I do have a recommendation, because this a way we respond to the certification process. If they could put together a book – not just a list – with tabs as to exactly, and on the front of the tabs, you know, is it tax records, you can have that as a tab. And then underneath there, you can have some little bullet points, exactly what you want – list what goes in that tab. A table of contents, and then division tabs.

Because that's what we end up doing. That's how we address it. We put together a book. But if they – if each organization could put that out and then, and me being the conspiracy theorist I am – I hate to say this – but once that is done, if I send that – if all those agencies are inter-related, the information doesn't change. Once I'm certified as a DBE or an MBE, if I could take the – once I get all my documents together, send it to a different organization or them share it with the other organizations and just ask us, okay, this entity needs X as opposed to what that entity needs is Y. So, all we have to do is now provide you X instead of having to put together another volume of material. You know what I mean? Once I send it to you that I'm a woman, once I send it to you that I'm..., once I send it to you that I'm African American, I shouldn't have to keep doing that. And the reason being is because when you're disadvantaged, and I never saw myself as disadvantaged, even when – I didn't even know about that term. I knew about MBE and WBE because I was like oh, and they were like, no, you're disadvantaged. I came to realize that in business, yes, we are. When you're disadvantaged, it's often resources, manpower. In order to have someone do all of this and compile all of this information, you have to pay them. And for us, my staff, employees, consultants, are all degreed professionals. Well, I have to pay them, which isn't cheap. You know what I'm saying? Just to give you example, my last staff member, I was paying him, what?, \$70,000, and the other one was \$50,000, you know? So, then I have to pay someone to help me do the other stuff, an administrator. We did have administrators. I still have somebody that comes in and helps me. But just to have the level of understanding or skillset to respond to certification requests and documentation, it can't be just someone who knows how to answer the phone that you would pay \$10 or \$20 an hour. It has to be someone with a higher skillset. So, the resources for doing that, if they would provide some people that do that, or a grant, just, you know, \$2,000 or \$3,000 to get your certification documents compiled and properly submitted, it would make a world of a difference” [#62]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We are in process of getting it. So, it needs a lot of documentation, so, I mean, to do on my own, it takes a lot of time. I need some help in assisting on getting the certifications. I don't know if state has any resources or somebody they can report to, to help me. That will be really great, to get those. I mean, most of the information is online. All the websites have that information. But when I do plus time, I mean, it takes a long time to get the paperwork together, and I don't want to go back and forth, wasting my time, so I want somebody who is experienced to look at my paperwork and see, 'Hey, this is all okay, we can do this,' or 'No, you had to wait,' or 'We need more documentation.' Once I submit it, they deny it, and I had to go back. It takes long time. So, I don't know what resources does the state provide to help us. A lot of information is online, but like when we submit the documents, I just need somebody to review before I submit. Because we were trying to work with somebody, and they charge a lot of money. And as a small business, we can't just invest thousands of dollars in just getting certifications.” [#70]
- The Subcontinent Asian American representative of a business development organization stated, "Being a more welcoming and educating and informing people more about how does the process work for example. I think they don't quite understand. I was recently having a great conversation with City of Indianapolis, their OMBW I guess from the state. Often people understand that to get a contract, first of all, they have to get a minority business certification. I always hear that state is harder versus cities, cities' harder versus state. I

don't know exactly, but the amount of paperwork that just needs to be done, and the amount of compliance kind of a thing that they have to do. Some small business owners don't understand that they need to be having lots of documentation ready. But they are not well-informed about all those things." [#76]

- A comment from a VBE-certified professional services firm from the availability survey stated, "I would never encourage anyone to start a business in Indiana believing that 'veteran owned' status would be a benefit when it comes to obtaining business in city, state, or federal government." [#AV]
- A respondent from a focus group of prime professional service consultants stated, "We always like to see when our contractors get the work, but there is a limited number of XBE construction firms in the area. What makes it even more complicated is that in Marion County you have to be certified through Marion county's office. But if you're certified through the state, it doesn't count. So, you're automatically limited to what lists you can use on Marion County public works projects." [#FG1]
- A respondent from a public meeting held in Greenfield stated, "Putting it online would be a huge -- the application process online would be a huge win." [#PT1]
- The female owner of a professional services company stated, "My comment is the certification experience with IDOA needs to be online. Other certifying bodies do have their certification online, it does make that a lot easier." [#PT1]
- A government representative from a public meeting stated, "Think of it -- you know, certification, you throw that term out there and they automatically say, oh, no, I don't want to get certified, it takes too much to get certified, it takes too long to get certified, and I got certified 20 years ago and I never got a contract. Well, certification doesn't mean you are automatically going to get a contract. Just because you started a business doesn't mean people are going to hire you. So, I think of certification just as a business license, a contractor's license, it is another sheet of paper that you use to leverage your company getting certified." [#PT3]
- The male owner of a DBE-certified construction firm stated, "It is disheartening to be told or asked up front before you provide your services, are you certified? Oh, that's great, you are a trucking company. Are you certified? Wouldn't you want to know if I can get the job done first? Like why does a certification matter. When I do tell you I have the certification, it's the cherry on top. It should be that they, yeah, you might want to do business with me, it shouldn't be the only reason why you do business with me." [#PT3]

5. Comments on other certification types. Interviewees shared several comments about other certification programs. For example: [#13, #29, #30, #71, #PT3] For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I don't think that was too bad. A lot of times when you're a smaller company, you start out like my partner and I both took \$500 in cash and went and got some brochures printed and that was the start of our company. And then you're starting this thing, you don't even know if it's going to be a business and all of a sudden if it is. So, with the WBENC our biggest hurdle was for us to prove that we both put \$500 in cash. And so, we're trying to go back, we started in '86 and we're trying to go back from 2009 to '86 to try to figure out how we

can prove that to them. And then we finally got to the point where if this is we can't prove that we put up cash or who actually put the money up, we got to move forward here. We've been doing business since 1986 as a women-owned. So, they finally kind of just let that go at the last minute." [#13]

- The Black American male owner of an MBE-certified goods and services company stated, "The minority certifications, the NMSDC, yeah, the National Minority Supplier Development Council. And we do that through the Indiana regional, which is now I think called the Midwest region." [#29]
- The Black American male owner of an uncertified MBE goods and services firm stated, "We never had any issues with it. We did not find it extremely difficult, simply paper intense. That was not an additional burden to be certified by Iremist DC or the City of Indianapolis." [#30]
- The Black American male owner of an MBE-certified professional services firm stated, "Mid-States, in my view, is the most thorough. IDOA is – Example. As part of Mid-States' they, y'know, of course, 'Prove you're an MBE,' and so – I think they asked for a picture. I think I gave 'em my passport, maybe my birth certificate. I'm pretty sure I gave 'em my passport, and it's a picture. And they came back and they're like, 'Okay, can you send us your birth certificate?' And I was like, 'For what?' "Cause your passport doesn't say – 'I don't think my passport – Let me see, it – I don't think it – Whatever I said, the way it was phrased or presented, it didn't have a race on it. Y'know, looking at my passport, it doesn't have my race on it. It has my picture. And so like, 'We need evidence that you're black.' And I'm like, 'My passport picture doesn't give you evidence that I'm black?' And so then they're like, 'Well, no. Can you send us your birth –? We need to have written evidence.' I'm like, 'Okay.' So then they asked about my birth certificate. So then I pulled my birth certificate, and my birth certificate specifically, it doesn't have a race. Yeah, my birth certificate doesn't have a race on it. So then I called back to them, and I said, 'Hey, birth certificate doesn't have any notice of any race.' So then they responded, and it was like, 'Well, then you ask for your parents' birth certificates.' So then I'm out of town; I call my dad. I was like, 'Hey, Daddy, how you doing?' And, y'know, like, 'Oh, I'm well. Blah-blah-blah.' And I said, 'Yeah, I'm submitting my stuff for [my firm's certification], blah-blah-blah-blah-blah. Do you and mom have your birth certificates?' He's like, 'Yeah.' I was like, 'Can you send that to me, 'cause they needed proof that I'm black.' Yeah, I told him in sent the passport, and he's like, 'Your passport picture wasn't enough?' And I said, 'No,' to which he started laughing. And he sent it to me. But, yeah, that was really surprising. I've never had anybody or any other entity go that deep." [#71]
- The male owner of a DBE-certified construction firm from a public meeting held in La Porte stated, "They are time intensive, there is a lot of information that you gather, a lot of work that goes into it. For a DBE it is no joke. They come and interview you at your place of business and, you know, just scour through everything. This is even after you have done all of the paperwork process to even get them to come and do the site visit. You get through that and you are thinking, oh, boy, now I should be able, I should be opening doors everywhere, and to not just say open doors where somebody is just going to start handing you things, but more open doors where the opportunities that we are being told certification offers small businesses." [#PT3]

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;
4. Differences between public and private sector work; and
5. Profitability.

1. Trends toward or away from private sector work. Business owners or managers described the trends they have seen toward and away from private sector work. [#27, #38, #39, #48, #60, #64, #66, #71] For example:

- The non-Hispanic white male owner of a professional services firm stated, "As of right now, it's kind of pretty static." [#27]
- The Black American male owner of an MBE-certified professional services firm stated, "For me? No. I take all. I don't discriminate. I take everything that I can get, every opportunity that comes my way" [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "For me, it's towards. I'm trying to get in there because once you get in there, privates don't have to bid everything. They can sit there and say who they want to use and that would be it, where a lot of publics, they have to get two to three quotes, and stuff like that. Even though you do great business with them, they can still go out the following week and put out another bid for another project, so there is no real loyalty. It's all about the numbers game." [#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "I think that COVID has impacted that. Private projects have fallen off." [#48]
- The female representative of a majority-owned construction company stated, "I think toward the public section – sector, whatever. I think because it is more – they're not as restricted guidelines, I suppose. And there's funding" [#60]
- The male representative of a majority-owned professional services firm stated, "I mean, always highway funding is something that has a direct impact on our line of work. But we do more than just for state DOTs, we also work for cities and towns and small, private companies to where if there's a slowdown in one area, we can go and work in another area." [#64]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It stays about the same. We try to keep the base diversified, right, because when one's up, the other may be down. There was kind of a rare run there for a while where both were up. But you want to have a presence to even things out. You don't want to be all in one market sector because if something slows down, we need to keep our people working and we need to keep the business running." [#66]

- The Black American male owner of an MBE-certified professional services firm stated, "We've had a trend more so towards private sector work. A lot of the work we do is developer driven. We do a lot of housing, a lot of light tech, a lot of hospitality recently. And interestingly enough, particularly right now with COVID-19 and the response, the intent and the need to move the economy is so great that if you have funds, or the ability to garner (no pun intended) said funds, the interest rates are so ridiculously low, and so favorable. So right now, it's a buyer's market from that standpoint, and we are seeing a tremendous amount of work, more so private development work, by virtue of all those different factors." [#71]

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.

Eighteen business owners or managers explained that their firms only engaged in private sector work. [#4, #5, #7, #11, #17, #22, #23, #26, #30, #33, #37, #40, #41, #45, #47, #68, #73, #74] For example:

- The non-Hispanic white male owner of a construction firm stated, "I would say 90% private, residential, and then 10% commercial. Just remodels are trending more than anything right now. A lot of people are deciding to stay in their homes and just remodel them. I mean I'm not opposed to doing any government work, I just haven't had a chance to bid on any jobs, so did any jobs like that yet." [#4]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "99% of what I do is just private business." [#5]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I would say 1% then for government. But I mean if you broke that down, I would say probably 87% is commercial and 13% would be individuals." [#7]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I would say all private really." [#11]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I wonder that have we had any government stuff at all. I don't think we have any government stuff. I bid on a couple. I bid online, I bid on auctions and I've done a bid with a DNR federal project." [#17]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "it's mostly private." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "The staffing has been all private. That's what I'm trying to get it to, to the government side." [#23]
- The Black American male owner of an MBE-certified goods and services company stated, "Ninety-percent of it is private sector. The main reason being because it comes with some paperwork when it comes to getting in the public sector domain." [#26]
- The Black American male owner of an uncertified MBE goods and services firm stated, "I do exclusively private sector work now. I'm not a certified MBE." [#30]

- The non-Hispanic white male representative of a construction company stated, "The majority of the work as far as actual dollar amounts is in commercial. But, actually, in the number of jobs, it's residential." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I don't have any government work at all, and I have not had any. I've never had any." [#41]
- The male representative of a majority-owned goods and services company stated, "we have got some opportunities to quote on government projects, but either they just didn't pan out or we've turned them down due to all the paperwork that's involved." [#45]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "95 percent comes from private." [#47]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Private related companies. because I do a lot of work myself. I don't know. I just feel that – that'd [government work] probably be too big of a job." [#68]

Two business owners or managers explained that their firms only engaged in public sector work. [#9, #35] For example:

- The Native American male owner of an MBE-certified construction firm stated "So the universities we do quite a bit with. I'd say it's probably 80/20 when it comes to university work. 80 federal, 20 university." [#9]
- The Hispanic American male owner of an uncertified-MBE construction firm stated "I'd say we cater to municipalities and state work. So, a lot of public work. It's highway work. We do ITS, the Intelligent Traffic Systems. A lot of covert-type operation for police departments and fire departments, those things like that. So, very little commercial work, almost like one percent. No residential. But the majority is industrial, highway work. 98 percent of my business is public work." [#35]

For seventeen firms, the largest proportion of their work was in the private sector. [#6, #15, #16, #21, #27, #28, #29, #32, #34, #36, #38, #44, #59, #66, #67, #75, #FG1] For example:

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "We do a little bit of work for the college and we do some work for the schools. I'm going to say it, it's less than 10%." [#6]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Mostly commercial work. we've done some recent Indiana state projects, but they don't do as much down here as they do other places probably, but we have to go through subcon proper or subcontractor." [#15]
- The Black American male owner of an MBE-certified construction company stated, "Mostly commercial and industrial." [#16]
- The non-Hispanic white male owner of a professional services firm stated, "I would say maybe 15 percent, 15 to 20 percent in the public." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I think it's more private [than] public but those private companies that uses us, I

think is a big deal because they realize that once they apply for these public work – these contracts, like Citizen Energy and the city, they gonna ask for an MBE, which I think is really, really great” [#28]

- The Black American male owner of an MBE-certified goods and services company stated, "That's where our business has definitely trended. Our first year, our main customer was the City of Indianapolis through United Water when they had privatized those wastewater plants. And that continued – that business continued to grow to where we ended up supplying 25 plants with United Water. [In cities all over the U.S.], their water plants. It just continued to grow. That stayed static, that being that that was the only one we worked with. And so, when the privatization became less popular because the privatization companies usually came in and did a lot of cutting of jobs – they right sized a lot of stuff. And once it was right sized, then you seen those cities fight to get it back. And so that business, it just pretty much stayed the same or gradually decreased. Whereas the other part of our business, the private sector, we were able to get – those two silver trophies with the balls on 'em are Coca-Cola supplier of the year. And so something like Coke we do approaching \$30 million a year with. Pepsi probably about \$20 million a year with. Kraft is bigger than that. Kraft is just over \$30 million. It'd probably be \$35 million, \$40 million this year. what I just named is probably 85 percent of our business, 80 percent, 85 percent of our business.” [#29]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Now we're doing more commercial than we are anything else.” [#34]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "probably 95 percent of our accounts are there [in the private sector]” [#36]
- The Black American male owner of an MBE-certified professional services firm stated, "I would say more of my work comes from the private sector, as far as volume. But the public sector, I get bigger revenue.” [#38]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Probably a 70/30 split on private work that we're doing for individual companies. 70 private and 30 being public work.” [#44]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "A lot of our companies that we work for are private sector.” [#67]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "We don't do as much publicly bid work. Our focus is more on healthcare. So, we work with a lot of for-profit, not-for-profit health systems.” [#FG1]

For twelve firms, the largest proportion of their work was in the public sector. [#1, #2, #3, #12, #31, #39, #42, #43, #48, #64, #70, #FG1] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Well, we're 90% public. The only thing different about our industry that's kind of, you see, as this thing called public private partnerships 3P. So that's a really unique way of doing business. And that's how they're building I-69 down here. So, there's three components to it. There's a contractor, there's an engineering company, and there's a

financier. So, the financier puts up the money, the engineering firm does his work, and the contractor builds the thing. And then they have to warranty the work for a period of time, like 25 years. And then the state pays that back to the financier over time, it's like a bond. Well it's called 3P." [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Probably 20 to 30% [are federal contracts]. We do some work for the Ohio National Guard, we do some work for the Navy, Pine Bluff, Arkansas, we ship product to Guantanamo Bay, we've got regular work with the Department of Veterans Affairs. We've probably got 15% private business." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We had done a little bit, but yeah, we've been plenty consumed with state work and so we've not gone after federal. Today, we're probably 80/20 again, just because of the size of some of our government contracts. You know, you close something and then it gets out of whack again. But that's okay." [#3]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Schools are probably 90% of our business. We do get a few private. We'll do a few day-cares here and there, gymnastic studios and stuff like that, but mainly it's schools." [#12]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "All public works, most generally; 90%." [#31]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Probably 60 percent of it, 60 to 70 percent of it comes from the public, and maybe 40 percent, 30 percent comes from private because, like I said, more privates, they can handpick who they want to use." [#39]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We are doing more public work, I believe, than private." [#42]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Almost 60 percent public, maybe a little bit more now." [#48]
- The male representative of a majority-owned professional services firm stated, "It's probably 75-25 [public/private]." [#64]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "I head up mostly higher education work. It's probably four out of five projects are our higher education and most of those are public contracts. Then our firm, that's probably about 30% to 40% of what we do. I would say that 70% to 80% of our work is public work." [#FG1]

Five firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy. [#13, #14, #18, #49, #61] For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I would say we probably have 50% private and 50% public." [#13]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "We purposely kind of are involved with several different market segments so we can take out the peaks and valleys of any given market, which kind of works out to work sometimes more out of dumb luck than careful planning. It does make a difference, but on an average, I would say we're probably ... now the split is between highway work and commercial work when I make this statement. But for example, [one division of our firm] does no highway work. They do work with the State of Indiana like on the Justice Center and things like that, but they do no INDOT work. So, their number's probably around 25 to 30% of the state funded work versus the commercial markets. [A second division of our firm] is probably 50/50, and [the third] is probably the same split as [the first division]." [#14]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "I would say for the accounts that I handle, which is roughly about 1/5 of the 3,500 units, I would probably say it's almost 50/50" [#18]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "I would say 50/50." [#49]

3. Experiences getting work in the public and private sectors. Business owners and managers commented on what it's like to seek work with public and private sector clients in the Indiana area.

Twenty 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 [#1, #6, #10, #17, #21, #30, #37, #38, #40, #41, #46, #47, #48, #59, #60, #73, #76, #AV]. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "It's been easier in the private. Easier in the private because we've kind of built a niche there that none of my competitors do. So, one thing about that, that work happens really fast. You find out about it one month and the next month you're working. On the highway end of it, we find out the stuff way in advance. But not with private. They come to us, and they don't hardly ever complain about the price. There's a website called Reprographics. And it has a lot, it doesn't have everything, but it has a lot of private work. And then you can subscribe to a service called Construction Data and you'll get an email telling you all the work that's bidding in your area." [#1]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "We've had a really good relationship with both of those [large private companies we typically work for] for a long time. They know that our guys are right downtown every day. We've got some really, really experienced people and they like us, and we like them, and we know how they operate. Back and forth" [#6]
- The female representative of a WBE-certified construction firm stated, "We get contacted a lot about anything major that's going on. And sometimes [the owner] will be like, 'Okay, yeah, we'll bid on it.' And other times, they're like, 'We are so busy, I'm not even going to hassle with it.' So in word of mouth, I think, especially in a community like where we are, word of mouth's everything. And if you don't treat your customers right, you're not going to

get any other customers from them, and they're going to talk bad about you. We bid on a project probably 10, 15 times a month." [#10]

- The non-Hispanic white female owner of a WBE-certified construction company stated, "Well, honestly right now, because we're not that big, right, the boys, our plates are pretty full right now. People are calling us left and right. [My son]'s phone doesn't stop ringing. Yeah. But it's for jobs. It's for these small jobs and stuff. So, I'm trying to look for opportunities to get us to a different level of work or a different kind of work." [#17]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "Basically, a good number of projects that I have done the last 25 years or so have almost all been the result of my assessment of a need for a certain project, approaching the organization. Working with them in terms of developing their understanding. As you probably well know, as a consultant yourself, very large organizations many times miss on the opportunities associated with certain particular issues, especially if the issues are basically issues outside of the boundaries of their corporate concerns." [#21]
- The Black American male owner of an uncertified MBE goods and services firm stated, "In the private sector a different balance is required. The existing relationships between private clients and their service providers understandably is a little bit more challenging. But luckily over a period of time we have developed relationships with private buyers" [#30]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "For example, somebody is selling a house, there is an inspector that comes and checks of things that are an issue, so they will contact me and I need to put a quote and go and fix the problem, so that would be a direct thing. Some of the realtors, they know me already, so they refer me sometimes, or the inspectors, home inspectors. That will be a direct or a friend that wants an addition in a house, that would be another direct thing." [#37]
- The Black American male owner of an MBE-certified professional services firm stated, "What generally happens is – particularly for private – they track me down through whatever sources, whether it be internet or a phone call or e-mail, because they're looking for a structural engineer or a civil engineer. Okay? Now, for public, it's a little different whereas they're tracking me down, but they're usually tracking me down through a bigger company. For example, like a bigger architectural firm or a bigger engineering firm." [#38]
- The non-Hispanic white male representative of a construction company stated, "Mainly from word-of-mouth and the fact that we work for other companies. Let's say, for instance, [a company we've worked for before,] their customers or the people that they work with that they usually call us if there's an issue or something like that. So, it kind of gets known to pass around that they should call us." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "From a private standpoint, it's certainly a bit more straightforward. You receive a call. They're interested in services. You go out. They either provide you with the scope of work or they ask you to provide them with what you think they need. I've even had that questions. You prepare a scope of work and you assign a price to it. You bid it. I've had occasions where they really like you and they want you, but your bid is outside of their budget. So, you do the dance. You either get the work or you don't." [#41]

- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "I had one the other day; it was a treatment center, they were just now opening. And she had gone to all three of us and gave us very specific what she wanted in uniforms, and whoever came in the cheapest got the bid. And I won. I wouldn't even know how to bid on a state or federal contract. I wouldn't even know where to start." [#46]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "Easier to deal with private companies than it is getting in front of government, towns." [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Private sector doesn't usually require formal requests for proposal. They just ask for a contract and then they select based on relationship and pricing. The public sector has a more rigorous selection process." [#48]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Most of them, we haven't had to seek out work. It's all been word of mouth. We're unique on what we do so when people look to do electronic access control on apartments, we typically come up as a vendor. We're a unique vendor in terms of that. So, we get the work because we're probably the only company – there are other companies but we're the only company well experienced in that type of work so we get it." [#59]
- The female representative of a majority-owned construction company stated, "The private [sector] has more [work]" [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I usually get like, my loads from the brokers. They posted their loads online. We have one that we use like that or Truck Stop, and they posted their loads online." [#73]
- The Subcontinent Asian American representative of a business development organization stated, "I think private sectors is a little bit more fair game I would call it. Because in private sector ... again, depending on how large and small companies you deal with, but then the procurement processes like in a larger [company, their] procurement processes are very well-defined. It is more merit-based, would say publicly traded company versus some of the private companies, it's easier for us, because somehow, we as minorities, we [need to find ways to] to build those networks. I've seen people having the better luck with smaller to midsize private sector, and publicly traded companies. Sometimes publicly traded companies do have stricter requirements as how many ... the infrastructure or I would say the corporate structure that they need, and sometimes small businesses don't have it. But then that is not hindering them to even apply for it." [#76]
- A comment from a Subcontinent Asian American female WBE- and MBE-certified professional services firm stated, "Hard to get any government awards." [#AV]
- A comment from an Asian Pacific male owner of an MBE-certified professional services firm stated, "I do not trust the State government, I have not been awarded contracts after several attempts. Never received feedback as to why I do not earn any of the awards/contracts. I am aware of foreign companies being awarded but I am a US citizen and a minority." [#AV]
- A comment from a majority-owned professional services firm stated, "Seeing a resurgence, but it is difficult to get a government contract in Indiana." [#AV]

Twelve business owners elaborated on the challenges associated with pursuing public sector work. [#3, #22, #26, #27, #41, #42, #43, #44, #60, #67, #71, #AV] Their comments included:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Probably how fast they move. The State can be slow, but not always. I think if there's a hardship with the State, I think sometimes, maybe not everybody, but some leaders become a little desensitized to the fact that it's a huge investment on the part of whether it be a prime or even a sub. I mean, it depends on the contract to pursue an opportunity, and put together a proposal, or search people, even if it's staff OG, and then they cancel. And so, you've done all this work, and spent all this time, and it's costed you a lot of money. I mean, there is an opportunity costs you're paying. In professional services, you're paying, in IT especially, big salaries. And those salaries are going toward non-billable work, when you're pursuing an opportunity. So, it's a huge investment. It just goes directly off the bottom line. And so, we need to be just super thoughtful about canceling, before you put a bid out, to not cancel it, to not put staff OG opportunities out, and cancel it. And I don't know what percentage gets canceled, but it's not insignificant." [#3]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "If only they'll give me a chance to talk to the department where we inquire how to get affiliated, then that would be a big step. I tried that before but it seems like they just told me, 'Yeah, somebody will contact you, blah, blah, blah,' and it never happened. I never got the chance to talk to them at all." [#22]
- The Black American male owner of an MBE-certified goods and services company stated, "That's just complicated, hard p's, hard q's and so forth. Their time and taxing. That would really be – I don't know if there's companies out there that do that kind of stuff, but that would be a really good niche for somebody, essentially get out there and help do those or you submit your paperwork to them and they help go through it line-by-line and help you submit them. That would be a good business for somebody to get into, because they would stay busy, first of all. And they would get probably a lot more efficient in doing it. The public sector, it would just be standard bids that you see sometimes that come across my e-mail. I may have seen some of them – construction's got something out there, blah blah blah, we'll attend them so far. But you have to be diligent and make a lot of meetings and a lot of face-to-face contacts. And that's where the real relationship and connections come from. Like I said, we don't have the resources, and it's just you and two other people managing and scheduling and then sometimes filling in for guards. You don't have the time to go to a lot of events. But that's just doing your homework and that's just part of the game. But it is somewhat frustrating. When it comes to the state stuff, like I said, I normally don't attend too many of those events, just because, like I said, at the end of the day there's going to be some cumbersome pile of paperwork you've got to fill out to even get there, get you to meet the basics or whatever it's trying to do. And some of those benchmarks may be so high, you know, \$5 million policy for something that you only carry \$2 million, puts you out of the park and you can't really afford to pay for a \$5 million policy that you're not generating work from. That would be e-mails for RFQs and so forth. And if there's somewhere close-by that we can attend we will try to attend. A lot of times – sometimes they're farther away; sometimes they're all-day events, you can't afford to be at 'cause you're away from day-to-day stuff. You know, so you've got to do two hours to Evansville or two hours one way or

another, you know, thing lasted an hour, that's a whole day gone. And the return on investment in time just doesn't pay out a lot of times, so you don't even go, 'cause the distance and time you've kind of wasted." [#26]

- The non-Hispanic white male owner of a professional services firm stated, "Well, certainly, historically, the RFP process has been very – at least for me, has felt like kind of a black box where you kind of get into an RFP and you're not – there's not an opportunity to have much of a conversation with the people who are looking for the agency because it all goes through procurement. With the new process, I think there's more of an opportunity to have a dialogue, which I think is very healthy because, often, if you just sort of respond with a written document, there's a lot of nuance about why something might cost more and why it would take more hours to do it this way and then that way, and the opportunity to kind of make your case a little bit stronger than just people considering the options as basically the same." [#27]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "But it just seems like – again, Indiana Housing Authority. That's governmental. It's not the state. But they put out a proposal not long ago. I went, walked through. But again, it was one of those where I had all these volumes of papers to fill out and sign and understand. How do you even know that you're in the ballpark? Well, someone told me, 'You can go online and you can look up the contract that was awarded prior to this one or year before last.' You couldn't see the existing contract. You can take a look at that and that will let you know what was awarded before, to get you in the ballpark. Well, I probably spent an hour on the website clicking around trying to find that information. I'm like, 'Where is the information?' So, I was told the information was there, but I wasn't told how to access it, how to find it. Just recently, I was really trying to bid on the election board. They had a proposal. Again, it's not state, but it's a governmental entity. So, I went, and did the walk through. All of that. Again, I had about five days to get it done. Same thing. You can go online and find out what the prior bid was. Again, I spent all this time trying to find this information. Finally, I called and somebody really nice picked up. I said, 'I can't find this information. Can you walk me through the website?' They did. I would never have found it had they not been willing to do that, to lead me to the actual contracts and documents and bid and proposals that the last contractor submitted and was approved on and received. So, I will say this. Anytime in my limited experience that I've had any dealings with county bids or – a lot of paperwork and very short deadlines and timeframes, and no one to really educate you or assist you, even in advance. 'You have the certification, so here's a class,' or 'here's a seminar,' or, 'Here's something to show you how to navigate the process when you get there.' That would be so helpful." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Our main contract here is as a prime contractor, I guess, with the way that it's structured. We bid for the contracts about two and a half years ago, and we interviewed. At the time, the Indiana State Department of Health was going through a transition period in terms of its leadership, so we actually had interviewed for the project four or five times because the interim directors kept changing. It was a little bit of a frustrating process, but that was I think a very unique experience, just given the political climate. We would interview, and then we went into sort of a period of waiting while they interviewed two other companies. We made it to the forefront, and we were the selected

vendor, but then funding is where it got complicated, just simply because it was a unique project that had never been done before. The funding sources that pay for these types of services, are heavily restricted, and so our innovative solution was hard to fit into a clearly fundable category. It took about nine months for the state department of health to identify how they were going to fund, and to move the money to the health foundation in order to be able to engage us for this contract.” [#42]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Well, some contracts are going to out-of-state members. Some of the contracts – what they do, is people go around the contracts by using their minimum, you know, with the RFPs. Sometimes I don't even know that something's gone out to bid, or not necessarily bid, they're just buying it under the amount because it's a uniform, it's not – you can buy X number of pants and split it up and not have to meet the levels, the requirements for a technical bid, you know what I mean? So, people do that a lot. Sometimes you don't know what's happening, they're just buying it under the – you know, there's like an amount you can buy without having to put something out for bid. I might not even see it. My signature's sent to three people and tell two people to give them a price on it and they know which one's going to get it.” [#43]
- The Black American male owner of an MBE- and DBE-certified construction firm stated "Again, everything was public. Any questions we had, we actually had to drive down to the facilities to have some clarification and they were very – the state was very helpful in clarifying what – and it really didn't have anything to do with whether we were minority or not. It was just getting clarification on the specifications of the job.” [#44]
- The female representative of a majority-owned construction company stated, "Well, my – what I'm thinking of, what comes to mind is the roadwork. Projects that are the infrastructure and – expressways or stuff like that. It's hard to bid because they're only – there's only certain companies that seem to only get those type of jobs. So, anybody who's trying to get into them, it's very hard to get” [#60]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "I guess for us it is hard to get into that public – I think it's harder to make those relationships in the public sector. I mean we do not-for-profit work, but it's kind of a good ole boy network in the public sector. It's not easy. It's very political. I used to get in my car – they had a big thing in Indianapolis every year where you could go down and meet statewide people that you could maybe do business with. And I did that a few times, but I felt like it was a lot of red tape and I thought it was really hard to do business with the state, so I kind of gave up on that after a while and just did my own thing. So, I felt it was a little confusing and complicated and it was like, 'Why am I doing this?' because I'm never going to get to bid on stuff. After we tried to, I thought it was really time-consuming.” [#67]
- The Black American male owner of an MBE-certified professional services firm stated, "I wouldn't call it easier. It tends to be less of a process, if you would, particularly the larger sector public works. I mean, the larger sector public work, they're gonna have their informational meetings, and they'll likely ask you to submit general qualifications about your firm. Then they will vet that; then they will likely have meetings with you individually about your capabilities or options. And they may go back and figure out if you make sense in terms of teaming. They may do that internally; they may either do that with the client. So,

the larger public sector projects' processes can be three, four, six months, compared to public. That might be 30, 60 days, if not shorter." [#71]

- A comment from a Black American male MBE-certified construction firm stated, "If they could do more advertising for potential government contracts because I know a few guys that own trucking companies and we have never come across anything like that." [#AV]

Eight business owners and managers described public sector work as easier and saw more opportunities in this sector. [#26, #30, #39, #44, #62, #64, #FG1] For example:

- The Black American male owner of an MBE-certified goods and services company stated "I do think so, more so than the private sector. Because if there isn't some government agency and we need a participation level it just doesn't really happen. It's important to me, but it just doesn't happen. So as bad as the system is with the state, not checks and balances, it does open a door for opportunities, but then there's opportunities where you can still get exploited. And like I said in the beginning, how they're the ones that hold them accountable" [#26]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Let's talk about the public sector. For an extended period of time, I was a prime or secondary contractor with the City of Indianapolis and the State of Indiana. I found it difficult to get work only in that depending on the size of the contract I would have to partner with prime contractors. We did not have that extensive of an issue getting work. I did not think it was burdensome and it was in the long run a good relationship between myself and IDOA and also other institutional organizations like the City of Indianapolis. Actually, it was easier to get work in the public arena. I could target my marketing efforts. I could focus on 8 to 10 agencies or 8 to 10 institutions versus in the private consumer market, you have to have a much broader targeted audience so that was our choice. That was our decision." [#30]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Public, they've got to get bids for the projects because it goes through a certain kind of order of who they pick and stuff. Easier to get than private, the public. Yeah, because, like I said, private can choose who they want. They don't have to get bids. I mean, it's a catch-22, honestly, because in doing that, they can stick with their companies. Unless you go in there and show them that you set yourself aside different from them other companies and they really like your products and stuff, you know, they can stick with the same one, where the public, they have to get bids, so you've got a little bit better opportunity with them." [#39]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "It really only become an issue MBE-wise if we're doing public work, public being working for the city, working for the municipalities, working for the county or even working for the state. The guidelines that are laid out for public work is a lot more detailed because, again, they're dealing with taxpayers' money. So when we bid on a job or even when we win a job, there's a very clear understanding of everything that's responsible and everything that we have to do and what the guidelines are to meet the minority participation aspect. That's not the case at all when we're doing private work. They could care less if you're minority or if you're not as long as you can deliver the work and get it done in a timely fashion." [#44]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "We've always sought private sector work, but private sector work is a decision made by the developer or whoever the stakeholders are. And in most cases, when they're looking for an architect, they don't have someone that looks like me in mind. It has nothing to do with my design skills, because I can send some of our work. When we are given an opportunity, we usually exceed our clients' expectations. But getting that opportunity is very difficult in the private sector. It's not something that we shy away from. We very much want to be in the private sector, more involved, but you have to eat." [#62]
- The male representative of a majority-owned professional services firm stated "It's probably easier to work in the public sector just due to the fact of education of the type of services we perform" [#64]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "We're recently going through a couple of RFP processes for some work with some not-for-profit groups. The way some of the RFQ or RFPs are written, it really takes the personalities or the background of the project teams out of consideration and that it's more of a merit based approach where your work and the work of your firm is really at the forefront. Aside from listing the firms that are associated with the project teams, they really don't have or did not ask for specific information that would denote that, this is a minority owned business. Now, I think that may change as it gets into the interview process whether that's in person or virtually, but that's one of the things I like about at least the public side of design and construction is that it tries to create a level playing field so that that's not ultimately the initial consideration, obviously, that can come to the forefront later on as you interview with the client." [#FG1]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "I don't know if I necessarily would agree that there would be a disadvantage [being a woman-owned firm] in conversations I am in lately, in the nonprofit worlds that I work in on the boards I've volunteer for in the branding discussions I'm in around various projects. Frankly, the complexion of the team is of paramount importance. People are really looking at it and saying, I'm just going to throw an example out there--people are really saying, 'We can't design a Greek sorority organization if it's all men doing the design,' and people are being very blatant and straight forward about that. Again, I'm just throwing out an example because that's what we happen to do is we do a lot of fraternities and sororities." [#FG1]

Four business owners or managers noted that it is not easier to get work in one sector as compared to the other. [#5, #27, #48, #59] For example:

- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated "You know the private sector you bill tax, sales tax. The government sector you don't, sales tax is about the only difference." [#5]
- The non-Hispanic white male owner of a professional services firm stated "Gosh, I don't think it's easier in one versus the other. I think the challenges might be a little bit different in one versus the other." [#27]
- The non-Hispanic white male owner of a majority-owned construction firm stated "I would say they're both challenging. I don't think either is easier or not." [#48]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "The thing is we worked on it but we were a subcontractor to a prime contractor. We bid to a subcontractor. We bid it just like we would bid a private job. There's a little bit more paperwork but not any more than a really solid private contract." [#59]

4. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Many business owners and managers highlighted key differences between public and private sector work. [#2, #3, #9, #13, #18, #25, #27, #30, #33, #34, #38, #44, #76] Their comments included:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated "Public requires more paperwork but that's about it. I don't have much of a problem with that, though." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated "What I found was, we had done commercial work, then we got certified as a woman owned business and as a very small organization that became all consuming. And wherever you spend your time, that's where your revenue is going to come from, right? So suddenly we were all state government business across agencies. So, we were diversified in that way and that was good. But after several years we thought, well, we should really diversify back into commercial. And what seemed logical was, that we would go after big enterprise customers, right? The state's big, the programs are big. That would seem apples to apples. But we found, and this is what I love about the state, and particularly, the State of Indiana, we found that these enterprise companies, while we would get in and talk with business leaders or IT leaders, and we would win a significant project and know that we're adding value and feel great about it, we would get pushed to procurement. And it would all become about price. Every single thing was about price versus value. And I cannot hire the bottom of the barrel people and deliver value. You know, I can't compete, and I can't do well by my team. And not everybody has my mentality, but I want to give them good benefits. I want to give that. I want to be a great employer. And so the only way you can compete on price is either hire subpar talent or give them no benefits, do not... Really not take care of them, give them the lowest salary possible and the worst benefits or no benefits, and I just can't do it. And so that felt bad. It just didn't feel well. So, I said, 'What are the characteristics of the state of Indiana in particular, that we so love serving and how would that apply to commercial?' I came up with four things; forward thinking, partner minded, they know that they have to use partners to accomplish what they're going to do and so they welcome partnership, evolving and changing, right, and data rich. Those are the four things that we look for in commercial clients, but now in that, in the mid-market, right? Not on these bigger guys, yeah. And it's been phenomenal. So, that's been over the past two years." [#3]
- The Native American male owner of an MBE-certified construction firm stated "Yeah, the commercial sector is boys and toys. Ours [the public sector side] is more paperwork level technical. So" [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated "The government offices you just said to hold their hand a whole lot more, not as first in

technology as the private people are. In private, if you don't know technology you don't win. Whereas in the government offices, you're spending a lot of time training them on your technologies and holding their hand to get through that." [#13]

- The non-Hispanic white male representative of a majority-owned goods and services company stated "I would say right now, I don't see too much of a difference except I would say more on the public side, those are the ones where you commonly have to get three bids or whatever. Whereas some of the private side, they're in more of a rush to get their elevator up and running than they are worrying about maybe a dollar that they save or whatever" [#18]
- The Black American male representative of a construction trade organization stated "I think private's holding off a little bit because they're not sure about revenue. So, what's a big historic example. Corona beer, Corona built a ten-billion-dollar facility in Mexico because Corona beer sales were skyrocketing and now in the Covid era Corona beer, you can't touch it right? You can't touch a beer named after the virus. So they were on the verge of market domination in 2010 and they were predicting market domination in 2010 and spent ten billion dollars building this massive, it's almost like a city, a production factory in Mexico and now it's up and running and of course, coronavirus. So now Corona sales are in the tank." [#25]
- The non-Hispanic white male owner of a professional services firm stated "Well, the private sector work can vary as well. I think one of the differences between, say, Indiana Tourism and the private sector is in the private sector we often have clients that grow. So, we do work, and they show great results and they're like, 'Oh, we need to invest more money in this because we're getting a return on investment.' But in the public sector, there's just the State. The government allocates the budget and there's just this budget. You do a great job, and you can demonstrate results and that helps us to be retained. But there's not the same growth in budget because the people who are essentially setting the budget are not the people who are in the control of the work, if that makes sense. I think sometimes public can be difficult and sometimes public can be real easy and good, and vice versa. The thing – it just really depends on the particular client that we're working with." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated "Two distinct differences. One is the pay process. The pay process in the public sector tends to be strung out. I was included as a subcontractor for a print and mail contract, which we did for approximately 11 years for the State of Indiana. That was an interesting experience. It was a rewarding experience. It was also a difficult experience in terms of making sure that a timely payment process was instituted. If there was any flaw in the process, it was the fact that the payment process by both the State of Indiana and the [private firm] was in many cases 65 to 90 days. Needless to say, that was an issue, but the size of the contract allowed me to ride that out. In the private sector it would be unacceptable for me to take terms of 60 days. The public sector [also] had stringent, very stringent requirements in terms of delivery and also in terms of product quality. The quality issue, which should be awareness, was maybe a little bit overdone. In the private sector, the issue of getting the product to the client in a timely fashion is prevalent, but they are not as picky in terms of it being exactly. An example of that would be we sold envelopes so stacking a pallet with boxes that are X tall exactly or a rejection would occur versus in the private sector it would be as long as the

product came in and it was undamaged and delivered in a timely fashion, no issues. In the public sector, they tended to be just a little bit more specific.” [#30]

- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated "It's different in the fact that I think you have to be more motivated. Basically, you're the only one that's going to get it done, where before, when you worked in a public sector, you may have had a team or someone else was setting the goals for you, so I think it's a little bit more challenging.” [#33]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated "With the commercial sector, it's business. It's not – I mean they've got their politics and they let you know about their politics sometimes. The more Republican they are, the faster – or the harder it is to get your money. For the most part, business is business.” [#34]
- The Black American male owner of an MBE-certified professional services firm stated "Well, it's just the project style and the project owner or client. Dealing with smaller – you know, so, for example, if I'm just working with a client that's trying to renovate a house or he just wants a few things done, you know, that's gonna be a little bit more hands-on for me as far as site investigation and, you know, putting together documents and walking through the results or the fix with the contractor. Versus the public, it's gonna be a bigger project and I'm gonna be a part of a bigger team. You know, they'll bring me in just as a civil structural engineer or just a structural engineer or just a civil engineer; and I play a very – just a – I'm not gonna say a small role, but a certain role in that particular project. So, my interaction with that team is gonna be much different than if I'm interacting with a client on a house renovation project or a house renovation structural report requirement.” [#38]
- The Black American male owner of an MBE- and DBE-certified construction firm stated "Well, I got to tell you 9 times out of 10 the private jobs do not necessarily care or request any minority participation because they're doing a job and it's a prime. It's just can you deliver. Can you deliver what you said you're going to do or as a sub can you deliver what you said you're going to do.” [#44]
- The Subcontinent Asian American representative of a business development organization stated "It's the amount of time it takes to make decisions. By the state. By the time an RFP comes, or by the time they're even saying that 'This new project is going to launch.' Basically, the time investment that it takes to work with state is a lot compared to private sector. I'd rather work for private contracts, private sector. Because I know they're... the shareholders, once they made an announcement that this project is starting in six months, they have very thoroughly planned RFP. I know when they say the project is starting on May 1st, yes, they need to start on May 1st. I think the state project could take forever. Even the completion could take forever. That also can increase your cost.” [#76]

5. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Three business owners perceived public sector work as more profitable. [#38, #60, #64] For example:

- The Black American male owner of an MBE-certified professional services firm stated, "As far as, you know, I could get six, or seven, or eight house or building structural analysis

revue and structural report requirements to do, and, you know, a lot of them are gonna be less than \$5000.00 as far as revenue, as far as fee. But if I get a public project, it can be one or two, but they're gonna be in excess of \$10,000.00 as far as revenue or fee. So, the volume definitely comes from the private side, but the revenue comes from the public side." [#38]

- The male representative of a majority-owned professional services firm stated, "I would think the public projects would be more profitable than the private." [#64]

Seven business owners and managers perceived private sector work as more profitable. [#1, #13, #26, #27, #30, #62, #66] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Private's much more profitable." [#1]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Well, the government I would say is not as profitable as the other one, but they're larger. So, you ended up making it in quantity, not as much it's you just filling up your night shifts and stuff like that with government work." [#13]
- The Black American male owner of an MBE-certified goods and services company stated, "I think most of the time private makes more economical sense for most businesses. 'Cause sometimes the state, you know – I've often said you can't let dollars be your driving force as to what you pay on the job. Sometimes cheapest isn't always better for the job site. You get what you pay for. And then the secondary arm of that is if you give a big leg of the majority of the work to some companies in another state, at the end of the day that money's going out of state and they lowballed the price and made the money and took what's left back out of the state. Yeah, they may have a field office here, but at the end of the day that field office is only a small percentage of the revenue they generate. And at the end of the day the main tax dollars, payroll dollars, whatever, the revenue's going back to our corporate offices. And a lot of times that's not here." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "All in all, private is more profitable. What we do is we try to handle the public clients exactly as we would a private client, but there is much more pressure to keep our hourly rates low than there is on the private side. So, with the rates low, if we could hire low-paid employees and then that – you can be more profitable in that way. But if you don't do that, it's more of a challenge." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes. Profitability on the public side was based on volume so we only – the reason we accepted the contract was the volume. The margins were much smaller but at the same time the volumes were larger. In the private sector, we had the option – we have the option of charging what the market would bear and so our margins were better." [#30]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Yeah, it does, and it varies. Typically, we are paid anywhere – architects bill, depending on the building type, if you do an interior, you may bill as low as four percent of the construction value, depending on the building type. But if it's new construction, we usually bill anywhere from five to even up to 12 percent, because I've worked in healthcare and hospitals. They're the most complicated and difficult building type there is. So, in public

sector, there – most municipalities aren't gonna pay more than five to seven percent. And if you get seven percent out of a public project, you've done very well. In the private sector, it's just a matter of negotiation. Some developers – and this is why I said it varies – some developers want top-notch design; they can afford to pay for starchitects, as they call them, and they have no problem with paying someone 10 percent or more. Small developers, those with less resources, they don't wanna pay you more than five or six percent, no matter how much work is involved. If it's building, site work, road work, everything. They think you should be able to do it out of the fee, or they know a guy who can. And so, it's like, oh, okay, and there have been times I've flat out told them, if you know a guy, call him, because we can't do it for that.” [#62]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Depends on which part of the public sector you're working for. IU has a fee structure in place for AE services that's limiting. So, it doesn't necessarily keep up with market conditions. But they have a volume of work and it's – when a public entity hires you for a job, you know you're going to get paid. So, that risk element goes down. So, you can deal with a little bit less fee on something that you know you don't have to worry about getting paid on” [#66]

Six business owners did not think profitability differed between sectors. [#3, #11, #39, #47, #48, #67] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "So it really varies probably most between staff augmentation and projects, and the State ... so since we've done so much staff augmentation work, and because we have lower overhead, we're probably really mindful, more so than maybe we should be, when we're bidding on projects to keep our rates, to not be exorbitant with our rates. And sometimes that can be costly because whatever, it takes longer to get something done and the risk is pretty much borne by us alone, right? From project to project, it's probably this pretty similar, at least for us, between commercial and government. I've seen rates from prime contractors that are 50% higher than ours. And I'm like, 'Oh, we should have been more aggressive with our rates. Maybe we're being naive or whatever.' But so project, commercial versus government, for us, we're probably just about the same.” [#3]
- The non-Hispanic white male owner of a majority-owned construction company stated, "It's the same as far as I can tell.” [#11]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I don't know. I guess I'm just trying to figure out how to answer this, because if it's going, like government, I don't know if government is under more of a private or – because they have certain pricing differences than going out and just bidding the product for my regular customers. They have a certain, like a PSA pricing. They have a certain pricing that you have to fall in line with, so it's different.” [#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "No, I think that they are both similar.” [#48]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "I've never seen a huge difference.” [#67]

E. Doing Business as a Prime Contractor or as a Subcontractor

Part E summarizes business owners' and managers' comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors' decisions to subcontract work;
3. Prime contractors' preferences for working with certain subcontractors over others;
4. Subcontractors' experiences with and methods for obtaining work from prime contractors; and
5. Subcontractors' preferences to work with certain prime contractors.

1. Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

Nine firms reported that they primarily work as subcontractors but on occasion have served as prime contractors. [#1, #3, #15, #17, #26, #28, #30, #38, #73] 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. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We have [been a prime], but rarely. I mean, we can get a bond and we can go through the paperwork to get the job, but that's really not our forte." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It's low. I mean, and so in terms of revenue or in terms of number of projects or whatever, I mean, we'll go after projects typically that are not bid as RFP. We'll go after ones that are bid on the small projects, contracts or knowledge services. So, those are contracts under \$500,000. And so, those will be assessments or things of that nature. Maybe an application development project or something, a mobile app or something like that. But those don't come out all the time. So, I don't know the percentage, but it's 5% [prime]" [#3]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "It's usually larger projects [that we are the sub]. We have gone in as a general, our not really in general, but just as the only contractor. We do most of our work as a subcontractor" [#15]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "When I have to bid on some of the stuff I saw, yeah, the prequalification stuff and it's like, 'I've not done a job yet.' Then when I talked to one guy and he said, 'Well, what you need to do is you need to get several subs under a prime, and then you can have some of your stuff. You'll have some pre-qualifications and then you can start bidding on your own.' Then I had some people telling me that I may not ever want to be a prime because there's much more responsibilities under that and requirements than being a sub for a prime. Administratively, it may be a wiser to be a sub in most cases, than to even consider being a prime on anything. I'm not sure I'd ever be big enough to be a prime anyways" [#17]
- The Black American male owner of an MBE-certified goods and services company stated, "We've never did a prime because some of those parameters I discussed earlier about the

amount of insurance you've got to have. Sometimes they say they may have an XYZ number of employees, full-time employees." [#26]

- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "It has been subcontract work. We was the prime on one. But since then, no, I haven't seen anything. Nothing else that we would want to bid on, and have a – I look at some things and read it, and I say, 'Hey, we – it's not – they're gonna bypass us on this.' So, I don't like wasting a lot of time 'cause it's a lot of time put in this. And we're not a large company. We're not big at all. We can't compete with these large companies." [#28]
- The Black American male owner of an uncertified MBE goods and services firm stated, "For the State of Indiana, we worked a sub – a prime contractor until the State of Indiana decided that they would put all printing under a prime contractor and we were not capable of bidding on that contract. We then became a subcontractor to the prime contractor. That relationship was very good. Our relationship with [that prime] obviously was for an extended period of time. And we felt that we performed up to and above what was required on the contract. The proof is in the pudding. The [State] didn't use us, so I didn't have any problems with that. Our only problem was the payment process." [#30]
- The Black American male owner of an MBE-certified professional services firm stated, "Well, for mostly the bigger public work, like I said, I'm going to be a subcontractor, I'm not going to be a prime. My company is not big enough for that for some of the bigger, you know, \$100 million projects, \$50 million projects. So, I'm not big enough for that. So, as far as, I guess, volume – to answer the question on a volume standpoint, I'm mostly going to be a subcontractor for projects that's gonna exceed \$10 million. And projects under, you know, a couple of thousand, I'm gonna be the prime contractor because they're really only looking for me. honestly, it doesn't matter to me if I'm prime or sub. I mean, it's just – if a project is of a certain size, I'm not – my company is too small to be the prime. Okay? It has to be a certain size where I can be the prime versus being a subcontractor. And it really depends on the project's size. I'm not going to be a prime contractor for a project that's more than \$100 million. I just don't have enough backing." [#38]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Working for the brokers, you're like a subcontractor." [#73]
- The majority of firms (18 of 42) reported that they usually or always work as prime contractors or prime consultants. **[#6, #7, #9, #10, #13, #18, #22, #32, #35, #36, #40, #45, #47, #60, #70, #71, #75, #FG2] For example:**
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Prime. We like to stay prime. That way we can get our money. We're not a sub to a... I don't like being a sub to a general. Or the sub to a sub. It takes forever to get your money. And I'm not a banker. If I wanted to be a finance guy, I would've gotten into the banking world. I would say 90%. 95%, we're prime." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "80% of the time I deal directly with my client and 20% I'm dealing with the contractor." [#7]

- The Native American male owner of an MBE-certified construction firm stated, "For what we do a lot of the problem is we're not a subcontractor. We're the prime contractor. So, when the state has projects, a lot of them do much bigger values, dollar values then what we're more focused on. We're not a subcontractor because it takes too long to get paid. It just so happened that this last year, I just had these numbers in front of me the other day, we did \$4 million in revenue. And of that \$4 million, \$336,000 was sub. And the reason I was the sub is because they had a small business requirement, a sub side requirement that they needed, so they use me to meet that requirement." [#9]
- The female representative of a WBE-certified construction firm stated, "We don't [do] subcontract work at all." [#10]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Most of ours is prime, but we do some, I would say maybe 25% as a subcontractor." [#13]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "I think the only position sometimes we're considered a sub would be when we're modernizing or installing a new elevator where the owner has hired a consultant or general contractor to run the new construction project or completely modernize the building and the general contractor or that person hires us. We work as a sub to the general contractor if you look at it that way" [#18]
- The Black American male owner of an uncertified-MBE construction company stated, "Oh, I've done both, but lately I'm focusing on, for my plumbing business, service work. That puts me in direct contact with where the money is. As a contractor, prime." [#32]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "Well, it's been as a prime. When going strictly to maintenance work, generally there's no general contractor involved. So, we – a lot of the items that we perform, it's mainly on the electrical side. I really don't have to control any other stuff underneath us, unless we hire that stuff. It depends on if it's a crane to lift a large area of material that we – for our purpose. But other than that, we've been working directly – we just stay directly with the city. No general contractor in the middle." [#35]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Both, but primarily it's the primary." [#36]
- The non-Hispanic white male representative of a construction company stated, "We have [been a sub] in the past a couple of times, but usually we're always a prime." [#40]
- The male representative of a majority-owned goods and services company stated, "Mostly a hundred percent we're the [prime] contractor." [#45]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "We have [been a sub], but not very often." [#47]
- The female representative of a majority-owned construction company stated, "Ninety-nine percent of the time [we're the prime]." [#60]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Right now, everything is prime, what we do. But I mean, I don't know. Some say that it's required to subcontract before you get into the door of fed prime." [#70]

- The Black American male owner of an MBE-certified professional services firm stated, "The majority of the time nowadays we're serving as a prime. And that has more so been due to the type of projects. Like, example, the one public project I currently have, I'm the prime. We are the prime on that project because we're an MBE, and the project is a multicultural center. The firm that I team with is a majority firm. So that was an approach or position where politically it made sense. I mean, we obviously have the capabilities, but it also just made a lot more sense politically for us to be the prime." [#71]
- The Hispanic American male owner of a uncertified MBE and VBE goods and services firm stated, "It's all prime work." [#75]
- The Black American male owner of a certified MBE goods and services company stated, "Most of our contracts that we have right now are prime" [#FG2]

Fourteen firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project. [#2, #4, #19, #21, #27, #31, #39, #41, #42, #48, #49, #64, #67, #FG1] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "All the bigger, all of the INDOT stuff, I am a sub. On all the federal government stuff I am the prime. Just say for a number I've got 20 contracts, 12 of those contracts I am the prime on. That total may be \$600,000. The other eight contracts might equal \$2 million, but those other eight contracts I am a sub." [#2]
- The non-Hispanic white male owner of a construction firm stated, "I do both. I would say like 50/50 right now." [#4]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We subcontract work and I do consulting work for engineering firms [as a prime] also." [#19]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "I guess, given that I have been active for a very long time for a good number of projects over a 25 year period, I would say that easily, in 60% of the cases, we were the prime. In about 40% of the cases we were the sub. In Indiana, I would say that, given the number of projects we have done since 2015, I would say that again, this is like you can say 50-50, where we were the sub in about half and we were the prime in about half." [#21]
- The non-Hispanic white male owner of a professional services firm stated, "it's just a matter who our client is. You know?" [#27]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "That varies from year to year, but I'd say last year I bet, last year we were primarily the prime. This year, we have quite a bit of sub work. It just depends. When there's big contracts for road jobs through INDOT, a lot of the time they solicit us for bridgework. It just differs from year to year on what is up for bid from INDOT." [#31]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "It's about 50-50. We get a lot of jobs that we go after, we're the prime, and we bring other companies in under our umbrella. We've got a lot of companies, again, that we come

in as the subcontractor because they want to use our installers and stuff like that, so it's about 50-50." [#39]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "So, on construction projects, I am a subcontractor, because I'm not the GC. I'm not the general contractor. I didn't get the bid. On all of our corporate, private clients, we're the prime. We don't work for someone else. We work directly for that client or that agency, that entity. So, most often, we are the prime." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Not current, no, we aren't currently doing much work as a prime. Our main contract here is as a prime contractor, I guess, with the way that it's structured. I guess when it comes to subcontracting work, we don't do a ton of that. The majority of our work is through that engagement. We will occasionally do subcontracting work on behalf of organizations who need to achieve more technical success with their projects, and who need consultants to sort of help with that. Through our subcontracting, we serve more in a consulting capacity than anything else, I would say. Generally, it's working with an agency that has been awarded a contract, and just sort of help guiding them from a technical standpoint." [#42]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "We most often are the prime... [probably] 80 percent of the time." [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "It's probably 50/50. A lot of times we work directly with owners rather than through a general contractor." [#49]
- The male representative of a majority-owned professional services firm stated, "Some of each. A lot of our work as a prime, we have on-call contracts with Indiana DOT where essentially – and that's probably more of the bread-and-butter of our operation. Versus for the public sector, the projects are going to be – I'm sorry, for the private sector, the projects are going to be smaller in size and probably less frequent." [#64]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "Mostly we are prime consultant, but more and more recently we are being brought in as XBE participation.1" [#FG1]

One firm explained that they do not carry out project-based work as subcontractors or prime contractors. [#5] For example:

- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "I'm a distributor" [#5]

2. Prime contractors' decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with certified subcontractors.

Twenty firms that serve as prime contractors explained why they do or do not hire subcontractors. [#3, #4 #7, #9, #13, #17, #18, #23, #30, #35, #38, #41, #42, #47, #60, #61, #64, #66, #67, #70] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We are very partner-minded, so yeah, we will. We don't do it very often, but we will. If we're priming we might sub a skill that we just don't have, and we need a team to be able to do that. Something that we would normally do, but we just, for whatever reason, wouldn't want to ... would rather have some flexible workforce than adding to our current staff." [#3]
- The non-Hispanic white male owner of a construction firm stated, "The electrical is hired out by a licensed electrician and then all drywall and painting I do hire out a licensed drywall and painter. Everything else I pretty much do in house." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Like labels, I have a vendor that's trade only. So, I send labels out, business cards if they need thermo printing because that's a specialty type printing. So, I subcontract for the specific need. Then some customers, it may be the sheet size of the product that I need to subcontract it out. I subcontract about 50% of what I do." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "So large businesses, we will sub to them or they'll sub to us for different reasons. That's very small scale. And we're usually subbing to them because they come to us because they can't access a contract as a large business. So, they come to us and then we perform 51% of the contract. So that way they can sell their product or do their engineering or whatever it is they need to do. We do 51%. we performed 51% of our contracts at a minimum. Some we do more. But we do a minimum of 51% of our contracts for performance. " [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Not too often. We prefer to keep things in-house, because you can't control what anybody else is going to do. Now, we are doing that a little more than we used to Well, we do if we have large envelope print jobs, we might have an envelope printer to print them for us. And that's really about it, or our large print job. Like, we might have a financial real quick or something that they're going to print, and then we just address them or something like that." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We actually have subbed a couple of things like the big concrete work, we subbed to another group with us to do that, but we're getting ready to sub with some construction folks because we're going to try and have two or three things going on at once. I took [my partner] and I said, 'Let's just set up a couple of things. Even though we won't make as much profit, we'll still be able to make more profit because we'll have more projects going.' Depends on how big it is." [#17]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "Rarely do I see us being subbed out or we never sub any work so if we bid on something, we're doing the work ourselves in house. We're never subbing it out. Yeah, there's elevator technicians all over 49 field personnel. They're all in the elevator union and there's an apprenticeship that they have to go through to get their card in order to touch an

elevator. So they have to have licenses per the state and city, state guidelines. You really can't just go out and find somebody that has that. Most technicians are really pretty much always in need, especially in the last four years where we've had a lot of growth. we don't use subs at all. If a general contractor or whatever asks us to do something that we traditionally don't do, we have no problem saying, 'Hey, that's outside of our scope of work. You're going to have to go hire another third party and that's on you.' We're not going to try to do anything that's outside of our line of work A. For insurance reasons and liability reasons but also B. We're just not... There's no reason for us to try to make a little bit of extra money marking up somebody else's sub if it's something we don't do." [#18]

- The Black American male owner of an MBE-certified professional services firm stated, "I do for the [the training side], the teachers are all sub-contractors. Now, on the staffing company, I use independent contractors to do, to work for me in different little, not staffing work, but the work in the business. I'll use an independent contractor sometimes to come in, I'll 1099 him needing to work for me, let's say in the office or right now, I'm working on a certification project, I just hired a young lady to help me pull this together, I'm just going to 1099 her. I do a lot of that, to keep people off my payroll, because I can't afford, I'm just so leery because I had a payroll that killed me." [#23]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes. By nature, printing subcontracts out multiple pieces. For instance, a standard printer may not have a different kind of bindery equipment. That's just normal in our business. A standard printer may not have the ability to mail because that's handled by mail houses in our business. So yes, we absolutely did and would contract out and subcontract work out." [#30]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "I don't think anything else that's not on our trade because we are already in the shop and I don't like to go into another trade that we don't have the manpower for." [#35]
- The Black American male owner of an MBE-certified professional services firm stated, "I can get through a project and, you know, have two, three, or four people with me, helping me to get the project done. And once the project is done, you know, they move on. So, they're not full-time, part – I wouldn't even call them part-time. They're just project to project. Based on the size of the project, I'll bring in consultants to help me get projects done. But they're not full-time or part-time staff members. I hire subs, I hire second tier subs, I hire third tier subs. I do whatever I need to do to get the project done that I've been fortunate enough to sign on." [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Rarely. There have been times that – one in particular comes to mind. Our client wanted their windows cleaned. They were second-story, 40-foot windows. We didn't carry the insurance to reach those heights, nor did we have the skill to do that. So, we did hire another company to do those windows for us. There has been a time or two that we have called on or pulled in carpet cleaners. We do clean carpet but there have been times that we really needed someone with more superior equipment than ours, the truck mount, because of the soil content. Sometimes it's just because we were overloaded, particularly in the summer. You can't do it all. I've more than happily called some of the other guys that I

know that have that skill and have that equipment and give them that work. Just take it.”
[#41]

- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We do have subcontractors that we utilize, yes, for things like visual design and copywriting, but the majority of the work that we do is done in house, or through our strategic partnerships with other companies" [#42]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "We have subcontractors that we use every month. most the time it's something that a client would request us to help, either a subsidiary of theirs or – that's basically the only time we're gonna contract work out." [#47]
- The female representative of a majority-owned construction company stated, "I would say 75 percent of our work is subcontracted out." [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Typically a turbine repair job will go about two months, so I have the tools to take the turbine apart. Then to do the cleaning, I would call out people that would do sand blasting, as an example, people that do non-destructive testing, like on the turbine rotor, to look for cracks and imperfections. That would be some of the contractors. Onsite repair work - like on a turbine shell, a casing, if there's welding to be done - you need to contract a metallurgist. You need to contract out certified, qualified welders. And those all are of course – they're state certified. They have to be – the company, to stay certified, they would have to have an R stamp or a repair stamp. What else? Just the – a variety of different services that, I mean, me as a contractor, I wouldn't afford to buy all the equipment, and I couldn't afford to buy sand blasting equipment, non-destructive testing equipment, x-ray machines, and things like that. So those are things that would be contracted out." [#61]
- The male representative of a majority-owned professional services firm stated, "Only on very small occasions." [#64]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "So, if I have a design contract with an owner, I may carry the structural – which we don't do in-house, structural engineer or civil engineering, or maybe we need a code consultant or maybe we need an acoustical consultant. Maybe we hire a testing agency. The owner may ask us to carry that. So, those would be our subcontractors." [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Yes, we use freelancers. We have over the years, many years, we've always had a need for a freelancer here and there when a job got really big. Or when we're traveling, you know, when we have something in another state, and we need to hire vendors. Like we do – our one client is international as well as – national and international, and sometimes we have to have stuff that's done in California. So yes, we have to get people that can do photo shoot for us, or we get overloaded and we need writers or additional strategic planners, or PR – we might subcontract a PR from to work with us." [#67]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "I did not sub to anybody yet, because we have enough pool of employees that we can use if the contract comes. And my contracts doesn't allow any subcontracting

because of liability in health care. So, most of it is like, it should be prime, and we have to hold our liability insurances and, yeah.” [#70]

Twenty-five firms that the study team interviewed discussed their work with certified subcontractors, and explained why they hire certified subs. [#4, #6, #9, #13, #19, #21, #25, #27, #30, #31, #33, #38, #39, #48, #49, #60, #61, #62, #64, #66, #67, #71, #FG1, #PT1] Their comments included:

- The non-Hispanic white male owner of a construction firm stated, "I sub all my roofing out and he's a minority owned individual. I really don't see much of a difference. I mean, I like to try to use people I know so I don't really see much of a difference in the two. I haven't had enough experience yet to really see the difference." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "At times, I have used a veteran owned business out of Seymour for asphalt. They stay extremely busy they're down south. He's tough to get and they're a little higher money-wise and they're slow. It takes them forever for, once we put a job on the books with them, it takes them forever to get to us. A lot of times I just don't have the kind of time it takes to wait on him. So no, we don't really pursue him specifically. We pursue subs that are capable of doing the work. In a timely fashion. Us being woman owned and minority owned, it's not a big concern for us to select subs that are minority also. We don't use that many subs anyway. We sub perform the majority of our work." [#6]
- The Native American male owner of an MBE-certified construction firm stated, "We go veterans first and then we go woman-owned and then we go minority-owned. So, I'm always first and then if we can't find folks that meet the requirements and [meet out] price and we use whatever's available to us. But we always check those boxes first. Majority. [We use a certified sub] I would say for a majority of it. We always hunt locally for the small businesses that are trying to make their way. That's our small business plan or requirement and that's what we do." [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "All the people that we buy paper from are women-owned businesses. We have a company that does international mail. They're a woman owned business. I looked for a woman owned or minority. Because we need to meet our criteria for what we call a tier one also. We want to as well. But it's real easy to find them if you do. In the mail business you typically don't have powerhouses like we are" [#13]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "If, for some advantage or something that I need to use a sub, I wouldn't have any problem finding any. I can find them. Some of my people that I've been a sub under, they're a little bit more established that they have lists of minority contractors that they've dealt with. I would probably go to them for the list. My structural engineer in Atlanta, he's a minority and I just use him because he's good, but if it ever came down to a job where I had to use a certain minority percentage, I can play that card." [#19]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "Yes, [I have used certified subs] but I definitely don't think that whether they were minority or not actually entered into my evaluation at all." [#21]

- The Black American male representative of a construction trade organization stated, "I might say my overall element would be to really think about our XBE firms as being true partners as opposed to an add-on or a problem to solve or a check box to me. So then how do you get to the point that just like any other, I don't know, business partner that's critical to you being successful, how do you get to that point. Something where the party or person is not just somebody that I can satisfy or some regulation you have to meet, but it's literally critical to how we do business. So we're big sports fans here, we were talking about football, baseball, whatever. So in the college football world for better or worse there are these recruitment companies that are kind of sketchy in how they recruit people, but if you're a coach, your main responsibility is to coach the talent that you have, yes you have staff recruiters but then outside of your staff recruiters you also have these paid recruitment services that you support. Although that's an outside entity, that outside entity is as critical to your success as anything you do, and so you partner with them and you help each other. So I think the best, that's the thing that I think is the culture change that would need to be done on that scale of... Hey we need to think about this as part of this is how a project is successful, not 'Oh hey, GC, you're responsible for making this happen, you've got the XBE spend up to this number.' Or CM or whoever." [#25]
- The non-Hispanic white male owner of a professional services firm stated, "When we're the prime, we have to meet certain requirements as part of the bidding process, in terms of the MBE, VBE, WBE. So, we do that. In order to do that, we have to look at the scope of the work that's being done and kind of say, 'What are some areas that we need, we don't have expertise in that we need other people to come in?' Then we look through the available people and/or companies in those categories and look and kind of find an organization that seems to have that expertise and would be a good fit. Because definitely in the public, we do it all the time. Then, on the private side, it really depends about who's the best fit for a particular project. when we're going through an RFP process, they will often reach out to us because they know we're one of the primes going after the work. So, they would like to be a part of it. Then there are lists that are published and lists by state and then there's the VB or the veterans for the state, and then certified for the national, depending on the particular project you're going after." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Absolutely, yes. That's always our first look, obviously, because we're an MBE. But if that cannot be done, then we move through the system of our current relationships with our current vendors. Normally I call the State of Indiana and say, 'Hey, I'm looking for XYZ.' For instance, if I'm looking for a graphic artist, I'll say 'Hey, do you guys have a graphic artist?' I normally call the City of Indianapolis, obviously, because that's more localized and I would call their MBE organization and they would either give me some references or recommendations." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Any time we bid on any work; we reach out to them. We've had great experience with the certified subs. [We find them] on the INDOT and IDOA websites. We're lucky that we've had really great experience with all the certified – we don't have a preference of working with non-certified over certified. They're all really good." [#31]

- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "Yes, I have worked with a disabled veteran who has a construction company. I've worked with the AMVETS and American Legion in our town. Yeah, I do business with women-owned businesses here in town. One of them is a vendor of mine for signage." [#33]
- The Black American male owner of an MBE-certified professional services firm stated, "Yes. By all means. And I've got a lot of contacts with those, firms that I've worked with 'em in over the years. Experience? I would say I guess it's been very good. I don't really think about it like that because, again, the way I look at it is people I've worked with over the years, whether they be, you know, WBE, MWBE, what-have-you, or whether they're not registered or whether they're not even classified in those areas. It just doesn't matter." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Frequently. We like to give back to the organizations that help us. [We find them] through a lot of the councils and stuff. They have a list of a lot of members and stuff like that, so we can go and we can go contact them, and they can lead us to a lot of the MBEs or WBEs, whoever that we're looking for according to the work." [#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Probably 20 percent of our projects [use certified subs]. [We find them through] referrals frequently. Sometimes for specialized things there are lists that states have. It's typically a requirement by the client. Private sector seldom has an MBE or DBE requirement so it's almost always public sector. I would say that they're equal [in performance]." [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "Our industry is pretty specific, right, to the fire protection. And I would say the majority of folks involved in fire protection are known and whether they are XBE, MBE, WBE, disadvantaged, we know that just through common knowledge. Why do we find them? I don't know, a lot of times the bidding opportunities have XBE participation of bids. A letter from the state and maybe a letter locally that they're certified. Usually in order to get credit for the objections they ask that they be certified and have that certification." [#49]
- The female representative of a majority-owned construction company stated, "No, unless we are told to. If it's in the bidding process, you've got to solicitate an advertisement, that's when we will do it. But otherwise no. They – the union gives us a list of those women-owned or minority-owned, a list of companies, and we – usually there's two of them that we mainly use that are in that type of field. So, we try to make sure that – we try to get them in, but if the bid's – if their proposal is too high and we've got something lesser, then we're going to take the lesser one." [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, "The companies that I work for typically will require you to use a minority contractor when available, and whether it's qualified. Oh, they're already on – in my work, I already know who they are and what their capabilities are. And sometimes the customer will say, you know, hey, I'd like you to use company X. And we'd have to accommodate them. They're paying the bill. Now, if they can't do the work, I'd fire them." [#61]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Yes, I do. I do believe in diversity and inclusion. I grew up in the city of East Chicago, which is very diverse, with people, because of the steel mills, from all over the world. One of my best friends from high school, and we're still friends, her family is from Poland. So, I've never been the type of person where if I get a project, oh, I'm only gonna hire other minorities to work on this job. That's not our approach. Our approach is to hire – to put together the best team for this project, you know? I've often tried to get – to give other women in the design profession an opportunity, you know, an opportunity that someone gave me, or someone didn't give me." [#62]
- The male representative of a majority-owned professional services firm stated, "Yes, at times we are required to do that. We've been doing this long enough to where we've got a good handle on regular DBEs that we normally work with, and we just continue to work with those same ones. And they're not aligned. The ones that we're using are – there are not many out there, so it's pretty much always the same ones all the time" [#64]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Oh, I would say three times a year, four times a year. It's our public sector projects when we need their participation. [We] start with the listing from the Department of Administration and then check by category. A lot of times we know what the firms are that carry certification and then we can call them up and say, 'Hey, how's your workload looking? We've got this project. Does it fit? Okay, do you want to be on our team?' Our industry is not that big. It doesn't take long to figure out who's got the certifications that you need to call. I don't know if that's intentional. But on our private side, it's – no, I don't think so. If somebody's got the technical competency and the reliability to do it, it doesn't matter whether they're certified or not. Size of the firm is usually what it is. There's very – there's just a handful of consulting firms that are as big as we are. We're not that big. We're 60 people, right? But to be able to keep up with – it's the number of resources. Typically, we find they are smaller businesses. Like I talked to you earlier about was the entire industry, design and construction, is all looking to those to get them involved in their projects so that when – whether it's a big or a proposal with Department of Administration and they're being evaluated or with any of the universities, right, that your proposal is as complete and attractive as possible. So, they're sought after. So, that means they're fortunate. They're busy. But it doesn't mean they're always available." [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Depends on the job. Because, like I said, sometimes we're required to have certain certification for us or whatever. But it's not a real big thing for us. Usually. Usually the client will say, 'You can use them because I know they're certified.' You know, usually the client will – they're aware of who they are, so they would just direct us to them. And like I said, ours was mostly been in the printing aspect, where we had to have union printer, or we had to use a certain business. But a lot of times our client will just say, 'Hey, I've used them before and I can put their bug on our stuff, so just use them.' So, like I said, it wasn't a big thing for us that we had to go out and search that." [#67]
- The Black American male owner of an MBE-certified professional services firm stated, "I don't tend to do it exclusively, but yes, I always do. One of the firms we tend to do a good number of our work with is a VBE. From a sub standpoint, there aren't as many MBEs or

XBEs as there used to be – I mean, they're growing. Let me rephrase that. As an architecture and interiors firm, there aren't as many mechanical, electrical, plumbing XBE firms as there used to be. Then there's [one sub I use], I think he's currently an MBE. But honestly, he is so steeped in public sector, and his rates are ridiculous. I actually had to remove him from our team 'cause his rates were so high. And I tell him that. That's why I say competitive. And they're not competitive at all. But they market themselves in that public sector work, high-end type public sector work – Justice Center, like higher profile – that allows them to get that fee basis, which you can't get on smaller public sector or private sector; it just won't work. In general, it won't work.” [#71]

- The male non-Hispanic white partner of a majority-owned professional services firm stated, "We're running at about 20% to 24%, give or take, over the last six years in revenue tracks towards XBE firms. I do feel like we need to have more minority firms representing all different interdisciplinary industries, whether it's engineering and other, we just need to have some minority firms have been acquired or change. There's been a lot of change in this area over the last 10 years, firms that we used to team with are no longer available.” [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "We are seeing that more and more, as a requirement for RFPs and contracting with more national organizations as well as some locally. We're seeing somewhere between 16% to 18% is what we've been tracking and that those numbers aren't as... we haven't been tracking that as long as I probably would have liked, but for probably across the last couple of years. We are seeing it as a focus just to make sure that we get a broad brush of participation. Fortunately for us, a number of our consultants that we typically partner with help us meet those requirements. I don't know we just don't really look at them as an XBE, they're just the right partner for the job. I think that was by design on their part.” [#FG1]
- A respondent from a public meeting held in Greenfield stated, "Sometimes hearing from the prime contractors they are finding that they may want to extend an opportunity to a small business but the ones that they are aware of are saturated already with opportunities. “ [#PT1]

3. Prime contractors' preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors. [#2, #3, #4, #7, #9, #10, #11, #13, #17, #21, #27, #30, #31, #33, #38, #42, #47, #48, #49, #61, #62, #64, #66, #71, #AV] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Whoever's got the skills we need.” [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Mostly it's relationship and people that we know and trust to be able to do the work.” [#3]

- The non-Hispanic white male owner of a construction firm stated, "Just worked with them, relationships with people over the years. I know people in the industry and trust them, so I just used them really." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "The quality and the cost. They have to be able to provide the quality, they have to be able to meet the needs of what I need done, and then it has to be something that is priced appropriately for what I'm allowed to charge for my customer. Usually it'll take a few weeks of research to find a supplier for that particular product, and then you go through the quoting." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "We go through a micro validation process with them. We first of all with credibility. Second of all, compliance, and ethics for third." [#9]
- The female representative of a WBE-certified construction firm stated, "The owner knows everybody. He is exactly, depending on what the problem is and what we need done. He would be coming in here after the morning meeting, going, "Call this person, this person, this person, this person. Tell them I need to have a conference call. See what time's going to work for everybody, then you get it set up." [#10]
- The non-Hispanic white male owner of a majority-owned construction company stated, "It just again goes back to finding someone that's capable and willing." [#11]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Just long-term acquaintances that we've had and worked with within the past." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "This would be mostly word of mouth. I don't have any way to find a sub. Honestly, the concrete sub guy is another firefighter. The Bloomington fire department is my resource for my subs." [#17]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "Well, it is very much based on my experience with certain individuals and basically the requirements, the technical requirements that I need." [#21]
- The non-Hispanic white male owner of a professional services firm stated, "We have to look at the scope of the work that's being done and kind of say, 'What are some areas that we need, we don't have expertise in that we need other people to come in?' Then we look through the available people and/or companies in those categories and look and kind of find an organization that seems to have that expertise and would be a good fit." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "We would use the same vendors for private or public. How we would select them is based on their ability to deliver what we needed and, obviously, competitive pricing." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "By price, most generally but, in our field, there's just so very few that are qualified so you kind of use the same handful of people over and over again. Just kind of our geographical area, who quotes the work and, like I mentioned before, if it's a bridge job and we're the prime, then we work with a lot of the same asphalt companies whereas if it's a resurface job and it's a blacktop job, then they reach out to us to do the bridgework." [#31]

- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "A lot of it is based on pricing. I try to get the best pricing for my clients. It also depends on the minimum quantities that they order or the factories offer. For instance, if a factory offers a minimum quantity of 300 but my client only needs 100 of some item, then I try to search out for a vendor that will do the 100 and still stay within the budgeted price for the client. Also, a big determination is if the turnaround time meets the timeline that I need for my client. A lot of times, clients wait until the last minute to order things, so I'm scrambling around trying to find a factory that can produce it, imprint it, ship it, and deliver it in time, so there are a lot of factors that kind of play into it. I also kind of look at the quality. I have vendors that are very high-end, and then I have vendors that are very low-end, and I try to weigh the quality, quantity, pricing, and timeline availability." [#33]
- The Black American male owner of an MBE-certified professional services firm stated, "Primarily people I've worked with in the past. Again, I've been in the business for more than 25 years, coming up on 30 years now. I know a lot of people. And primarily it's people I've worked with in the past and had success with, how I select them. And it depends on the job, you know? If they're busy, if they're not busy, can they handle it. You know, they're not familiar with this type of work. Because engineering, particularly civil structural engineering is in a lot of – primarily in the building industry, but it works in a lot of different areas." [#38]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We generally will research them ourselves and build a relationship with their executive teams. We will do background research on prior relationships and how successful they were, and then, from there, make sure that those organizations are able to meet the requirements of our contracts. Many of our contracts have stipulations that anybody that we subcontract to is able to make available their financial records and their credentials for any auditing purposes, and things like that. We sort of follow a workflow of vetting them against our existing contracts to make sure that they're qualified to do the work we need." [#42]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "We just have a good rapport. We get along well, our clients like the work they do" [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Usually referral from other ... from colleagues or from the client." [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "We prequalify them." [#49]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Well, as a business owner, I'm not going to work for somebody if I don't know them. You know? And that's just common business sense. Well, for me, it was a pretty easy task; I had a pretty good feel for who knows turbine work and who doesn't. Because I used to be involved with the selection of the different contractors for work at our site." [#61]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Different organizations, you know, industry-related organizations, get lists of people, and I email them, ask them do you wanna be on my team, I'm doing X, I need a

mechanical engineer, you know, I need a designer, I need a draftsman, I need another architect to help me get this work done, that type of thing, and they just respond.” [#62]

- The male representative of a majority-owned professional services firm stated, "Location and price.” [#64]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "They're usually – the ones that we do work with are – we usually have a long relationship with them. But we also – we select them by technical competency or maybe it's a specific market or project type that we need. Sometimes it's just an opportunity kind of pops out of nowhere and they called us because we fit for them. We recently did a project for an insurance company based out of Texas, that local office. They have an interior designer that does all of their space management and renovations and everything for them. But they have to – they need state – when you go to a different entity, you usually have to find somebody either get your design firm license in that state or find somebody to sub-consult with you. That's what this particular firm needed. It was like we'd never worked with them before. So, we usually just vet them out and see what we can find out about them, see if there's anything troublesome that we may find that's like not to work with them, try to find a reference. Then make a decision on the risk involved with how big of a project it is and what would be at stake.” [#66]
- The Black American male owner of an MBE-certified professional services firm stated, "To some degree it's who's available. I tend to have staples that I will interact with in general. I try and find about newer firms that I may not have had interaction with; if I deem it a less critical project, to get to know them. That oftentimes may happen via word of mouth. I mean, an example – we have a project with a public entity. And that project has extremely tight turnaround, and I reached out to two of my staples, and they just couldn't make it happen. Reached out to some colleagues inquiring about some of the firms that they had worked with, smaller firms who did good work and who could have good turnaround and had a recommendation. And they're a WBE, and that's the firm with whom we're working” [#71]
- A comment from a non-Hispanic white VBE-certified construction company stated, "It is difficult to find/hire licensed plumbing subcontractors.” [#AV]

Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors. [#27, #31, #38, #49, #66, #71] For example:

- The non-Hispanic white male owner of a professional services firm stated, "Well, definitely from the standpoint of the MBE, VBE, and WBE, that is something that is not a specific thing that we look into. So, we may definitely use somebody in those classes, and we do. For private, yes. In those categories. But we immediately go to what organization is the best fit for this. On the other one, we say, 'Who – within this category, who are the potential people that fit in that category?' Then we'll interview those organizations. there is a difference. The one difference is that we have to meet certain goals. So, we monitor the spending on the certified ones in the public realm. So, that's different.” [#27]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Probably all of our subs we would crossover but most all of us just do

public work. I guess blacktop people are different in that they do more private work but the rest of us all are pretty specialized in the public sector.” [#31]

- The Black American male owner of an MBE-certified professional services firm stated, "There's no, 'Okay. I'm gonna only call these firms for public and I'm gonna only call these firms for private.' No, it doesn't work like that for me. For me it's, you know, people I've worked with, I know they can get the work done, we've got a great relationship over the years, I call them no matter what the project is. For which sector or side, it comes from." [#38]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "It wouldn't make any difference." [#49]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "No [difference]. You always want to work with somebody that you can – one that you can trust and depend on to meet your delivery commitments to your client. Then that's how we look at that selection is, 'Are they the right firm for the job based on technical competency, reliability?' Then is there an existing relationship? We may have – an owner may have a specific job that comes up that we're best suited to be the prime on because of our area of expertise. But I would ask them, 'Hey, is there a structural engineer that you normally work with?' 'Well, in fact, there is. Call XYZ firm.' We would call them up and talk to them a little bit about it because you're always looking for the best team, and that's a component of it, too, is what makes you most attractive to the client to win the sale." [#66]
- The Black American male owner of an MBE-certified professional services firm stated, "Yeah, I'll use [XBE certified or uncertified subs] for either sector. I'm not exclusive to one or the other." [#71]

Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform. Preferred subs usually have a long-standing relationship with the prime and are responsive to the needs of the project. [#4, #6, #7, #9, #19, #27, #30, #33, #38, #39, #45, #47, #48, #60, #62, #66, #71] For example:

- The non-Hispanic white male owner of a construction firm stated, "I mean most of the subs I use, I used them for... Well, I've known them for years now, I know their quality of work and they know, really when you can get that relationship, they know what you expect and they know what you're going to allow and what needs to be done. So they typically, you don't have any problems and that's why you keep using those people even if they may be a little bit more expensive than the next guy because of the quality of work." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "We don't want jokers and we don't like to experiment with new subs all that often. Because it's our reputation on the line and our livelihood. Our customers are expecting us to use these people. I mean, they know the people that we're using. They'll call our asphalt guys by the first name and they'll say, 'Hey, you're going to have Mark come and look at this here soon, right?' Yeah, absolutely. Or 'You're going to have your insulators come do this tomorrow. Right?' Yes, we will. They know who we're going to use so when we bring in somebody new, they're like, 'Hey, who's this? They don't know how we do things.' We know that they know what they're doing.

They're a very legitimate company. Established. They've got lots of trucks. They've got lots of subs that work for them. When we call and we call last minute, they perform. That's still where the construction industry is at, as far as I'm concerned. They will always be available to you because they know that if they jump, they're still going to get paid. You pay your bills. At the end of the day, that's what makes the relationship between two company." [#6]

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "You give them a trial job and usually I'll try to give them three strikes before they're out. I had one company that I did that with over the winter and they failed every single job. The long term, what makes [my preferred subs] different is I've been doing business with them for a long time, I have a comfort level dealing with them. They tend to understand the language of how we communicate. I have one vendor, is what we call them, but I have one vendor that I use. I email him my specs, they give me a cost. Shoot him a sample of it, and he responds back. I send it off, tell him what I want. And he's like, 'Okay, got it.' And I don't talk to him again until it's done. And they don't kick you to the curb the first time something didn't go smooth" [#7]
- The Native American male owner of an MBE-certified construction firm stated, "We have a lot of reoccurring subs. Once we get them qualified to do work with us, we try to reuse them over and over. A lot of our work is repeat work in the same location. So, we use the same subs a lot of times. What makes them different? Their cost, their quality of work. Quality of work, quality of documentation, reliability." [#9]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I have CAD people that will be architecture degree educated, but not registered yet. I have those that I've been acquainted with over years. That's done work for me and they actually maybe do a better job than me. They're cheaper priced and very competitive." [#19]
- The non-Hispanic white male owner of a professional services firm stated, "We ran into it within the past year where we hired a sub for a project for public and it was – we were not getting what we needed out of it. So, we ended up removing them as our sub and moving it to a different one. So, we've run into those circumstances. But if somebody is not performing, we won't keep that going. I do think there's two categories there. One is the public and one is the private. So, I'll deal with the private side where we have the most flexibility is just – we've got a sub coming in tomorrow. We just know that that company and know what they can do. We know the person within that company who we're going to be working on and you just know they're smart, they know their stuff, they're going to hit deadlines, they're going to – and we can rely on them. Because the problem is that if we say that we're going to do something and suddenly a sub doesn't perform for us, the client isn't going to – we can't blame the sub. It's all falling on us." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Obviously if they perform, I'm gonna work with them. If they don't perform, I'm not working with them the second time. [I keep them] because they consistently perform the tasks that I assign. We also have an understanding on price." [#30]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "They're very well known. They have great products. Their customer service is phenomenal. You can just count on them, so they are what I consider one of my go-to

vendors, and I have several of those. Out of the 3,500, I probably use 25 to 35 of the same vendors just because they've got a proven track record." [#33]

- The Black American male owner of an MBE-certified professional services firm stated, "It's all dependent on, 'Can you get the work done that I need?' I don't have nobody on my blacklist, so to speak. It's just that connection. You know, they understand what I'm after and the timeframe we're dealing with to get things accomplished." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Well, it all boils down to the quality of the work, and we have to be very careful who we pick and select because we have a standard that we want to carry over with our company name, so that's the only thing, is just making sure that the quality of the work is very good. Just because of how they've done pay transactions when it came to finishing work, and stuff like that. There are a few that I would not work with." [#39]
- The male representative of a majority-owned goods and services company stated, "We have relationships with several that we've worked with over the years. [It's the] quality of their work" [#45]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "One; we just don't – we don't get along, plain and simple." [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Lack of responsiveness. Their responsiveness and communication is almost always the case." [#48]
- The female representative of a majority-owned construction company stated, "The only ones we won't work with – if they're having problems paying their union dues. And we kind of look at – look into that to see – especially if it's a new sub and we're not really sure and they come aboard, the owner will go ahead and check to see if they are up to date on their union Dependability. And they know what we look for and they know our work ethic, I guess. I mean, it's just a history of being with that company for so long." [#60]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "There are a couple where we've had a negative experience. The architect is basically the conductor, so to speak. And if we're, you know, we bring on someone, engineers, in particular, and our, you know, your portion of the work is due at a certain date, and you just can't get it to us for whatever reason for another month, that lets me know that our project isn't priority in your firm. So, my client is waiting, especially in private sector. If they're a business and they need their space opened, that's a month's loss of revenue for them, you know? So, in that case, there have been a few that we don't work with. And then, had a very negative experience with a very large firm on a public project that they have five offices, and we were scheduled for a school to have their drawings out at a certain time. Me and my staff of five, at that time, were able to meet our clients' design requirements, their needs. Their firm said that they wouldn't be able to meet that schedule, and this was after we presented to the school board and was contracted and everything. Lost the contract, \$730,000 contract, because of them. Huge firm in Indiana. I won't say who." [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's techno-competency, reliability, track history, tendencies to not meet delivery deadlines

or owners tell you, 'Yeah, we've had them on our campus before; we prefer you found somebody else.'" [#66]

- The Black American male owner of an MBE-certified professional services firm stated, "It ends up being just a performance issue. I know I'm not perfect, and if there's an issue, you talk about the issue; you try and work through it. But if the issues continue to mount or to recur, it's not worth the risk, 'cause sooner or later you're gonna get burned." [#71]

4. Subcontractors' experiences with and methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

Four subcontractors mentioned the helpful role Indiana's programs play in finding work. [#1, #2, #15, #31] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "on the INDOT website, you'll get all the pay items, you'll get the plans, get the contract information, which tells you what the minority goals are, what the quality's like, any other special provisions that you need to know about. Here this is on the INDOT website too. This is your plan holders list. Here's the potential bidders. This over her, it says, are they valid forbid? So, this guy, this guy, this guy, and this guy, are bidders. The other two are just suppliers in order to plan this. So that's who you'd send your quote to. And their email address is right there." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Got to be in good standings and on the list. In the business we're in absolutely nothing is more important than to be in good standing with the city and the state and be on their list for visibility. I mean, they're just ... To be absolutely frank with you there's absolutely no value in showing up at any pre-bid meeting if you're not on the list. If you're on the list and you're a broker, nobody wants to use you, so if you're not on that list and established by INDOT or IDOA, you're wasting your time. That's where the game get played, that's where the big guys go look for qualified folks to put on their team. Anything short of that, you're wasting your time. In business time is valuable. The expression that was used to me is that they get to pick the winners and losers. That list is that valuable." [#2]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I register with the websites that do plans and stuff, you know, that have plans. And I get sent invitations through there a lot of times. And also, we have about the names of 50 or 60 contractors in the area. And so basically we work through them." [#15]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "From being the DBE and WBE. We're listed on the Indiana Department of Transportation and the IDOA website. Most all firms that are bidding on any type of work like that have to reach out to us. That's pretty much how, just by those certifications, that we have the visibility. The prime solicit, so they have to do more than 50% of the contract. Since it's such a big resurfacing job, then they'll reach out to us to do the bridgework. That's the case in some of the jobs that we're doing this year. Just by quotes, but we are listed on

the bidders' list. In the website and then we all reach out to each other, yeah. There's just a protocol, so any time there's the jobs are listed and we reach out to all the subs. And they reach out to all of us once. And it's posted on the site who is listed as a bidder, so we quote anyone that's listed as a bidder. And they do the same with us. Yeah, that and just the working relationship we have. We have a pretty good reputation of doing good work." [#31]

Ten subcontractors reported that they are often contacted directly by primes because of their specialization, their certification status, or because of they are known in the industry. [#13, #17, #21, #28, #32, #38, #41, #61, #64, #68] For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Like it might be a big book project or catalogs or something like that. And then we work with the data and insert them and they might not be security certified, like we are, so they can't handle the data. So, we do the other part of the data work for them." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "In my county, I'm the only female septic installer on their list. Everybody else's male and I'm sure they're all white male, but I don't think there's any minorities. Don't know for sure. But by the names, I'm the only female on the list. And then I had a lady, and we didn't get the job, but I did have a lady send me a note that she wanted us to quote on her job because she, quote, saw my name on the list. And I think she purposefully sent it to me because I'm female. I'm pretty sure of that. I think it worked in the reverse. Even though I didn't get the job, it was based on price I'm sure, but I thought that was interesting. Now, that was hard, is trying to figure out who would be a fit for me in terms of who could be a prime that I can sub under? And who are some of the primes that are working in the region down here in this area that makes sense currently? What's currently active? That may be state jobs that are working down here in the Southern part of the state. Who's some of the primes that are working on facility things at Crane? How did they find out about me? I get emails every once in a while and I get a phone call every once in a while from someone. Although it's usually somebody from New Jersey or Virginia and wanting to know if I could do snow removal or something. I'm like, 'No, not really.'" [#17]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "all the projects that we have done, which were not very many anyway, all of them came directly from people who know my qualification and who know exactly as to what we can contribute. They approached me to come in as a sub." [#21]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "Well, it goes back to when we were subcontracting with a company here in Indianapolis. They won the contract to do security with [a large company]. During – [the Indy company] contacted us and told us, 'Hey, we need you guys to work with us and be our MBE with the project.' And we – of course we said yes. They loved our work. So, when that ended, they remembered us just from us doing that job there. And it – of course it was about three years later. [Laughs] But they still – it helped us because we done such a great job. And they called us [later, because] the company that was working with [that big firm] wasn't doing such a good job. They wouldn't show up. So, they called us, and then they remembered us from before. And we started working with them first as a small site. And then we branched from one site to three sites, from three sites to sometimes five. " [#28]

- The Black American male owner of an uncertified-MBE construction company stated, "Well, I put little ads in the local papers, and put out some papers then, and I've attended a lot of meetings. So the small city like I live in, everybody knew who I was, and that kinda thing. When I'd get a chance to do a couple of jobs, I'd try to follow the pattern that [my mentor] taught me. Said to 'go out and do a job so good till nobody can do it better. Then,' he said, 'can't nobody stop you.' So I've tried to practice that, and that became my mantra. They say, "If you want something done right, call [me]." I teach that in my school." [#32]
- The Black American male owner of an MBE-certified professional services firm stated, "They're coming to me. I'm not going out there, you know, digging up RFPs, submitting RFPs to get these projects. I'm not there yet." [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Well, you know, it's interesting, that statement, do we seek business, because we don't typically seek business. It kind of seeks us, which is interesting. Almost every client that we have right now is word-of-mouth, all except one. That has been – it has been that way the entire time." [#41]
- The non-Hispanic white male owner of a majority-owned construction company stated, "It would be word of mouth. As an example, some of the bigger contractors at the steel mill. Well, they may get a job that – well, the steel mills or the customer may want one purchase order going to one contractor. So that contractor, let's say he gets a boiler repair job. Well, there's different areas of that boiler that are different labor groups. So, if it's something in my field, I'll get a phone call and say, hey, they've got a blower. Can you get us some millwrights out here who can do that? And it's all word of mouth. I mean, everybody knows everybody, you know, in the steel mills. That's how that works." [#61]
- The male representative of a majority-owned professional services firm stated, "Same way we do to the – to elsewhere. It's just a lot of it is word of mouth and just experience – our experience and our background, our staff. We're a very specialized, niche company that perform a specialized service, so, on a lot of occasions, there's – it's really not very difficult to market because we're one of the few areas that provide this service." [#64]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Word of mouth carries me on pretty powerfully, Like I say, word of mouth's pretty powerful because not only am I capable of doing the work, they know you work. Their word is pretty powerful in saying, 'You don't have to worry about him. He won't have to touch any of your stuff. He goes in, does his work, and he ain't gonna leave the job and not come back and fool around.' I mean, when I go in, I mean business. I know what I gotta do 'cause I seen it. And I go in there and get set up and I do it and then, I do it in a professional way and it pays up. That way, one tells another that I does real good work and reliable and 'He don't touch nobody's stuff' and it goes a long ways. There's been times I went to their house, 'Oh, here's the key to the house or... I've gotta go to work. See you later.' And I never met them before or nothing. But the word of mouth – people say, 'Well, he's reliable and he don't mess with somebody's stuff.' It goes a long ways, you know." [#68]

Twelve interviewees said that they get much of their work through prior relationships with or past work performed for primes. [#1, #4, #7, #9, #11, #37, #42, #47, #48, #66, #67, #71] They

emphasized the important role building positive professional relationships plays in securing work. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "It's just about building relationships with them. People in the industry so that when you do quote them, \$100,000, where did they go? You're not a flake. You have a reputation; you can do this. You've done it before, and you get a lot of repeat business that way." [#1]
- The non-Hispanic white male owner of a construction firm stated, "I still do all the plumbing work, 90% of the plumbing work for the old company I used to work for. And the sub work I actually do demolition and plumbing and remodeling for them too when they're booked full and need somebody to do it." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Usually they'll get referred to me from one of their customers, or somebody that knows one of their customers. Again, it goes back to that word of mouth, and that's how I get them." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "A lot of our big contracts come from our [partnered] engineering firms. They say, 'Hey, these guys got this project, they got this full business plan requirement, contact them' and based on individual projects they make a recommendation to us. Whether we pursue it or not is our choice. But usually they do the designs, and we get information on the fact that they're going to go to contract and get this out. So, we try to partner up with those larger subs under those types of contracts so we can be a part of their team." [#9]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I don't really, I just subcontract off of a group of contractors that I have relationships with." [#11]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "General contractors, they are starting to know me. Just like that, they call me, and there are a few companies that they do work as general contractors, and they call me, too. Relationships, I would say relationships, I met someone in a job, and he will see my work and then he will remember me, and then he will recommend me to another job. I would say that's most of the time, through the same environment of work is where I find people that they will recommend me in the future." [#37]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Yeah, generally, it's through word-of-mouth recommendations from organizations who have worked with us previously. We generally are referred to organizations." [#42]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "When we offer our services to somebody else, that's at the request of a client." [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Relationships. Just we debate about who will be the prime and we accept a lesser role. Usually it's a function of our role on the project." [#48]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "So, sometimes one of our subconsultants will have a relationship with a client and they'll be the prime and we'll be subconsultant to them. Or it's relationships or specific technical knowledge." [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Yeah, it was more word-of-mouth. It was like people that we worked with, like there would be printers we worked with in the past, we'd have somebody call them and say, 'We're going to get this through, but can you guys do this?' So no, it was never a big thing for us, it was just somebody would call and say, 'I need an agency. I need somebody to do the strategy on this. Can you guys do it?' So it was more on a personal level with our existing vendors or contractors that we already were working with." [#67]
- The Black American male owner of an MBE-certified professional services firm stated, "Well, I think it one or two fold. If you're responding to an RFP or an RFQ – Example. I could be looking at another firm, like a friend's firm. They're a majority firm. They're not a large firm; they're larger than us, larger than my current firm. Like that first firm, a 12-person firm. They do a lot of K-through-12 work, and so he'll inquire about me chasing it. In that instance, since he has the majority of the K-through-12 experience, I may sub to him. And so that's an example, and that's peer to peer, architecture to architecture. Y'know, contractors may, if they're looking for a design bid, they may reach out to you, asking you to team as part of that design-build relationship. But it goes back to, as I said, either advocacy or relationships. So either having someone – if it's more so either a larger project or a public project – someone who's engaged with or advocated for you, or a relationship with contractors, whomever, who may know you." [#71]

Six business owners reported that they actively research upcoming projects and market to prime contractors. [#3, #26, #30, #39, #49, #73] Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services. For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We'll connect with prime contractors there [at conferences]. Really having conversations with leaders within the agencies about what's coming, what's going on, who's talking with you about those programs and trying to have conversation before the better us conferences. And so, we'll get introductions that way sometimes. We also are very friendly with minority and veteran owned businesses and so I will frequently be asked if I connect with a prime, do you know a minority or veteran owned business that we use? And so, I have some that I really trust that I really am super happy to recommend, that happens So, I really believe that there is some, for sure, following up after better conferences or being present and meeting people in person, and that has bared fruit. But there's just a lot to proactively building relationships. We'll go to the Medicaid conference each year. That's great for existing and new relationships. We have relationships. I know prime contractors value those. They may put more weight on them than it really is. If you have a good reputation, that's a good thing." [#3]
- The Black American male owner of an MBE-certified goods and services company stated, "A lot of times we do partnerships. Some have worked out, some from what I've found in the past, exploit the smaller companies, because you'll give a bid proposal with three-day

window to respond when the prime had it for two months. So a lot of times they pressure you to get a bid in when you don't really know all the facts, or sometimes you may underbid something or sometimes you just pass on it 'cause it's too detailed or lengthy to dive into in 48 hours or 36 hours or whatever little leeway they give you sometimes. So that's terribly frustrating a lot of times. Primarily through e-mail solicitation. That is the mainstream of information that we get, and the few events we attend here and there, when time is permitting. That would be e-mails for RFQs and so forth. And if there's somewhere close-by that we can attend we will try to attend. A lot of times – sometimes they're farther away; sometimes they're all-day events, you can't afford to be at 'cause you're away from day-to-day stuff. You know, so you've got to do two hours to Evansville or two hours one way or another, you know, thing lasted an hour, that's a whole day gone. And the return on investment in time just doesn't pay out a lot of times, so you don't even go, 'cause the distance and time you've kind of wasted. We don't spend much for advertising 'cause that's kind of a hit or miss. But mainly brochures or a couple of events here and there that we'll make it out to. And just networking events mainly. You know, referrals. The main way I find out is if I see a job or whatever, I may just e-mail the person at the state, whoever is over it. And I get the list of primes that have submitted to get drawings or said they're going to bid at the prime. And then I did change that e-mail into saying, 'Hey, we're out here. We can assist with you,' blah blah blah. That's normally how you find out." [#26]

- The Black American male owner of an uncertified MBE goods and services firm stated, "Normally there would be an open quote process where myself and other subcontractors would bid back to the prime. And then based on that bid process since we were in the bid pool, it was a competitive bidding process. And based on our ability to provide both price and quality, the prime would make their decisions based on that. Specifically, for IDOA situations, we would at that time review the upcoming contracts, look at the opportunities and whether or not there were primes that would be looking for MBE. We would then present our abilities and capabilities to that prime, offer our services. And if there was a good fit for both pieces, we would then joint venture on projects." [#30]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "We look at the contract, the scope of the work, what they have, and we try to go after it if it's something we can do." [#39]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "We send a proposal to the person requesting the work and if it's successful we go to work. In most cases we have to have experience in the types of projects that they are asking for us to submit a proposal for. In a lot of cases we have to become prequalified and have the ability to do the work and do the work safely. So there's a lot that goes into that. You have to have insurance, you have to have a certain safety rating, you have to have certain skilled labor professionals, certain skilled designers. Meaning having certain certifications." [#49]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I like to just look online. 'Cause most of the time, you could be just wasting time calling brokers, trying to find a load. They have the load – maybe it's not the one you're looking for or it's not going your way. So, it's easier just to look online for you – figure out where you're

gonna have to cover the load from, where is the destination you're trying to go, and you see the kind of loads.” [#73]

5. 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.

Many business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly. [#1, #3, #11, #23, #25, #26, #27, #30, #31, #32, #39, #41, #47, #48, #61] Examples of their comments included:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We don't, but we don't really want to because they don't treat their subcontractors very well. I won't tell you their name, but everybody else, we work for everybody. There's a couple guys that we got to make sure we cross our T's and dot our I's. We build better relationships with the people who choose us and pay us. Either they lied to us once about something and it costs us money, or they just lied to us, bold faced lie. Can't build a relationship with somebody that won't be truthful. Or they don't treat their subs very well. We got a guy up in Chicago, a huge contractor, notorious for treating his subs poorly. Payment or that they lie to you. They'll tell you things like, I had one guy tell us, 'The engineer on this job wants you to bring two message signs over to the job over in Muncie.' So we deliver them over there, put them in the yard like he said, and we build for them. Well, come to find out three months later, the engineer told him, I don't really need those, get rid of them. And he let them sit there for three months and then he wouldn't pay it." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "It goes back to those four criteria, but the one that I would weight the most heavily is partner minded: they want to be a good partner, they are high integrity, they want to live up to their commitments to the state. They just get it. There's the saying that pigs get fat and hogs get slaughtered, and that that plays out. That is so true. On the other hand, I really don't want to throw names out there, but for the same complete opposite reason, which I also highlighted, that company that I had to chase down myself and the other minority partners; they used multiple, not just one a bunch, they used a bunch of subs and there was a disconnect between their team that put together the response, which was actually great to work with and put together the strategic team and their delivery team. They never ever talked to each other and the mindset was so different. They didn't have any interest in ever using any of this team. I would talk with the other minority on there or several of them, 'Have you heard from them? Are you doing work with them?' 'Nope, I can't get a return call. I can't get a return call.'" [#3]
- The non-Hispanic white male owner of a majority-owned construction company stated, "The one company that was a little late on the pay. I probably wouldn't unless time there was a set time, I wouldn't risk working with them again." [#11]
- The Black American male owner of an MBE-certified professional services firm stated, "What we've had a problem with is sometimes some companies, smaller companies that will give us work won't pass the credit check so we've stayed away from that, that issue." [#23]

- The Black American male representative of a construction trade organization stated, "On the flip side, and this is something we've heard from diverse firms, is that when there's a lot of work out there, and this is pre-Covid, and I haven't heard this as much during the Covid era, but pre-Covid when there's this work everywhere, you could be a little bit selective. You might say, 'Oh that owner has a project but I don't like their policy on this or I don't like their payment system or I don't like their whatever, so I'm not even going to bid on that project, I'm going to put a bid on these guys projects because I like working for them or I like doing projects for them.' For better or worse, there are some general contractors and developers who are very good to work with for XBE firms. And so, they're like, oh that GC was awarded that project, well then I'm going to try and get some of that work. Or they go, wait a minute these three GCs are all bidding on that project, I'm going to then be part of this guy's bid package and not these other guys bid. So then theoretically in a booming market XBEs can be more selective on even where they sought business." [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "There are some primes out there I think that they haven't forgotten where they came from. They're not too big to remember how they got there, meaning they may understand some of your small logistical challenges with a smaller MBE because it wasn't long ago that they were one of those two categories themselves. So, there are some that we prefer to work with given the chance. And then just get on their needs, what type of job do they have." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "If we were to work for a prime, we would assess them as we would a client. Are they good to work with? Are they respectful? Are they – is it profitable work? Does it fit in our wheelhouse? All those sorts of things." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes [there is a prime I won't work for], they don't pay." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "More from a geographic area or just the type of work that both of us do. We keep getting paired off together." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "One in particular. I was blessed to have a great relationship with the old man that, rest his soul, has passed on, and it passed on to his sons that runs the company now. For example, I've bid a job with them, and they said, 'Well, don't worry about the material stuff' He said, 'We got your back,' y'know. For example, I did bid a job for a couple hundred thousand dollars, and I need money up front to go buy materials or whatever, if I don't have that. He said, 'Well, yeah, don't worry about that,' said, 'We got that.' So, I've ran into that kinda thing, and I'm grateful for that. But that's the position most persons that start from scratch, first-generation contractors, run into. And that's a surprise for them. How do you get from home plate to first base, y'know?" [#32]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "It falls into the fact that we had relationships before, and it just didn't work out. Let's just say they weren't being fair. They were trying to get over, and I just don't work with people like that." [#39]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Because they wouldn't pay. I was nine months trying to get my janitorial pay out of them. We provided service. They're big enough and they don't care. We provided janitorial service for [a giant firm] several years ago, out by the airport. And again, 30 days – I don't know how many days it was. It was a while ago. Couldn't get paid. I wrote a letter. I sent the letter to corporate. I went to their website. I said, "These are your values. These are your principles. This is the size of your company. We are a small company. If you have these principles and values in place, then why don't you practice them with your contractors?" I could not get paid from them. We quit. They didn't let us go. We let them go for failure to pay in a timely manner." [#41]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "Just long relationships with people." [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "We've had successful collaborations." [#48]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I don't know how to delicately put this, but if I know a contractor and I hear through the grapevine that he's paying somebody to get a job, I won't work for him. Or work with him." [#61]

F. Doing Business with State 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 Indiana;
2. Barriers and challenges to working with public agencies in Indiana; and
3. IDOA's and SEIs' bidding and contracting processes.

1. General experiences working with public agencies in Indiana. Interviewees spoke about their experiences with public agencies in the Indiana area.

Twenty-two business owners had experience working with or attempting to get work with public agencies in the Indiana area and in other places. [#7, #9, #10, #12, #18, #25, #27, #28, #31, #34, #36, #38, #39, #40, #49, #60, #64, #66 #76, #AV, #FG1, #PT1]. Their comments included:

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated "Yeah, we did brochures, and we did napkins. We've done things like that. With state agencies, I know from previous employers and stuff, that you basically make sure you have your requisition, make sure everything's labeled correctly. You deliver it to the department it needs, and you go to specific areas for those deliveries. And you turn it in and get signed off on, and then you leave and you do not bother anybody in the process. I would say on a level of hardness it was probably 45%. But they weren't difficult to work with. It's just because once you have the right person, they're not really any harder to work with." [#7]

- The Native American male owner of an MBE-certified construction firm stated, "I don't want to talk bad about anybody, but they just didn't have the coordination. Their project went on a lot longer than it should have and the justifications that we normally would provide turned into a mountain of paperwork for them and kind of stalled out for way too long. Our goal is to get in and get the scope of work done and get gone. Theirs is, well, let this contractor or that contractor get finished and then you guys can go in. That's not the way we work. We bid to a schedule and that's what we're expecting to keep, so we didn't have a lot of success with them. It could have just been the agency. It was a pretty simple project and had we ran it like we normally do under our project management system, I think it would have been done on time, on budget, and maybe even cut the schedule from." [#9]
- The female representative of a WBE-certified construction firm stated "We gave them [the county] the invoice. I emailed the invoice over the day after, and within a week we had payment. They were great to work with. There were no complaints. They were happy with the finished product. It was good all the way around." [#10]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "I like the schools. Schools are great. I mean, as a rule, I love them. I mean, there's exceptions to that. I mean, the financial part of it, I love the schools. They pay the bills, they're honest, they're straightforward, and if I ever get into a problem where I get a teacher that's a moron and they haven't, and I can call the principal. I don't say it this way, but I can say, you know. 'Hey, you've got a moronic teacher who's not paying his bill.' And that principal will take care of it. So I don't worry about the money part of it." [#12]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "We've had quite a few universities and quite a few... I will add to the university situation that in IU and Purdue, they have their own elevator teams. But every once in a while, they need parts, or they need assistance with different projects they can't do and they do call us for that assistance. we also do other work with city, county, county jails, county government buildings to the city buildings and state buildings. It's just a wide variety." [#18]
- The Black American male representative of a construction trade organization stated, "I would say overall that, and I'm thinking about from the design side, from the CM side or from the GC side that people very much like working with our state institutions. But as far as commercial buildings or big public buildings, stuff like that. Those aspects are then, those groups find working with the state entities to be very... The ones who have very positive relationships, have great relationships. Maybe even the prime, the prime/sub-contractor level where they see that the relationship is dominated by the design firms and the GCs, so after those agreements are made, it's business as usual. So, then they have not necessarily noticed that much of a difference between working with, you know doing obviously a drywall, not because drywall happens that much, but just you know. Drywall at a Purdue or IU is no different than a drywall at a gas station, you're so many layers down at that point that it's just coming into work. I think that that would be the difference. While then I would say the design firms that have good relationships with the higher ed institutions, they love it and they will cater to them in many different ways and do that work, I think the GCs and the project CMs, so what are the... I don't know, throw some names out there, AECOM, Turner,

Wilhelm and so on. They like working with these universities. I will say that some of those universities have different policies and sometimes different people are part of the relationship process, so you can drive around yourself and you'll see more Wilhelm signs on IUs campus for construction projects but if you go to Purdue then you're going to see a lot of AECOM stuff around these sports related facilities and then you're going to see a lot of Turner stuff on a lot of the academic buildings. So maybe that's just the name of the game, that those companies work well with those institutions or their key leaders." [#25]

- The non-Hispanic white male owner of a professional services firm stated "It's always great. Yep. Yeah. They – probably the exception, and it's not a public agency, but if you were to look at IPL, AES, that has been more challenging. But all the universities and the state agencies have been great." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "My first contract that I got on my own through the MBE process with the State of Indiana, I bid on a contract in South Bend. After maybe four years – after maybe four years, the contract went out for bid again. And the process, which the city – they had – the city had options to bid maybe on sections of the state, or we can bid all of it, the whole state and provide security for the whole state. So, we decided to venture out, and we got all our people together and did the application. It was a PO. We did the PO and submitted it for the entire state, which at that time we were the lowest bidders, but we didn't get the contract. Reasoning behind that was they said that we didn't acquire enough background or enough experience [after working on the same contract for four years]. I don't know why they came in with that. And they gave it to the same people that initially had it, even though we was the lowest bidders. And that kind of put a – it kind of put a little pressure on my mind because then I was thinking something's just not right. Something is not there. And so that for about – I guess for about a couple of years went by, and I did – this came up for bid again. I decided not to go through this process 'cause this was a long, tedious process. And from prior experience I figured that we was not gonna – we was wasting our time anyway." [#28]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "We have not done any work with any of the universities. I think maybe just because of the bridge aspect of our work and when there is a pedestrian bridge or something at those locations, they're bid through INDOT or through the local in municipality most generally. That's been our – 'cause we have bid on several pedestrian walkways at IUSB and at IPFW. But it's been through INDOT or through Fort Wayne or through – a lot of the type of work that we do for the bridge structures is not covered in the umbrella." [#31]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated "Well, you're at the whim of some politicians and politicians know everything. So, you try to give them the best advice and when their decisions compromise the integrity of the work, you get into a problem there. You try to advise them the best you can, but some people just aren't good at listening and understanding. So, we've been fired numerous times from municipalities, but it's just 50 – basically, they don't know how to take advice and then just decide to go in a different direction. That's fine. We're big boys. I mean we've lost up to a quarter-million-dollars a year in work because of a politicians whim." [#34]

- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Prison institutions in Plainfield, or not Plainfield, in Pendleton, Indiana. They found me on Google and reached out. It was pretty standard. I put in a bid and you got your bid accepted." [#36]
- The Black American male owner of an MBE-certified professional services firm stated, "Public sector work is a lot easier to get paid. You know, you go through your steps in sending up your information, submit your invoice and so forth and so on. But it's – yeah. I can honestly say it's a lot easier to get paid for public sector work versus private work. Yes. Well, I just think you've got a bigger machine when you're working with public. You've got people that are gonna be looking for – to process that information. But when you're working with a private owner, I mean, it's usually just one person. And depending on what that person is or isn't doing at that time when they receive your invoice, you're gonna get paid or not." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "We did a labor job for Fort Leavenworth. They needed our company to go down and put a bunch of desks, theater seats, it was like maybe a full week-and-a-half, two-week work. We were there for four days, we got the job done, and they screamed about us. Here's a company, they gave an opportunity, a small company they didn't know that much about, and we went down and did the work and went above and beyond what they thought, so they were real happy. Then, of course, we've done a lot of schools. Actually, we used to do a lot of work with the IPS, the Indianapolis school system, and then when they switched over the job for the person is the head bidder and stuff for that, we stopped getting work... Request for bid through the Internet, some things came through my e-mail, and then sometimes a friend of mine would tell me, 'Hey, did you see this? They had a bid for furniture. You need to go look at the city or state website,' and that's how I found out. Well, there were some that stood out. There were some that stood out because, again, I guess the emergency of the project, they were like, 'Hey, we've got to get this done,' and so when you've got companies like that, that makes it easier because they just want to see the bid, whatever that is, get it done, to where if they've got a lot of time, then they can really be selective. [Getting paid], well, when you're dealing with, where you've got the government or something like that, they normally have a net-30, net-60 and it's non-negotiable. You get the work, that's it. You have to send a PO, you've got to wait your 30 days or 60, and sometimes it could be hard for a small business like mine because our vendors need to get paid, and we're not carrying a \$20 - \$30 million company to where we've got to pay these guys. But most of my private organizations who buy from us, we ask for 50 percent down, 50 percent on completion of the project, so when we get the job done, they pay us. It makes things easier, so everybody gets paid, and stuff. It makes it a lot easier." [#39]
- The non-Hispanic white male representative of a construction company stated, "With the LaPorte County Library, they are very simple. We also work for LaPorte County itself, the business. I mean, as far as the government. And they are very simple. We just send them a quote on what we want. They'll send it back and unless they have any questions or anything like that, it's fairly simple. Usually, it's like one or two pages long, the application and stuff. It's fairly simple as far as the nongovernmental, but once it gets into the governmental, then it's – of course, it's much more difficult. There's much more paperwork required. it's quite extensive. And as far as the paperwork that's required and what is required on both the

frontend and on the backend. So, you have to do a lot of paperwork to get awarded the contract, and then you have to do a lot of paperwork after you got the contract. If I had any questions during the time, I want to fill all that paperwork out, typically we just have to call them and find out exactly what they have. Or if I have questions, we just have to call them and find out what specific information they're looking for. Usually the response time is fairly quick." [#40]

- The non-Hispanic white male representative of a majority-owned goods and services firm stated "Installing fire sprinkler systems. I couldn't say they're easier or harder. The work is spelled out and you just do it." [#49]
- The female representative of a majority-owned construction company stated "Every – I mean, there's so many applications out there to look at all kinds of jobs. I mean, it's – they all have everything on there. So... The soliciting of all those are basically all the same." [#60]
- The male representative of a majority-owned professional services firm stated, "I would say INDOT has been very easy to receive payment from. They are – we're paid sometimes within two weeks." [#64]
- The non-Hispanic white male owner of a majority-owned professional services firm stated "It may have changed now. We haven't put anything out for bid since COVID in the public environment. But the number of bidders were getting thin just because there was so much work going on and people were picking and choosing what to bid on because they didn't have the resources to deliver. So, they would pick and choose and then – pricing had slowly been creeping up because the laws of supply and demand." [#66]
- The Subcontinent Asian American representative of a business development organization stated, "I work very closely with for example, airport authority. Maybe because of smaller organization versus working with entire state, I understand it's state is like a machine. But I thought Indianapolis airport does a very good job. They are very organized, and they share a lot of information, and they work very closely with minority business owners. They reach out to me all the time. They are more communicative I guess compared to state I think so. Universities, they use certain type of contractor that probably not a lot of Asians are. For example, I've seen with universities, and I'm seeing that with even the airport authority, so they have most of the majority of the expenses are for construction. And even construction I see is a big part of their expenses. We don't have that many Asians who own construction companies to start with. Very recently, they had, for example, new food vendors they wanted and suppliers. I said, 'Yeah, that's a great one for us to look at that.' I think the same is true for the universities also, that university, particularly Indiana University I was thinking, and I said, 'Wow, the amount of construction you do as a contract.' And that's one of the contractor expenses they do is humongous." [#76]
- A comment a non-Hispanic white WBE-certified goods and services firm stated, "Carmel doesn't support their businesses. We've been here 30 years. We fend for ourselves." [#AV]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "[We] try to have proposals that are 15%, maybe at a minimum of XBE representation against some projects, some universities maybe hire 15% to 20%. We're not hitting that target at all universities. I know the universities that we talked to they're trying to make up for that on the construction side. I think they feel like they're doing better in labor and

materials and some of the provisions for building the projects, implementing the work, and maybe are satisfying their goals better that way and making up for the weakness in design.” [#FG1]

- The female owner of a professional services company from a public meeting held in Greenfield stated, "Not IDOA but another certifying agency, they had an opportunity for minority business, sort of their outreach program, so you think, oh, that's great, they may want to walk the walk and talk the talk, but there were no goals associated with it and the successful firm that received the contract was a non-profit entity. So, it would be interesting to see if different certifying bodies were saying, you know, you certified businesses, if they themselves when they are recruiting for different opportunities, if they stick to their own goals." [#PT1]

Twenty business owners described their experiences working with or attempting to get work with IDOA or INDOT specifically. [#1, #2, #3, #6, #7, #9, #12, #17, #18, #27, #28, #30, #31, #35, #39, #40, #48, #64, #66, #71] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "On the INDOT website, you'll get all the pay items, you'll get the plans, get the contract information, which tells you what the minority goals are, what the quality's like, any other special provisions that you need to know about. Here this is on the INDOT website, too. This is your plan holders list. Here's the potential bidders. INDOT's problems are all of the good engineers that used to work there have retired and they've got a lot of younger guys who don't really understand the way things work. We've got eight message boards out there, okay, and plus a ton of construction sites. Well, they want us to move them around periodically from place to place. However, the plans don't really show where they need to go. So they want us to make the decision. Well, we're not engineering company. We're not going to make that decision. But the guy on the site, who's a young state guy, he doesn't understand that and he wants you to do engineering type, make engineering-type decisions and we think that's too much liability so just tell us where to put them. You're the owner. Another example is we'll get a set of plans and it'll show things that don't make any sense. For instance, there'll be an intersection with three... There's a left turn lane, right turn lane and a straight lane, okay? But the straight lane, if you follow it, it runs you right into a center median on the other side of the intersection. So we want them to redesign it and shift everything over on the plans and they won't do it. So you get out there to do the job, then you got end up making a decision. Do I just go home after I traveled 50 miles to get here or do I somehow figure out how to make it work? That happens a lot, a lot. We get a lot of... We do a lot of detours for the state where we'll close State Route 26 and detours can only be on state roads on a state job. You can't detour somebody down a county road. So you might have a detour that's 40 miles long and then it has to have a sign, a detour sign, every three miles. Well, they're notorious about getting the signage wrong. It's screwed up and then you got to... what you do is you go out... You send your guy out there. He puts a mark on the road or drives a stake wherever your sign goes. We have to call the utility companies and get them to locate that there's no underground utilities where we're going to put our post. It's a 40-mile track. So you got to call it all in. The utility locators come out and locate it. Then you go out to do it and the signs don't make sense because the engineering drawings were inaccurate. And then what are you going to do? You have to go back out another locate? It's

just a total lack of experience from the people in the field for INDOT, so it's a real problem.” [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I would speak pretty favorable of INDOT, in that they've done a good job supporting us, making sure we're in their database, and that kind of thing. [Still,] INDOT has not given us that work. We are not selected, and our bid is not considered if they're not going to get 60% credit [because I'm a broker]. That has to be fully understood throughout your whole interview with me, nobody wants you for 5%, nobody." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I mean they're wonderful to work with. Yeah, I have always found, I mean, there's different personalities, right? But I have never found it terribly difficult to get a meeting at an agency. Again, some are more receptive to others and maybe... I don't know. But generally, I haven't had too much difficulty, and I think that, again, it's because a lot of the leaders within our state agencies recognize the value of partnership. And also kind of hearing what people have to say and learning about kind of what's going on across agencies. There's a cross pollination that happens by engaging with the vendor community, right? The state does that organically some, but sometimes there are certain agencies that just don't cooperate with the other agencies as readily. And if you're meeting with both, you can kind of say, "Oh, I was talking with them about this, and have you thought about that? You guys ought to talk to each other." So some of that happens. Generally, they've been pretty receptive to me. Every business has their own set of standards and corporate culture and ways through the payment. So mostly it's been easy. Mostly it's easy." [#3]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "I used to bid that stuff a lot, but it is horribly competitive. There's just not a lot of opportunity there. We're all union. There's not a lot of opportunity there for a union shop to get in on something. Not unless it's huge. The smaller jobs that go through the IDOA, every nonunion outfit in town is on that stuff. We cannot compete with those rates." [#6]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "You know, I really do think when I looked at the INDOT list, I really do think there's a lot of opportunity there, even for just some of the small side job parts that they have. And I'm not 100% sure how they work compared to the federal government contracts, where the prime contractors have to have so many subs that are within their women-owned or small business set asides and things." [#17]
- The non-Hispanic white male owner of a professional services firm stated, "Well, all of our contracts go through them, but we don't do work for them specifically." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "Well, we had really, really bad problems with the state paying. I think they should overhaul that one quickly because sometimes you have to wait a month or two to get your – get paid, which that – from that standpoint alone would put pressure on the business. And our – what we – we still have to come up with the money to pay our workers. So, withholding those contract money to subcontractors, I need – definitely need to be shortened, a shortened timespan to when they get paid." [#28]

- The Black American male owner of an uncertified MBE goods and services firm stated, "We did related printing product projects, mailing projects, poster projects, just various print-related projects. I was a sub under IDOA but for the universities and the ... I forget what other group, I was the prime and they don't call them "prime". It was just an open bid. IDOA was only for the contract work where I worked under prime. Otherwise, it was a pretty standardized bid process with bid specifications, timeframes, et cetera, which is pretty standard in our business. The IDOA project, INDOT where I had not been the prime paid promptly. I'd say within 45 days. That was – that's very... IDOA project where I was underneath a prime, that's a different discussion. INDOT when I was not under a prime paid well within a 45-day process. Very acceptable." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "All of that has improved so much in the last few years with the City and with INDOT most generally." [#31]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "We do a lot of maintenance work for the State of Indiana. ITS Department which is – encompasses a lot of those virtual weigh stations, weigh-in motion stations. Putting sensors on the roadway to monitor a speeding truck, overweight truck. Street lighting, the traffic control lights that you see on the intersections. The overhead – the tall, 40, 50-foot lights that you see on the roadway, we maintenance those for the cities here in Northwest Indiana as well." [#35]
- The non-Hispanic white male representative of a construction company stated, "Then we are, of course, working for INDOT and we just sent out a bid for two projects through the Indiana Department of Transportation. Usually they will contact us and ask us if we are interested." [#40]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We get paid like clockwork. Once the pipeline's established and the pay application is usually – that usually runs very smoothly on a state project." [#66]
- The Black American male owner of an MBE-certified professional services firm stated, "The impression from some with IDOA was that you had to pay to play. And I know, at least with us at [firm], initially we hadn't done that – made a political donation. And then it seemed as if soon after we made some political donations, we actually had a job. So I don't know if it's true or not, but what we had been told – And it wasn't a significant political donation, but regardless – What we had been told, and what we ended up doing, they both ended up coming to fruition. So, well, let me rephrase that. That was, we got a job as a prime. We were on teams with jobs previously as a sub. So, I don't know if it's true or not. And it's not a question. Yeah. It's kind of a, y'know, one of those cause and effect type things. You say, 'Well, wait a minute.' But again, I can't complain, 'cause we were engaged as a sub on those IDOA projects. It was just, the difference was not the prime." [#71]

Twenty-six business owners described their experiences working with or attempting to get work with one or more SEIs specifically. [#1, #2, #5, #6, #7, #9, #13, #15, #16, #18, #23, #27, #30, #38, #39, #46, #47, #48, #49, #60, #62, #64, #66, #67, #71, #PT6] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We do a lot of work at Purdue, private work for people who build buildings over there that are... They just built two huge buildings over there last year. And one time we had seven private jobs at Purdue that were for either investor groups or private. So, we'll do the traffic control. We'll do the concrete barriers. We'll put the fence around the side and all that. Those are private jobs. They're not only the university, I don't think. Purdue's our biggest one. So, you can go to this website, Reprographix, and look and see what Purdue's doing. No, [we don't need to be prequalified], not with the public entities, but a lot of bigger contractors want us to be safety prequalified. So, they have us fill out a several page questionnaire about our safety history and they want to know our EMR, which is our employer... It's the safety rating that you get based on your reportable injuries and it comes from your work comp insurance carrier. So if you don't have any claims for three years, you can get a rating of less than one, which means they take your rate and they multiply that times that number and it lowers your insurance cost. But a lot of big contractors want to know your EMR rating... Ivy Tech, you just got to depended on them... Well, no wait a minute. Sometimes they are on Reprographix but a lot of times they'll call us." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "We've gone to Purdue a couple times. I don't recall going to IU. We tried to do some work with Ivy Tech in terms of janitorial products and supplies and things like that, but none of that has panned out. We went to Purdue, went there a couple times... The individual was exceptional. The individual was doing his job, trying to get us exposure, but nothing happened...There's a group that represents the universities, and I don't know what the group is called, but there's a group that was trying to get a bigger buyer discount by being the nucleus for buying janitorial products, materials, and all that kind of stuff. I thought they were buying it for multiple universities. We tried to play in that circle and has failed. That was a couple, three years ago. They were like, 'Okay, we're looking to ... Instead of just buying for Purdue, or just buying for IU, or just buying for Ball State, and each going to buy 30,000 we're going to buy 200,000, and instead-' and it never worked out." [#2]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Well I used to do a lot with Indiana University, several years back. And then with local people that had Indiana University souvenirs and that type of thing. And then I guess somewhere some attorney told them that there's no reason to be letting them sell these products outside of the school without you earning some money from it. So, I had to start jumping through hoops and actually I was giving Indiana University a good price on everything that they bought because I did know they were reselling most of it. So, when that occurred, I just decided no I'm giving away enough. They wanted me to pay a fee and so on. And I said, no thanks, thanks but no thanks. And that ended our relationship there. And I just have never pursued it again and like I say, I was giving IU a good price on what we did. And knowing that they were reselling and then when they enacted this thing, you had to be licensed with them and all of that, had to even give more and I just said I'm not going to do it. I've never had any problems getting paid." [#5]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated " Universities pay slow. We have worked at Ball State as just a pass-through contractor and we were a sub. We used to work at Ivy Tech a lot. Then we lost our contact that we had. We had a good stretch running there, but then they

changed hands as far as the maintenance guys that were giving out the work. We lost all our contacts there. They moved on and we didn't know the new people that took over. They didn't know us. It was more or less calling your own. We didn't quote stuff out there. They weren't really official. You got to remember a lot of our stuff, we're in and out in a few days or a week or two weeks. We're under a lot of the time, what we bid is under that amount that's got to go out for public bid. The stuff that these places need done right away. A lot of times if they call and I go there that day and I quote it that day or the next day, and I have an answer on whether I have that thing or not, the instant I quote it. [For Purdue], We don't go to Lafayette. I try to stay out of Lafayette. It's all different unions up there." [#6]

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated "I wish I actually knew how to find out how to get those. I would love to be able to walk into IU's auditorium and know the right person to talk to. Usually I just open my mouth and say something about, 'Who does your printing? Who do you talk to about it?' That's how I find out. I would actually love to know how to find out, how do you go about finding out the right person. Because what I do is basically just ask, 'Well who does it? What's the person I need?'" [#7]
- The Native American male owner of an MBE-certified construction firm stated, "Purdue's good. They're great to work with. IU, on the other hand, our work restrictions were heavy because of parking. So we found that it was difficult to... We spent a lot of extra money trying to organize the project so that we could get our trucks and trailers in and out. It was because it's so busy. Lesson learned on that one was put more money in the logistics of those contracts. [With Ivy Tech], there's two contractors that are really dug in down there, and when they come out with the qualification requirements in the RFP, it's obvious to us that they're targeting them. Who helped write them maybe or something." [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We have the mail contract with them [IU], so we get to do a lot of their printing as well. We have a great relationship with them. We also do work for Ivy Tech. So, we've done printing, we've done imitation for them. We just do whatever they ask us to do here locally, but it's not been on a national or the whole state level. It's been just here locally" [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We've done business with Vincennes University, but they got a bad comment from a factory rep in a job we were connected with. And for some reason, they just equate us with that job, even though it was a bad material. So, how does a bad material get us...? We haven't done much work up there since." [#15]
- The Black American male owner of an MBE-certified construction company stated "I got an opportunity to work at USI. And that's the only time I ever made any kind of leeway I had been going out there for years asking them for work. They said they could give me a try to paint a couple of apartments and if it worked out. The guy that who had the bid in the first place couldn't handle all the work, so after I painted a couple of apartments they wanted me to keep on, so I painted more apartments that worked out there that summer." [#16]
- The non-Hispanic white male representative of a majority-owned goods and services company stated "Yeah, [we've worked with BSU], it has been awhile because we don't have that on contract. We did a couple years ago and there were some differences of opinion on

what was deemed to be... We deemed it to be vandalism and they said that it was covered in the contract and we just mutually decided to go our separate ways. Basically, what happened was in our opinion, there was a wide spread of vandalism in the elevators and our contract read that vandalism is not covered. And they disagreed with that." [#18]

- The Black American male owner of an MBE-certified professional services firm stated, "I would love to [work with universities]. One of the other things I wanted to do was trying to figure out if there was a way to partner with Ivy Tech... it's just a lack of information and it sucks." [#23]
- The non-Hispanic white male owner of a professional services firm stated "I would say IU's is as hard as the public one, but for the other ones I mentioned, it was a much easier process I'm sure they did, but it was – with them, it was – it didn't feel like – again, except for the IU situation, it did not feel like a government entity. It felt like a private entity where we went in, we presented to them, and they selected us through a process of looking at our proposal and hearing the presentation." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated "IU was difficult. INDOT was not. They publish and it was just a matter of reading the documentation. IU the nature of the IU bid process is that it's handled by departments and it's not centralized. So, you had to basically find information on a department and market to a particular department or group within that department, so it's just much more scattered. But, IU paid promptly" [#30]
- The Black American male owner of an MBE-certified professional services firm stated, "Now, that's one [Vincennes] I tried to get work with, and it just didn't happen after I was cut. As far Vincennes is concerned – you know, one of the things I've learned being in this business is it's who you know. You gotta know people in order to be – to a certain extent, to get an opportunity to speak with them, and then have some work history with them. As far as Vincennes is concerned, and I can speak to this pretty straightforward, is I've done a lot of – had done a lot of projects with Vincennes and for Vincennes while I was working with my previous employer. And had, you know, met their staff at Vincennes and knew a lot of the contractors and players down in that area, and successfully completed a lot of projects. And so, once the company, my previous employer, had cut me, I went down to Vincennes, you know, and had a little powwow with the team and let them know, 'Hey. This is what happened, but I'd still like to have an opportunity to get projects as my own company.' And, you know, left business cards and information sheets about my company and what we could do, but never really got anything back. And, you know, I'd follow up a few times because I know all of the people there as far as the team is concerned at Vincennes, but never really got anything from them on that. So, I just kind of left it alone and moved on... Was it harder? Yes, it was harder. There are more steps you have to take when you're dealing with public sector work, particularly the Ivy Techs, the Purdues, and Vincennes. There's lots of steps. You know, advertising, and so forth and so on. Contracts. Meetings. There's a lot – and I'm accustomed to it. You know, I've been doing it for a number of years, so I'm not going to say it's hard for me. But when you compare it to some other public work that I've done, dealing with the higher education – I'll put it like this – the higher education in the public sector work can be a little bit more challenging." [#38]

- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "Yes, if you are talking about are they customers of mine, do they send their nurses over to me and their respiratory therapists and their CNA classes to put uniforms on their backs? It's actually not a contract; I'm just their preference. That the chairpersons of those departments came over and met with me, didn't like how their students were looking, didn't like the prices they were paying. I introduced them to something else at a more reasonable price, and word of mouth took over from there. 'Cause they're responsible for their own uniforms. The university doesn't buy them for them. But they definitely can direct that traffic, so that's so kind and very generous of them to direct them to me." [#46]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "We have done work for them. We do some marketing for their annual charity events through networking; my father went there, and my grandparents went there, and season ticket holder. I mean, through networking. Was bid process easier or harder? Pretty easy." [#47]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "I am a graduate of Purdue University Building Technology program. And to this date, my firm has never received any work from Purdue University. We joint venture with larger firms, some in Indianapolis, other here in northwest Indiana, others in Chicago, put together different teams. We've responded to several RFQs. We just magically never get awarded the work. And we have a volume of work at this point. We've completed over a million square feet of interior renovations, built, but that doesn't seem to be enough for us to do anything from my alma mater, which is strange." [#62]
- The male representative of a majority-owned professional services firm stated "Working for universities, there's usually a niche market that is accustomed to working with various universities or there's certain consultants that are more prone to work with certain universities just due to past relationships. So, sometimes those are difficult to find. Well, INDOT would be easier compared to any of the others" [#64]
- The non-Hispanic white male owner of a majority-owned professional services firm stated "Laboratories, classrooms, dormitories, let's see, state office building, educational facilities at the higher ed facilities. Mixed prime and sub work. Probably when you work directly for the universities, it's easier. That's a direct relationship with the client. When a project originates in, say, the Department of Administration – I don't know if it's still called that or not – or like the – there's less of a layer. Usually like whatever the entity is that needs a building built and it's going through – the Department of Administration adds a layer to – the Department of Administration is actually the owner, right? But there's another layer there with the end user that's part of it that would be an owner-client and they're just the user of the facility or the department that occupies it. So, it just adds an extra layer to it." [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "We did do some work when John Coggins was at PNC. Actually, we got to bid on some stuff a long time ago, but then they put this woman in over at Purdue that just kind of took over everything and then nobody got any work for her. So, we did try and do some work for Purdue. So that was one that we did work with over the years a long time ago, but never could get in the door with them." [#67]

- The Black American male owner of an MBE-certified professional services firm stated "We were the prime on that project because we're an MBE at Ball State. This was my first project with Ball State. I challenged Ball State in something that wasn't even really – Short story. It was the [large construction] project, they decided to engage with a majority firm as the construction manager, as an advisor who was helping us through the process. That firm, my view, never did their job. The Ball State construction lead was female. Their executive partner, basically the partner in charge, was always so disrespectful to that Ball State lead. They didn't do their job. They didn't provide adequate guidance or support that ultimately Ball State ended up firing them. It took 'em almost a year to get to that point. They end up firing them. And then they said, 'Oh, you have a week to get these documents together and change 'em, et cetera, et cetera.' And I told the Ball State folks, and I said, 'You know what? I got an issue.' They said, 'What?' And I said, 'My issue is you let this firm go all this time giving you substandard work, and it was acceptable; being disrespectful, and it was acceptable. You gave them so many opportunities to provide you horrible service for months, and then you finally made a decision.' And I said, 'If this had been an XBE firm, you would've never given anywhere near as much leeway to any issues that any XBE would've had.' And they just looked at me. They didn't agree; they didn't disagree. But to me, 'Your quiet is acknowledgement in and of itself.' ...Honestly, IU was the hardest to get work with. Purdue was incredibly easy. A lot with Purdue. A tremendous amount with Purdue, actually. It was all architectural and design. We were considered one of their on-call architects. Probably had, in a seven-year period, probably had over 20-plus projects. Purdue was incredibly easy. I felt it was. I nurtured that relationship. I'm not trying to be arrogant. I nurtured that relationship; I mean, we applied for RFPs blindly over, oh, probably about – they had a lot coming out – about six months. And then I just reached out to the facilities folks and at that time the university architect, and met with facilities folks, and ended up ultimately meeting the university architect, and ended up establishing a relationship with the university architect. A good one. And then just inquired about, 'Hey, when submitting, is there anything we can do?' Hopefully the right approach. 'What can I do to respond better, blah-blah-blah-blah?' The discussion largely was a matter of 'We just need to find the right project for you.' And then there was a project. They were renovating a food service, and Larry, the university architect, just called and that was our first project. And that probably took about eight months to cultivate that relationship, and it was well worth it." [#71]
- A respondent from a public meeting held in Greenfield stated, "I think the problem with the universities is that they say they want diversity then, you know, you turn in a firm that has the whole project team 60 percent diversity, but we haven't done three of the same or five of the same projects which is almost impossible to get, and then we don't even get an interview. They don't even talk to us. So until they rewrite their RFPs and RFQs to say we want qualification, we want licensed architects, we want diversity, we want this, and hold to that, we are never even going to get the chance to get to the table to present our team. And, you know, we have every -- we have XBE with M, W, V, all of that on our team and very experienced people, but we couldn't get to the table. They really need to focus on taking that out and they need to understand that qualifications are more important than experience. Because you may have five but only one of those was in good, and maybe we have one but ours was exceptional. So I think that's a big problem with the universities. I put in an RFP, and the firm that got it, it was an historical building, it was on a campus, and

all of the state agencies are required to use people who are Public Works certified because it is a construction project. So, I didn't get an interview. I called them and I said, you know, this firm that you picked, are they historical (inaudible)? I said are they Public Works certified, and they said no. I said, well, you are using state funds to build this building, you have to have -- this firm has to have Public Works certification. And they said, oh, we don't care about that. So I called the Public Works, State of Indiana, and I said what is -- don't they have to have the Public Works certification to do a project, either to design it or build it? And they said, yeah, they do. And I said, well, how come they are letting them go ahead with this? And they said, well, we don't have any compliance, we don't have any way to make sure that they are doing it the right way. And so, I went to the Commission for Women and I said what's the point of having a certification process if you are not going to enforce it?" [#PT6]

2. Barriers and challenges to working with public agencies in Indiana. Interviewees spoke about the challenges they face when working with public agencies in the Indiana area.

A few business owners highlighted the length and large size of projects, allowable profit margins, communication with decision makers, and lead time before projects are announced as challenges, especially for small, disadvantaged firms. [#3, #6, #9, #13, #18, #22, #27, #30, #37, #41, #43, #67, #71, #76, #AV, #FG1, #FG2] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated "So we get their notices, but it's almost always construction work. It's very rarely anything that we would do." [#3]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated "We don't bid enough. I used to bid that stuff all the time. Ten years ago, I'd bid that stuff. I'd go in, I'd look at the board, I'd watch it online, and I'd pay real close attention to that work. I don't anymore because I'm just not competitive at it. I couldn't get enough of it to justify my time of looking up and seeing what was ... I just couldn't hand it. I didn't know the people. It was typically a different project manager on every job. I didn't know them, they didn't know me. I just never built a good relationship. I just could not be competitive enough to land that stuff. I just took my eggs in another basket and went on." [#6]
- The Native American male owner of an MBE-certified construction firm stated, "It's been a year or so since we've done anything [with the State]. We pretty much are federal related. We don't do a lot with the state only because of the competition levels. For what we do a lot of the problem is we're not a subcontractor. We're applying contractor. So, when the state has projects, a lot of them do much bigger values, dollar values then what we're more focused on. So, we're not a subcontractor because it takes too long to get paid. So, we don't have a lot of opportunity within the state. Many of them are too larger projects for us and we're just not going to be a subcontractor. No. I'll be real honest with you, boss. The universities got contractors that are right outside their front doors. It's very difficult for us to be competitive when I've got to pay people to go there and per diem. We have a 52-mile rule. If we're 52 miles from the reporting office, then they get per diems and hotels. So, it's very difficult for us to compete. Now, I'm less than 52 miles from Purdue. I don't have per diems, but anywhere else, I got pay per diem." [#9]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Some of the buyers or the states are not technology oriented. So, things have changed. They might go to a printer where it's really a digital job. And so, they're paying more because they're sending it to a printer first and then bringing it to us where we would just print it and address it and mail it all in the same process. So I would say that's a barrier sometimes when we're trying to get people to really understand this is a digital job or this isn't is the biggest thing, that we keep people understanding the technologies when they're buying and they just have to hire those people and keep them in those jobs." [#13]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "Maybe they've made changes, etc. But if there was one place you could go to see all that or if you got some kind of... I feel like we're all in our emails so much these days, in our inbox. If there was some kind of email that was sent saying, 'Hey, something was added here,' or maybe that's just something we need to change on our end to have someone that goes in and looks at one place or multiple places to figure out what RFP's are out there. It kind of gets drawn out over a couple months and then people get angry with us 'cause they see the elevator down for months and they know that we're used to being on sites. Then they blame us when it's really not our fault. It's just kind of the process. But that's really the only difference is just trying to help the general public know that just because this elevator... Yes, we have the service contract on it, but repairs go out to bid. It's not our fault, the reason the elevator's been down. That's one instance that I can think of that I came across in the recent past that stands out being maybe a difference cause a private company, like I was telling you earlier, they want that elevator up and running fast. And they're willing to have the elevator be down for one day rather than a month or two. That just doesn't happen [with the state]." [#18]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "I'm pretty sure that's what's happening, they only reach out to those companies that are established and they know already and gathered them for the bidding." [#22]
- The non-Hispanic white male owner of a professional services firm stated, "One of the challenges that we do run into is in a budget year, when it goes from one budget to the next, that creates a delay in payment. I mean it's not a huge challenge, but it does create some cash tightness." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "For an extended period of time, I was a prime or secondary contractor with the City of Indianapolis and the State of Indiana. I found it difficult to get work only in that depending on the size of the contract I would have to partner with prime contractors. I did not think it was burdensome and it was in the long run a good relationship between myself and IDOA and also other institutional organizations like the City of Indianapolis. It was also a difficult experience in terms of making sure that a timely payment process was instituted. If there was any flaw in the process, it was the fact that the payment process by both the State of Indiana and the [prime contractor] was in many cases 65 to 90 days. Needless to say, that was an issue, but the size of the contract allowed me to ride that out. In the private sector it would be unacceptable for me to take terms of 60 days." [#30]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "I have called in the past to some counties, one or two in my area, and asked what I can do to

get any electrical work, but it looks like they normally go through general contractors, and they don't hire electrical contractors direct. That's my understanding, or my experience. They just asked me to send the paperwork, and nothing has happened. I have a general contractor that he does work for the city, and he calls me whenever there is electrical work to be done but I work as his sub. When I have sent my paperwork to the cities and counties, I haven't gotten anything." [#37]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "What's important for me, as a small business, is being paid in a timely manner. That 30 -, 45-day turnaround will sink a small business. That's another one of the reasons why you really have to look long and hard at those government bids, those government opportunities because they slow pay. The other one that I worked – we did some work for – this was county. The Marion County Fair. When we finished the job, they handed me the check. I didn't even have to give them an invoice. My bid was the invoice. But when you talk to these other agencies – for instance, when I did the walk-through on that election board, one of the things that the person that met us and was showing us the facilities said, 'We pay on time and we pay.' I mean he continued to say that because, obviously, he knows that everyone else knows that that 30, 45 days – you can't wait 45 days when you're maintaining payroll and equipment and supplies and insurance and rent and all of those things. You can't do that." [#41]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "You've got state not valuing what we bring to the table in terms of tax dollars. You buy out-of-state – they don't seem to make the connection between buying from a large distributor and sending their tax dollars out of state and purchasing locally and having that come back to help the state. They just don't make the connection. It used to be 'Buy American.' The only people that buy American anymore are USPS, where they have really stringent rules and they have to stick by them. But other than that, nobody really cares anymore. They're all buying outside of the country; they're all buying out of state. They don't seem to relate to the fact that we employ people, and we pay taxes. It's super-frustrating. It's super frustrating and the other thing I think is also the state or the city puts enough pressure on local organizations to do the same thing. So, you have local organizations that are getting huge tax breaks from the state government or from the city government and they're sending their business out of state. I'll pick on the hospital; they become a hospital. It's just absurd to send 30,000 people that are buying uniforms to an online site which is out of the state. So, every single uniform dealer in the State of Indiana is not selling product to IU Health system. And what you have is IU Health working all these deals with the city and the state throughout the state. It's through the entire state. This – to me it's just mind-boggling. But when I complain about it, I'll get these responses: 'Well, we can't tell a local entity what to do.' Yeah, you can. If you're making a deal with them, if you're making a deal with them or if you're doing a permit with them – of course you can tell them what to do. It's ridiculous. They all up and down the city; they're not paying taxes on it. They're sitting there, dead space and they're sending all this business out of state, thousands and thousands of uniforms are going out of state. Thousands. That doesn't mean they don't buy anything from up but it's a fraction of what they should be buying from us, a fraction." [#43]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Our tourism board here, Porter County Tourism, has never – I mean many years ago

we worked for all three tourism boards: La Porte County, Porter County, and Lake County. We used to do work for all those different public sectors, you know, government agencies. And it is very hard to get work from them. And sometimes it's been frustrating; they go to other states. They go – we had our local tourism board use somebody out of California. So, it's very political I think, and I think it's hard to deal in the public sector. Like I said, most of our business is manufacturing companies and all of that. But getting in with the public I think is – in the public sector gets very political. Sadly. But it's the state of Indiana, too. I mean our local community is very political. And even on some of our local government agencies, they don't even keep their business in the community; they'll go to Indianapolis and get a consulting firm when you have agencies here that can do the same work. So that's been a frustration. I don't know, I just feel we haven't done a ton of public sector work, just because it was too many hoops to jump through. Sometimes in the public sector you get a lot of people are changing, you don't have the same people you're working with all the time. Public sector work evolves as far as the people that are involved and the hoops you have to jump through and the waiting game. You know, it's a whole different world working in the public sector.” [#67]

- The Black American male owner of an MBE-certified professional services firm stated, "The reality is oftentimes working with public agencies, there tends to be a level of politics engaged. And it varies, of course. But y'know, there can tend to be some level of politics. And I initially very intentionally had stepped away from political work, just because I didn't want the additional stressors of that type of work, if you would. And so, I was very deliberate in the type of work that I would go after. Like the IU work, I finally went ahead and submitted, and will do all that to at least apply for that work, 'cause it's gonna be about \$4 million worth of work. But the Justice Center work, I was continually asked if I was interested in being part of the teams, and I repeatedly said no. Or, y'know, some of the other, larger projects over the past three or four years, I've been approached and queried if I had interest in the work, and I've said no, repeatedly said no.” [#71]
- The Subcontinent Asian American representative of a business development organization stated, "I would say I think from our community perspective, they've done a lot. It is still not working. We are not on the board, we are not on the commission, we are not part of the ecosystem period. I had some real good conversations with governor's office for last 10 years. It is very complicated for us to break into that cycle, let's put it that way. In some areas, the Asians have some headway in terms of some technology contracts, but there are so many other contracts, and all, and it's just not happening. I would just say it's [established] networks. I don't know what state or university can even do. [Or if] they know how to do it. I'm not sure as to how to break into that.” [#76]
- A comment from a Black American owned MBE-certified construction company stated, "Lack of information because there is not a lot available.” [#AV]
- A comments from a Black American owned MBE-certified construction company stated, "Indiana is comprised of a lot of municipalities, so decisions are handled by Boards of Directors and committees if they are not familiar with your business it is hard to get their business.” [#AV]

- A comment from a Subcontinent Asian American owned MBE-certified professional services firm stated, “There are no contact person in government agencies for less than 25,000 dollars.” [#AV]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, “I have been working on more public projects and I’m really seeing that the public projects are pushing hard to get the XBE participation and it is challenging.” [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, “The climate is very aggressive. Some of our university clients have in the contracting world have started to request a fee numbers or fee ranges. I think maybe skirting around procurement law by maybe not asking for a price but asking for a fee range or something. So, we’re seeing incredible pressure pushed downward on fees for projects. 7%, 8%, eight, 9% fees for complex renovation projects with eight, nine, 10 consultants that we have to manage when we’re prime are now pushing down to five, six, and seven. Particularly, community colleges, they see themselves as almost like nonprofit organizations, in a way, or a community organization. That’s incredibly difficult to split the fees. As a prime contractor for midsize to large projects, we are falling below 50% of the stake, of the pie. At some point, we’re taking all the risk. We feel like we are, at some point, almost brokering deals. There’s a lot of concern there. The incentives don’t seem to be there yet for business owners to do the right thing because like I said before, , the margins continue to push down and [people] saying, ‘Look, we’ll pay more fees for more voices at the table,’ that no one’s doing that with public dollars, it seems. They want to see it, but not what maybe... I think there’s an added cost right now for us because we partner to get that since we’re not a minority owned business. So, it adds cost to our business, anyway. We think we’re seeing 15% [goal] as maybe an example of a high bar to hit in most States. Again, if it is an HBCU entity or sometimes community college those goals can be a higher 20%, 25%. That gets pretty difficult to hit and really starts to... once you get above 15% a year, now you’re likely to see the prime contract holder or the submitters, the proposers that are prime and minority will be the ones who will win those contracts, which is obviously the goal to really be prime and not just a consultant. 15%, for example, again most primes, we’ll call it traditional architectural firms that provide interior design architecture, landscape architecture, the basic package there. Being somewhere over 50% is proven time and time again, where you need to be to somehow make any profit at all. The lower that number gets at some point, you’re going to break or go lower. So if you think about 50%, and if you have six or seven consultants, which is pretty common, that means you’ve got five consultants left out of yourself to split up, 50%, if you will. So, when we are submitting in the areas that goals required, the professional area of expertise, the discipline that has come forward as a minority firm has to be a significant design. It has to be significant role, like a structural engineer, a mechanical engineer, lead designer, whatever it might be. We appreciate the goals, and we are pretty creative.” [#FG1]
- The Black American male owner of an MBE-certified goods and services firms stated, “I would tell you what of my major factors is the pay. When it comes to the state and everything, they cut my price off almost in half. So, a guard would usually cost \$25 an hour for an armed guard to be somewhere. But when it comes to the state, it’s \$15 an hour. And so, it cuts all my money, basically, because I’ll pay them roughly \$14 an hour. I mean, a

dollar is not enough to be profitable. So that's one thing. it's hard to become a prime with the government, because the requirements are so hard." [#FG2]

3. IDOA's and SEI's bidding and contracting processes. Interviewees shared a number of comments about IDOA's and SEI's contracting and bidding processes.

Two business owners viewed IDOA or INDOT as more approachable and focused on small business development than other public agencies. [#2, #42] Their comments included:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I would speak pretty favorable of INDOT, in that they've done a good job supporting us, making sure we're in their database, and that kind of thing." [#2]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "It's been fantastic. They were very responsive and very forward-thinking. They appreciate the expertise and are willing to listen to any sort of ideas or any sort of feedback that we might have about ways to improve. I think they do their best to sort of leverage us in a way that improves their access to information so that they can use it to improve healthcare and remove disparities across the state." [#42]

Two business owners discussed difficulties in learning about IDOA and SEI contract opportunities. [#18, #AV] For example:

- The non-Hispanic white male representative of a majority-owned goods and services company stated, "Maybe they've made changes, etc. But if there was one place you could go to see all that or if you got some kind of... I feel like we're all in our emails so much these days, in our inbox. If there was some kind of email that was sent saying, 'Hey, something was added here,' or maybe that's just something we need to change on our end to have someone that goes in and looks at one place or multiple places to figure out what RFP's are out there." [#18]
- A comment from a Black American owned MBE-certified construction company stated, "Lack of information because there is not a lot available." [#AV]

Many business owners shared recommendations as to how the IDOA, SEIs, or other public agencies could improve their contract notification or bid process. [#4, #6, #18, #25, #29, #35, #38, #39, #48, #66, #AV, #FG1, #FG2]. For example:

- The non-Hispanic white male owner of a construction firm stated, "Yeah they could, and they could do a better job of where there's projects for smaller businesses. You know, a lot of smaller business seems like they just kind of shy away from, either because they're afraid you can't do the work to their time frame or they just have built relationships with other businesses already and so use them. I find a lot of times that you give a bid on something and you're just bidding to keep the other person honest." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "It's the nature of the beast really because people that move take the people that they're familiar with them. Right, wrong, or indifferent, that's what we do. That's what everybody generally does. Maybe sometimes it's not right that you don't get to know maybe somebody who's already been in and out of there, but I

don't know. I guess for me personally, I've lived long enough to see that that's just the nature of the way things go. What do you really do? Do you then go in and force people? Say, hey you have to do this. When the top of the food chain starts telling their maintenance guys who they have to use, and they're happy with whoever they have, those guys don't care what color you are. They don't care what your primary language is. They want what they want done. They want it done; they want it done how they want it done. So when you get down to the nuts and bolts of actually performing the work, the guys that are actually in charge of that, they really don't care about all of this malarkey of minority-, women-owned, and veteran-owned, and all that. They couldn't care less. They want the job done with what times they're used to working with who they're working with already. Nine times out of ten, they've got a relationship with the people. Those guys know their way around the facility. They know how that facility operates. They know what's required of them because every place is a little bit different. That's what happens. The guys that are actually down there getting the work done" [#6]

- The non-Hispanic white male representative of a majority-owned goods and services company stated, "I think they do a nice job of, was it the 'Right to Know' or something like that? Where you submit bids, and you can go and look at what other people bid on the same projects and that's very helpful. That's how we found out we were half the or double the cost of that one bid and we just scratch our heads. Well they're going to lose money right away. Why are they doing this?" [#18]
- The Black American male representative of a construction trade organization stated, "The thing that I always hear a lot is that work could be more of the forecast down the road. So, let's say we need to build a complex of some kind, whatever that is. We need to build more student houses. So instead of saying, you know, the package is available to bid on and here's the timeframe for that, where is the notification of next year we're going to be bidding out this type of project. Or something six months from now, expect this to be coming down the pipe. Where is the forecasting, a regular update on what the future opportunities are going to be? Particularly knowing the process that state institutions or state agencies have to go through to carry something to the point where they put it to bid, there is so many bureaucratic steps along the way, the idea that people couldn't be given more heads up that hey, this is coming. Or even this is potentially coming and here's the likelihood that it is coming and be updated on that would be the main thing that the construction industry wants to know. So, you know, what opportunities are out there that I need to get ready to apply for, put my application in. Pull together my partners so we can put together the right application. I would say the faster payment can be done the better. So, anything that can be done to accelerate payment, even if, let's say you're at 30 days, right? You say I know that I can perform such and such work and I will get paid for it in 30 days. That even that's great and you're doing better than half the companies out there at that point, if that could be shortened to two weeks, that's even better. That means that those companies know that if I'm working on that project, I'm going to get paid faster, that moves to the top of the line on priority" [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "I think you really have to have a shift in personnel. Because the ones I think that are in place now think that to have a minority program means that they're having to fund it at a higher level, that if I buy from black person, that it's like a give me. Well, every business I ever

involved – was involved in I saved the customers millions of dollars. And if you just say, ‘Bid something,’ see, that’s the mindset now, is, ‘Let’s bid it out and make sure they get the bid.’ Bids are not fair. Bids are only fair usually to the incumbent. And that’s what was happening in the City of Indianapolis when I first started this business. So, my thought would be to, one, get somebody in there like what happened when I started, who says, ‘Wow, yeah, you’re right. The same company has had this polymer contract, \$700,000.00, for probably ten straight years. And the guy who makes the decision used to be the salesperson for the polymer company. And the guy who is the salesperson for the polymer company used to be in his chair running that part of the plant.’ So it looks like to me that even with my bad eye that I could see that, but you need some people in the right places that are willing to – well, not just make their past look good and when you bring stuff. And so, what happened was [a decision maker] said, ‘You come in and show me what you can do.’ Now, imagine if it was the way it always been. I just can bid on that one product. Well, this guy is saying, ‘This product is the best. It performs the best, so you gotta be twice what it is.’ That product wasn’t the best. It wasn’t even close to being the best. But everyone in the industry all over the country knew that Indianapolis’s bid was fixed. Fixed how? Fixed because you already knew what the end result was. So, they just walked away and said, ‘I won’t bid.’ Or else they would bid high. And then these folks retain this business, and then they would stay out of the other cities. And everybody and this guy as a salesman on one product bragged about him being a millionaire. Yeah. He only has to make one call once a month. Yeah. That’s what – that’s the kind of thing that has to be changed. They have to be open to innovative ideas, not just bidding on – you bid on this product. But rather, can you bring me a way to do this? That’s better. We have the business with [a large private firm], but we can’t get the business with the City of Indianapolis. Now, they’ll say, ‘Well, we’ll let you bid.’ But if it’s set up the way it’s set up, the ones who support me at [the big private firm], they’re not gonna support me here because they don’t trust the system.” [#29]

- The Hispanic American male owner of an uncertified-MBE construction firm stated, "It is just – it all depends on what areas you work in. There's so many different groups within the state or the city and stuff like that. There's so many chiefs, not enough Indians, they don't speak to each other. Then different departments and department heads, which we found is a real big issue when you're trying to get a simple question answered and it takes multiple people that you have to go through to get that answer, which will hold up progress on the jobsite or what have you. So, that's where I could see. If there's going to be a team put together for a certain job, that team should be able to get quickly together and get answers to keep the project going." [#35]
- The Black American male owner of an MBE-certified professional services firm stated, "As far as contracts, you know, that's kind of a different deal there. Because, like I say, I've been fortunate with some, but others I just have not had an opportunity. And I know, I know, I've read, and I've spoke to, there are some situations where they have certain percentages that they have to follow and so forth and so on. And I think that's fine and dandy, and it works. I mean, it puts me in the door a lot of the times with some bigger projects as a sub to a prime. But it hasn't really put me in the door directly as, for lack of a better word, I guess a prime when I'm going directly to the public entity to try to get a project. Because, again, they don't really know you. So, I don't know. That's a tough question. I'm trying to figure out how the best way to answer that. Because I think the only other thing you could do is up the

percentages. 'Okay. Rather than 15 percent, you've gotta have 25 percent of certain – of disadvantaged business owners to take part in this project.'" [#38]

- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "One of the recommendations that we've been talking to a lot of our customers about is that the 50 percent down makes it a lot easier because we can get the product there, you're still holding 50 percent, and then you get all your work done. Then, from there, the work gets done, like anything else you go do in our country, you pay for something, you get it then, or if you get something done, you pay for it and it's over, end of transaction. That's how we should do it instead of making, especially small businesses, wait a month, a month and a half to get paid. That could be a lifetime." [#39]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "Yes, I think that for businesses that are not actively doing business with INDOT, it's very difficult to get in with INDOT and to win projects. So, figuring out how to allow for new businesses having – like some accommodation for new businesses that have not done INDOT work in the past would be very helpful." [#48]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'd like to see IU loosen up a little bit on their fee structure thing but until the marketplace revolts against it, then it's going to stay low." [#66]
- A comment from a VBE-certified construction company stated, "I would like to see more access to government officials." [#AV]
- A comment from a Black American owned MBE- and VBE-certified professional services firm stated, "The State needs to offer more work to minority companies." [#AV]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "Design build... I have seen where the barriers have been able to be surpassed in design by firms that can find their way to the table on a team delivering work, where in qualifications based selection process, they wouldn't have survived that. But in a price-based scenario they're able to get to the table. I know that's how we really grew our experience in larger public work from ratios point of view, back in the '80s and '90s. We were a younger firm; we didn't have all the experience. Some of the deals we were striking on or hitting on were designed build because you could do the work, you could get there, you could work hard and deliver successfully. Even though you didn't have necessarily the most experience I'm just saying that, I guess, I see an opportunity for the State of Indiana. I know there's occasional RFPs that come out as design build, not that many, produced, tried it. I use tried it and maybe that's something we'll see more of." [#FG1]
- The Black American male owner of an MBE-certified goods and services firms stated, "I mean, I think the airport does an awesome job at using minority-owned businesses. I think they do an excellent job. I would say, also, Eskenazi Hospital is also trying to do great. So, everything ain't bad. So I will tell you, those are the two institutions that are doing a great job, of trying to make sure that the minority businesses are involved I mean, my whole thing about the city and state is, hold these people accountable, using the goals that we have. Because they don't use the goals, and these businesses keep going out of business. Then they keep bringing the goals down. And it's, 'You keep bringing the goals down, because you can't meet the ones you got.' And it's because we can't get these jobs. If we're not working,

we go out of business. I mean, if you look in the last 10 years, Indianapolis has blown up, as far as putting 8,500 apartment buildings downtown. But I will tell you, 30 black construction companies have went out of business in the last 10 years. That doesn't even add up, because we have so much work downtown, but again, nobody's using black businesses downtown, because they don't have to." [#FG2]

G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of Indiana's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. Relief programs for businesses affected by COVID-19;
3. Past marketplace conditions; and
4. 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.

Sixty-eight interviewees described 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. [#4, #6, #7, #9, #12, #13, #15, #16, #18, #19, #22, #23, #24, #25, #33, #36, #40, #41, #45, #46, #47, #48, #49, #60, #61, #63, #65, #66, #67, #69, #72, #73, #75, #76, #AV, #FG1, #FG2] For example:

- The non-Hispanic white male owner of a construction firm stated, "Well, you know, this time last year was my busiest, April would've been my... March and April would've been my two busiest months but..." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Typically, at this time of the year we are rolling. As far as workload, we've got some jobs that are held up right now that we were really anticipating being started right now. We would like to... And we've got a contract that we were supposed to be awarded, some manhole rebuilds on Senate right there about 11th and Senate, [remakes and] rebuilds, but it's going to require four or five steam outages on the line going up the Methodist hospital. We're not going to shut down [firm A] right now. We're not going to shut down their steam and put that extra taxing load on their maintenance guys to start their boilers, close their routes because we're trying to keep that place going right now. And there'll be a downhill trickle effect from that and for everybody, they're all leery of giving us more work because they don't know if their company's going to say, "Hey we're going to switch to emergency only." If they do, then the hand, we'll say, "We've got a seam manhole open and halfway done", and they tell us to go to emergency only at that point. That'd be an emergency because we can't [leave a] big hole open right out the middle of the street." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Yes it has affected it. I haven't felt the effects yet. I mean, the way it's affected it is,

I'm not nearly as busy as I was. I've had to sanitize my shop and we wear gloves and masks. I cannot go in and chat with my customers. I call ahead of time now that I'm a few minutes away. Then I leave it at their door. Then they come out and pick it up and there's gloves and the masks involved. It's affected it that way as an ongoing thing. The thing that I'm worried ... It hasn't affected me as in not getting any orders because my orders are done by email, but my customers are not in the office now. The orders are further apart than normal and I'm having to adjust, like one order today, they're in the office on Mondays and Tuesdays. If they're not there when I deliver, just leave it in the entryway and they'll pick it up when they come in. So, I'm no longer interacting with my customers. Yes, there has been orders, like I said, I should've already had been meeting with the board of realtors for their programs and we're not able to start on that yet. Which means I'm a really have to hustle as soon as we can. Then there's certain days I have to deliver to my customers that they're there. There's some contracts that've just been put into a waiting mode. They'll probably do them, but we're going to have to postpone when we can get it started because we can't meet to do it. The thing that's going to hurt me is with my customers not working, how many are actually going to come out of this and stay a viable company? How many are going to close their doors? When that happens that's going to hurt my business. So, I see my damage from the virus as being residual, I guess. My customers, if they don't survive, they're not going to be my customer. So, I don't see it hitting me until next month or the month after because that's going to be when the real story comes out is how many companies have survived the virus and stayed open? That in turn is going to affect how many customers I have left at the end of it. Because this is big enough that major companies are having issues." [#7]

- The Native American male owner of an MBE-certified construction firm stated, "Every project I got is shut down right now. Well, we do a lot of reservation work, so the Native Americans don't do well with viruses, so they go the extra 10 miles to make sure that their people are protected. I've got a superintendent that I'm paying to sit out on a reservation right now because he can't go in or out of the reservation. Oh, it's kicking our head, kicking us hard. It's getting pretty thin right now. I can probably hold out maybe another 20, 30 days. After that, but that's not the impact. The impact, I think, is going to be going back to work. All this time that's went by my progress billing has stopped. I'm going to have 30 days of labor before I get another progress bill out. Then I'm going to wait 30 days to get paid, so I'm looking at 60 days to catch back up. My contract schedules say I got to have a certain amount of something complete by a certain date. It better be complete or I'm not invoicing until the next month. Right. Then all my customers now are saying that... They're saying that, yeah, we'll give you a time extension, but no monetary extension. I'm like, "Time is money, folks." Nobody's considering monetary extension at this point. No, I think the impact on us is going to be more when we go back to work than it is right now. Right now, I can control my costs. When we go back to work, I can't. I got labor. I got incidentals. I got per diems. I got gas. I got trucks. I got all everything. It comes back, but no progress bill. Our operating costs run about 40,000 a month. So all these loans that they're saying that are forgivable are needed, are necessary in order for us to cover that hump because if I got to borrow money to run those months and then still pay it back, I'm not gaining. Yeah, I mean I pay, because of our union labor response or our contract with our union labor, I got to keep \$40,000 in the bank or I got to borrow that payroll, which is another 3% on top of the money. So, everybody's got their hand out for everything. There's nobody talking about

those issues. I mean they're starting to now. I'm also seeing my competitors being bought up for 20 cents on the dollar. Two of my primary competitors that I usually bid against, they called me and said, "Hey, good luck with the customers because we're going to have to sign out." I'm like, "What's going on?" They said, "Well, we got offered to be bought by a larger company. I can't pay the rent for these months." So they sold. I had one call me and ask me what my price tag was. Told him it wasn't for sale, not yet." [#9]

- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Yes, our fall fundraisers are a lot more than our spring fundraisers. The way the fall is looking right now. The way that they're talking about it, it's like... I've got most of my customers that said that they've given me dates, but who knows if it's going to happen? We lost \$100,000 in sales in a day. I had schools... And of course, they canceled, and then I thought, well, they'll come back. You know? Because I didn't think it would go until the end of the school year. And then the governor canceled them, and they canceled their sales. The only ones I didn't lose completely were the ones that had already turned their orders and their money into the school, so they didn't want to try and refund everybody their money. So those schools ended up, when the kids came to the school to pick up all their stuff that was still at the school, they picked up their fundraiser stuff and ended up delivering them to their customers. And I mean, I don't want to go into debt to be waiting on... The only thing I can think of is, I'd have to switch businesses. I'd have to come up with a whole new business, if schools do not go." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We worked all the way through because we had contracts. We had all this tax statements for Indiana. I had to be out by April 15th, and there was no waiver on that. So, we worked the entire time. We are considered an essential business. And so, we worked the entire time. And now the direct mail portion went down. People are not marketing like they should be. Very scary for me. Because if you don't do it, you won't get a better result. You'll just not have your business then. And so, we try to keep talking to our customers and guiding them through what they should be doing at this point. So, we're doing a lot of consultation on that. With our nonprofit mailers, we just talked to them and said, and people don't recognize and realize that mail is more important now than ever because people are going to their mailbox every day. And then we have companies that market home products, and their sales are skyrocketed. So we keep just looking at what is smart, what is selling right now? And then how do we get those people to keep on marketing? So not to be afraid, come out of the dark, there's different ways. You have to do it differently now, you can't do it the same, but you just have to keep counseling them on what to do next. I get 300 emails a day, literally. By the time I leave my office the last thing I want at home is another email. But if you send me something in the mail, I'm going to look at it. I might get online and look at your company and I might buy online, or I might just call you the next day. So, mine being the same, I'm getting a new roof put on my house, I've got some repairs done to it. We're going to black top our driveway. Everybody is doing all this home stuff. And if you're selling any kind of those products, you need to be paying attention and getting in the mailbox. I'm getting a little concerned because a lot of the projects that we had before are done. We're just really trying to figure out how we get everybody to get back to marching again. And we're still desperately looking for, or any kind of statement processing that's going on in the State of Indiana, and getting our state to understand they have to do business local We keep

things very clean and we stepped up our ... When you work in an area, you clean it before you leave. When you arrive on it, you clean it again. And that didn't work for us. And then we ask our people go to work and come home, go to the grocery, that's it. And a lot of our people just really listened to us. And then we started. We came up with this big project that we needed to get started on, and we didn't have enough people. So, what we did was we said, "Okay, who has someone at home that's been sheltering in place for a family that needs a job?" So now we have sons and daughters and grandkids and stuff like that. They know we're sheltered in place. And that's been our new hire to hire like 10 people. And so, we've hired them, and it's worked out beautifully for us. So, it's just doing business differently, you have to just be very, very creative during this time." [#13]

- The non-Hispanic white female owner of a WBE-certified construction company stated, "We had several job sites close down." [#15]
- The Black American male owner of an MBE-certified construction company stated, "This year, because of the virus, [USI] didn't have to do any work hardly at the dorms, because the children, they went home early and they didn't get to do that much damage where they needed painting that bad. Absolutely. I haven't made a dime this year." [#16]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "And then now that coronavirus has hit, we actually have been hit pretty hard like, I think, a lot of people. So, I'm curious to see where and what happens here into the future. Thankfully, we've got some hospitals and many other, what we call essential businesses, a lot of industrial accounts that need their elevators and they're still paying their bills. But a lot of hotels, stuff like that, and other businesses like the convention center, etc. I mean there's some that are paying their bills and there's others, the majority of them that aren't. And that's the tricky part of all this is we'd like to get paid but we'd also like to keep the relationship that we have. And understand the position that they're in. And really, from an operation standpoint, if you were to just walk away from your building and let your elevator just sit there, you're going to have a really big repair bill when you try to open up again So if you try to just make the customer know that, "Hey, we understand the position you're in but you also want to protect your investment that you have in the building," and hope that they see that. And that's the position we've been put in a lot over the last couple months. We did have a round of furloughs. They're basically deciding... And that was countrywide. So, we furloughed three of our employees in our office here locally. So we're dealing with those, trying to pick up the pieces from where those individuals left off and make it work, which is tough to see and tough to deal with. Now the barrier really is communication and talking to the decision makers at, our partners cause we don't know if they've been furloughed. We don't know if they've been laid off. We don't know if they're working, maybe they're working on a very limited schedule. I can't go out and travel so you're flying blind with, "Okay, where are these people? Who do I need to talk to now?"" [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We were really, really strong up until about a month ago and things started tightening up and dropping off. We would bid on a job for the engineering architectural work, and we'd put in a really good bid and then we would be undercut by somebody who needed this job a lot worse than we did. Yeah, as far as my side business goes, the contractors have been

pushing me, a lot of jobs I get come from contractors. "Hey, I got a client that wants this. Can you go talk to them?" The contractors have been pushing me to keep going, to keep going. That's been a big help, but the owners have been a little bit reluctant. Especially if it's a business, and they don't know how these things are going. Others are taking advantage of the situation saying, "Hey, this is a good time to build because [sales] came down and all this stuff. Let's close and let's rebuild, and let's remodel or whatever we got to do and get back going." Then, there's also a lot of people that are going out of business, so there's some real estate that's available that eventually, that's going to catch up with me and it's going to hurt my business a little bit because of the vacancy factor. I always watch that, the lower the vacancy, the more architectural work, the more new construction areas out there. If there's a lot of vacant businesses, then it's not that good. I've had to be a little bit more fee sensitive with clients here probably to the tune of 20 to 25%." [#19]

- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "we are so used to following the CDC rules about infection control and all that. So despite that, we implement that in our clinic but clients are still hesitant to come because they're scared. It really hit us a lot, especially we don't have that much of doctor's referral. It's mostly word of mouth." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "I got hospitality workers at [firm A] at the office building downtown They do the lunches and the breakfasts and all that stuff for the conferences and the bigshot executive meetings and all that. Well, hey, COVID. Ain't nobody meets. Basically, what I'm trying to do is develop industry sectors. I'm trying to increase, I'm trying to have advanced manufacturing logistics, and we thought that hospitality and food was good, but with COVID it's kind of thrown a monkey wrench It killed hospitality. Just killed it, destroyed it. Which just speaks, I mean, that was our bread and butter We were such a small... We don't take all other small businesses because we were afraid of people not paying bills and stuff. We were trying to build our base strong, which was good, because when COVID hit, yes, we lost everybody at [firm A] but [firm A] did pay their bills. We were decimated, we were decimated. Literally, we don't have any work. [Employee A] is laid off, actually, right now, he's on unemployment right now. He did PP[P], and then that ran out. Then I had to put him on unemployment. It's just not enough work. I'm hopeful that it won't be, I won't come out of this thing negatively. I just want to get back to work. I just want to make some money the old-fashioned way, you know? Where I know what it is. Just makes me nervous" [#23]
- The female representative of a Native American-owned MBE- and WBE-certified professional services firm stated, "The way we've been affected in our local market, obviously we lost about two-thirds of our temporary people that were placed on assignment because all the companies went down. And then we also had a staff of two other full-time, long-term employees that we laid both of them off on a permanent layoff. We're back up to almost the numbers we were at pre-COVID and we just hired a new person back in our branch." [#24]
- The Black American male representative of a construction trade organization stated, "When we get to COVID, initially still, one because the governor of Indiana decided that construction was an essential industry that business did not necessarily stop. I know that some job sites have had positive cases and they've had to shut down and contact trace and

sanitize and those sorts of things. Usually that's created a 24-to-48-hour slowdown at an individual job site but for the most part it hasn't derailed projects necessarily. I think the challenge has been when they have a positive case then sometimes that can disable that subcontractor for doing certain amounts of work. The other thing is some of the suppliers have also experienced some COVID cases then sometimes the subcontractors are ready, the GCs are ready, the owner's perfectly fine but then the supplier can't get the supply there. So that was our initial COVID issue. I think what's happened since as the economy has slowed down, and particularly for some of our public funders, the actual money that people had thought had been appropriated already is now being held back or potentially held back. Also for the corporate side no one can really predict what revenues are coming down the pipe that projects that were supposed to happen, things that had been put up for bid already. Things that were ordered are still happening but things that haven't been bid out yet or haven't been awarded, they're pulling back on some of that stuff. So the big challenge now, so I'm working on this project now but in 2021, what's going to be available? What's going to be out there for me to bid on. And who knows about 2022 at the moment. I'd say that the real challenge is going to be one of maybe three things. One, what sort of economic relief comes down the pipe? What sort of minimum stop gap thing is going to be done to help, I'd say, primarily small business but just to keep the economy in a positive direction? The other thing is what is going to be the relief provided particularly to local municipalities and state governments to help make some of these tax shortfalls that then might put our state budget back on track so we could then have our public entities issuing out more and more building projects again. I think that's one. The second of course is when do we have some sort of dependable vaccine or therapeutics where you expect that if you do...you can likely to not catching it. I think the final thing though is, I would expect that the COVID crisis has changed our economy in some ways. There are a lot of business, that aren't coming back, business I think will come back whenever things can come back. Then also peoples buying habits have just changed. Like you said you would be normally doing these interviews face to face, now they're all phone calls. But a lot of industries have had people change things. So you know gyms are not necessarily a big driver of the economy but gyms were a dependable economic revenue with memberships. But because so many people transitioned to buying Pelotons and the home fitness equipment, how many people are going to go back to the regular gym when it's safer and easier to work out at home? You start asking yourself well, restaurants, I mean people in one sense would probably like to go back to restaurants and bars but then at the same time, do people think about socially gathering and interacting in different ways? So whether it be bars, restaurants, movie theaters. A lot of that commercial economy might change and that also might change how we construct things, how we design them or even for the industries to come back in the same way or the same scale. So I think people are always going to want to see movies but then does AMC need a 20 theater megaplex... or the ten theater megaplex. I think that element of how consumer spending habits change will influence what we do in commercial construction. Also how do people, talking about public, that we actually had an event about a month ago with a series of universities that are connected with ICR. Just kind of asked them how has COVID impacted them right now. The one question they weren't sure of was design wise, would they start designing campuses differently based on how [students] experience [school] during COVID. So the question would be, we don't know. I mean one if this becomes more of a standard, hey we just have to live with a certain amount of danger, a

pandemic, then we probably need to think about how to space things differently, how to not have things so compacted, how to allow for more virtual learning options as part of our standard approach." [#25]

- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "Yes, it has. A lot of the businesses are closed; therefore, they're not ordering a lot of promotional items, so yes, it has been. That has not been an issue, until the COVID-19 outbreak and then hand sanitizers were a big thing that was not available. But, under normal conditions, no. Product usually is available." [#33]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Because we're tied so closely to the restaurant industry, it is crippling. It's extremely crippling. I'm waiting on the PPP to jump into effect. I'm waiting on the disaster relief program. I'm waiting on customers to pay. I'm waiting. We've, not eliminated, but we've downsized three employees, hopefully being able to bring them back. I've taken a salary cut. Those are just some of the things we've put in place. We've cut back on hours, as well." [#36]
- The non-Hispanic white male representative of a construction company stated, "Quite bad. We were off for two weeks. We're back. We still haven't come back completely full-time as far as the work – amount of work that we have. So, we're trying to make – you know, we're trying to make sure everybody gets paid and we're still paying them because of that payroll protection. Right now, we're just making everybody, you know, to 40 hours to get everybody to get their full-time, their 40 hours under the payroll protection program. Because we don't have enough work right now because of everybody basically being – a lot of businesses that we work for are not letting people in unless it's an absolute emergency. And then some people, as far as residential, they're not really calling, or they don't want us to come into their house right now until after this is over." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "There's a lot of work out there. I mean, there's a ton of work in the city. I would imagine that in the midst of COVID-19 and all of these changes, you know, that work is going to increase because cleaning has certainly, as a result of that, taken a new meaning, so to speak, or to another degree. It's been pretty much shut down. We've lost 90 percent of our work, 95. Again, office buildings. Right now, we have one person working two days a week for a total of about five hours. Mind you, this person's working in an office that's closed by the stay-at-home order. That client said, "We want to help you, so you come clean anyway, two days." There's no one in there. So, our worker is going and wiping and disinfecting. Well, there's one or two people that are in there, but this is out of an office of a couple hundred people maybe. We have two other workers who are working one day a week. It's a one day a week client. Because it is a senior condominium facility, they are wanting us to continue to come. They didn't want to pay us to do a disinfect. So, I have three people working out of approximately 18. That's it." [#41]
- The male representative of a majority-owned goods and services company stated, "Just people putting projects on hold. We've just been concentrating on our marketing. You know, keeping our name out there." [#45]

- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "And then COVID-19 happened right as I was starting to make some headway. And me being an essential store, I stayed open, and for the first couple weeks it was difficult. We still had a few people coming in, people were calling, but it was frightening. And then February came and it got worse and I started to panic. Bills were starting to pile up, my American Express bill was over \$141,000.00; I couldn't make the monthly payment. They weren't working with me. This is what they said when I asked for some financial relief from them, they said, "Sure. No problem. You don't have to make your monthly payment. But, we're going to shut your card off." Well, that's not helpful, you know? That's right around the time when they started announcing all these financial packages for retail. But you couldn't get on the site; it was crashing every day, or you would get all the way through it and you'd hit Submit and it wouldn't submit 'cause there was too many people in the queue. So that was probably two weeks of me trying to fill out two applications from the Better Business Bureau on the bailout. And then it was probably a month later that we found out that – well, the whole world found out that they had given all the money away to all these big corporations that were not small business. The Ruths Chris of the world and the Bob Thomases of the world and all these people that trade on the New York Stock Exchange, they got preferential treatment and all the money dried up. Now fortunately for some of them, they did the right thing and gave it back, but by then we're into month three and we're dying. There was no money to be had. I contacted my bank at [bank A]; I told them that I couldn't make my rent – pay my mortgage payment – 'cause I had taken a loan out to buy it. And they quickly went to work, contacted the Better Business Bureau on my behalf, and I got a forgiveness loan, so I didn't have to make my mortgage payment for six months. So that helped. So that's kind of where I'm at now; I'm trying to dig out. Sales have started to pick up, and then of course it's July 4th weekend and I just checked on the store and there's been no sales today. 2:00 and we have not had one customer today. So every time I start making a little headway.... The other thing that happened today too was they announced that they were canceling the 4th of July celebration and that we are not proceeding to stage five to reopen here in Fort Wayne. So I think that spooked a lot of people, 'cause our numbers are starting to climb again. So I feel like we're going to have this horrible dip just when I'm starting to dig out, that we're going to have this horrible dip again. every day on Facebook or Instagram or even on the news you hear about all these small businesses here in Allen County that are closing, even now that we're open, because they're so far in debt they can't get out and they didn't get any bailout. None of us got help. Now I know that he did get employee protection. I don't know if [firm A] got any. We don't really talk that much, but me and [firm B] talk quite a bit. He actually there for a little while was so concerned that he was calling me weekly. He said there was nothing he could do financially for me, but he wanted to make sure I was okay, you know that we all had to stick together. And if I didn't have inventory, if I needed something, I could call him and vice-versa. So we kind of developed that relationship trying to survive through COVID-19 without having to order or make bigger bills for ourselves. We were trying to swap inventory between our stores to service the customers that we did have without having to take on more debt. So that was something that we did together, which was nice." [#46]

- The non-Hispanic white male owner of a majority-owned construction firm stated, "I would ... yes is the answer and it has caused just generalized anxiety and we've lost some business from the private sector." [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "Well, a lot of folks are working out of the office. We're an essential type of business. The work is still getting done in the field. I say we're working more remotely. Definitely being affected. Employees have other responsibilities with their families, so yeah, they've been affected." [#49]
- The female representative of a majority-owned construction company stated, "Well, since we are such a small company with very few employees, the only thing it has affected is the bidding processes of trying to get jobs to bid on because there's nothing out there to bid. So, that makes us work – our work is slower. We still have a couple of contracts that we're under that we're still finishing up. But I mean, it's – finding those big jobs has been crucial because they're not out there like they were last year because people are not working, or companies are not – it's limited." [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, " [I] did get a call in the spring from [firm A] asking me for availability for the fall, this coming fall, to do consulting work. And we were supposed to have done an outage in May, and that got cancelled because of the COVID. I was – I had a job lined up. They wanted me to go to St. Louis and follow some repair work on one of the machine shops there. And they said, no, with the virus going on, we're going to have to cancel you out and maybe pick it up in the fall, after we find out what's going on with COVID. So, I still haven't received any – I haven't received a purchase order yet for any fall work, you know. They say it's coming, though." [#61]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Pretty significantly. We had I don't know how many different projects that were put on hold because of it. You know, it just made a lot of people nervous about how much revenue they had and what projects they had going on, and they basically – I had two good-size projects just come to a screeching halt. Well, I'd say they were slowing down in February and they came to a screeching halt in March. And they really haven't come back. But I've been fortunate to be doing residential work as well. So, I – that's how I've skirted through this COVID thing." [#63]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Somewhat. But not too much. I used to have interns from Notre Dame working for me. But they – their programs have been somewhat impacted, and so I've not been able to get that up and running as of yet." [#65]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, operationally, we made investments so that everyone, 100 percent of our company could work remotely. Given the technology that it requires for us to operate with the computers and multiple screens and needing huge servers for file storage, that was a substantial investment at the onset of this. Then, just – the design industry is collaborative, by nature. We've had to learn to work remotely, work over Zoom and Teams and other online portals to kind of adjust the way that we share information and we interact with one

another. Our clients, our clients experienced the exact same thing at the exact same time. So, we've all got to adjust to all this. So, we haven't been able to – we haven't missed any deadlines, but everything has slowed down a little bit, even the pace of our clients, too. So, things that had deadlines at the onset when we moved home, we met those. Then just the pace of work, it's just a little bit different now. We're looking into, "Are there efficiency gains and losses in everyone being remote?" There's and investment and an impact there but it's of an undetermined nature. We can't say that we're down to 80 percent productivity because, if we're meeting deadlines and our clients aren't complaining, the only thing we can weigh that against is our projected – our budgets and those look in line with where they always have been. But as far as our operating inventory of stuff that we need, electronic equipment and office supplies and stuff, it's not a problem. It's just the COVID-19-related stuff was a bit of a challenge, hand sanitizer and PPE. The market's catching up with the demand for that stuff now." [#66]

- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Well, we have not sat – we do not have meetings in our office anymore. We have learned it has affected us because we have now all learned how to Zoom. A couple of ways it has affected us, number one, some projects ended up getting putting on hold. We had some with our clients that suffered during this time, so that was not a good thing. I mean we felt we're still busy, we still maintained being busy throughout the COVID crisis. But some of the projects changed, I guess. And then how we do business. We have always had meetings in our office. We've always had production meetings with our team. I haven't seen my business partner since March; we just talk on the phone. He lives in a different town, so we just communicate on the telephone. So, it's just we're doing everything online now and from afar. But we're still busy and we're still working through it. So, we've had to adjust like everybody else. And I think then as far as workflow, we've seen up and down with our clients, where they've let go of people; maybe their projects aren't the same that they used to be. But we feel fortunate that we've maintained being able to get through this and still stay busy." [#67]
- The Black American male owner of an MBE-certified construction firm stated, "Let me put this down, when you look at the airlines charging outrageous prices, the buses not running or the trains is not running, then I don't have anything to do. Because all of the RV drivers – not a majority of them, all of them have to go – have to get on a – if they're going out of town they have to get on a train and they have to get on a plane or they have to get on a bus. So that means when everything slows down, I slow down, because there's like a chain reaction. The COVID-19 isn't helping me whatsoever, you know, people getting that it was just a down; it was just a real drought. And getting back up to that point where, you know, where I was at, everybody's afraid of the COVID-19. It's kind of scary. But I have a few out there that I pick up because of the fact that they feel like it's safe, it's clean, and the way I treat things and how I go about my daily routine, cleaning the van, make sure everything's clean, it's up to par, everything's good to go, everybody has a mask on, we have sanitizer. And just keeping moving. You know what I'm saying? Just being safe and being honest and being fair is the key. I know that there's some RV drivers out there that has the COVID-19. I come in contact with over 213 people, and that trims down to maybe like 60, and then it's starting to accumulate and go back up, but I have other things that I do also, providing rides for people. It's a given, but then again, it's not given like it popped back like a rubber band; it's not like

that. Because number one, the flights are trying to get their money back because of the time they had off, but number two is that everybody wants to go, but then again, they don't want to go out and get this COVID-19 and be down. So, it's a little scary and a little scarce right now." [#69]

- The Black American male owner of an uncertified MBE construction company stated, "Well, the business – this year being kind of crazy due to COVID because, you know, starting as a small business and as a new beginner business a lot of people don't want to give you the opportunity due to the money crisis that the United States is in at the moment. So, a lot of people don't want to take certain chances, which I understand. So, you know, it's just – it's just hard right now for small businesses. And then, you know, people look at you as a minority, you know I'm saying, and kind of like – and kind of got a – it's an effect on you as well because – you know I'm saying? It makes people not really want to take chances, you know I'm saying, due to what certain things going on, you know I'm saying?" [#72]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Yes, it did. I couldn't find no work to recently. Last month [I] start working." [#73]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "We had shifted from integration to integration and production, live production, and doing live meetings for corporations. Obviously, those live meetings and live events and all that stuff has completely ceased. Meetings and groups are just not happening. we haven't been able to combat it. We're stuck because event permits aren't being released, and businesses aren't having conferences and conventions and that kinda stuff." [#75]
- The Subcontinent Asian American representative of a business development organization stated, "Those who are in the retail industries, and they were small business owners or restaurant owners also, they suffered, and it was very hard for them too... Versus some of the people who had contracts, who had the government particularly, and more of a project-based, where they could go to remote work, they are doing okay I guess. Retails have opened up. I do know that some of the restaurants have shut down, and I don't know what exactly ... everyone's [emergency] plan is different. But then some restaurant owners probably not even planning to open it up, or rent out of the business. A lot of individuals have ... they just could not sustain it for four months, [so they] shut down and all. It's case by case I would say. Because a lot of individuals have lost their insurance. The small business owners have a tendency to have one spouse have corporate or some kind of basically a job that provides them the healthcare, and another the spouse is doing the small business. A lot of people have lost jobs, and that way, they lost their medical insurance. The healthcare insurance, I hear a lot, that's the one thing. Secondly, the [small amount] of checks that they were getting was \$600 a week was not close to what they wanted, something more they needed. They are still struggling, especially all the motel owners, they're still not recovered. For them, it's harder to just shut down the business and just walk away. Because now they have larger establishments. But then, what I see in that industry is they had to let go or furlough lots of employees. I'm more worried about 2021. It's because this is the time of the year most of the businesses, they're doing their forecasting for 2021. There are large corporations [and] they're skeptical and that's why all of their external vendor expenses, they're very conservative. Their budgets have been slashed a lot... They made some real time adjustments, because they said "Oh, we're not doing well. There's [literally] no

revenue coming in, so let's cut down on some expense." But now, a lot of businesses are not ready to make those promises, and their 2021 budget is probably 25% depending on what kind of industry your is down. They say, "We cannot predict at this point there's no [point] running it too." Cold weather, in fact, this year the cold weather is coming even earlier than before, and election year. There's too many other unpredictability. I am seeing people being more skeptical about '21 budget planning." [#76]

- A comment from a WBE professional services firm stated, "[It's] been a little difficult due to the pandemic with schools that have budget cuts." [#AV]
- A comment from a WBE professional services firm stated, "Trying to survive right now. Not a good time for travel agents." [#AV]
- A comment from a majority-owned construction firm stated, "Obtaining work has been an issue due to Covid." [#AV]
- A comment from a VBE professional services firm stated, "Market place conditions suck right now because of everything being shut down right now, I don't know why they can't re-open." [#AV]
- A comment from a majority-owned goods and services firm stated, "The event part of what I do is a train wreck in 2020 due to COVID. Most of the events I worked for where pretty much non-existent from March to September though some are starting to come back now." [#AV]
- A comment from a majority-owned professional services firm stated, "There is a lot of uncertainty in the business environment right now, people are hesitant to make major changes until the election and COVID-19--a sense of a little fear and doubt -- people are trying to maintain the status quo." [#AV]
- A comment from a majority-owned goods and services firm stated, "I think there is a ripe market waiting to expand as soon as we find a way to open the markets and people are not and held back by COVID-19 and people do want to work not just if he can get extra \$600 from the government. Get rid of incentive not to work." [#AV]
- A comment from a majority-owned construction firm stated, "Right now with the virus its very tough for small business to make things a go." [#AV]
- A comment from a WBE professional services firm stated, "Due to COVID-19 it is not a good time to be in the travel business. I think there will be more businesses closing in the future." [#AV]
- A comment from a WBE professional services firm stated, "During this time with coronavirus I can't make any plans for expansion right now." [#AV]
- A comment from a majority-owned goods and services firm stated, "Biggest thing affecting business is the COVID-19 virus and government reaction to it." [#AV]
- A comment from a majority-owned professional services firm stated, "Our industry does a lot of work for aviation and commercial enterprises and is just dead now. What keeps us going is defense spending and energy spending from the government." [#AV]

- A comment from a majority-owned goods and services firm stated, “Very slow right now due to COVID. Shipments we order for sale are taking much longer to receive.” [#AV]
- A comment from a WBE goods and services firm stated, “With COVID, it’s pretty hard to do anything, it kind of killed us this year.” [#AV]
- A comment from a majority construction firm stated, “Manpower is an issue because the government is paying people to stay home.” [#AV]
- A comment from a WBE construction firm stated, “Difficult to find people to work due to the unemployment insurance provided due to COVID-19.” [#AV]
- A comment from a majority-owned construction firm stated, “It’s getting tough. I lost over a million dollars.” [#AV]
- A comment from a majority-owned construction firm stated, “I can see a huge decline in retail and restaurants. Concerned about the offices buildings.” [#AV]
- A comment from a WBE, MBE, and VBE goods and services firm stated, “This year is a disaster because of COVID-19. People do not have money to spend.” [#AV]
- A comment from a majority-owned professional services firm stated, “In survival mode right now because of COVID-19.” [#AV]
- A comment from a majority-owned professional services firm stated, “Business is down because of COVID-19.” [#AV]
- A comment from a majority-owned professional services firm stated, “It is difficult to increase business due to COVID-19. Several projects have been put on hold due to COVID-19. New construction has been put on hold.” [#AV]
- A comment from a majority-owned professional services firm stated, “Business has been pretty tough lately because of COVID-19.” [#AV]
- A comment from a majority-owned professional services firm stated, “The state screwed up how they close sites. The funding is not being used wisely. It has had an effect on people needing their property cleaned.” [#AV]
- A comment from an Asian Pacific American-owned WBE and MBE professional services firm stated, “It is difficult to get business because of COVID-19.” [#AV]
- A comment from a VBE professional services firm stated, “I have concerns about the pandemic regarding hiring.” [#AV]
- A comment from a WBE professional services firm stated, “We are dealing with a lot of ‘bogus’ unemployment claims due to COVID-19.” [#AV]
- A comment from a WBE professional services firm stated, “Business has slowed due to COVID-19... Hoping that changes.” [#AV]
- A comment from a Subcontinent Asian American owned WBE and MBE professional services firm stated, “Business has not been good due to the coronavirus.” [#AV]
- A comment from a majority-owned professional service firm stated, “Things are tough with the COVID right now.” [#AV]

- A comment from a majority-owned goods and services firm stated, "Business is not going great because of the virus." [#AV]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "It's just funny. I think we all are in the same boat. It was going crazy and so busy up until March and then it's still crazy, but in a very different way. I was involved in publicly bid project that was really pushing the XBE participation. It went out to bid, they held special meetings to try to get the participation. All through the design on that project, I was saying to the owners, "The bidding climate right now is totally unpredictable." Things are supposed to cost 300 a square foot are coming in 500 a square foot. It's just really hard to pin a number down. Sure enough, our project came in much higher than was expected and the project was shelved. At that time, what I said to those owners actually was, "If there's a recession, you'll be able to get great pricing on things," but from what we're seeing right now, I'm still seeing prices coming in a third to a half higher than I would think that they would. It still remains very, very unpredictable...Just some very specific things. I can say that prior to the pandemic, the cost of aluminum had tripled over the last year. Since the pandemic, aluminum is holding a little steadier, but wood is impossible to get. So we're still in a very unpredictable climate, I'd say. Lots of people wanting to do things, but very hard to know if you should act on them or not because of the unpredictability. [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "Since March, so many RFPs were shelved and projects went on hold that had just started. As a firm, we can keep our chins up a little higher in that we are in five other states and internationally. So we aren't talking as much about what's coming out in Indiana because they're outside of private developer work and real estate brokerage firms that there isn't a lot, it seems, maybe on the housing side...The climate is very aggressive. Some of our university clients have in the contracting world have started to request a fee numbers or fee ranges. I think maybe skirting around procurement law by maybe not asking for a price, but asking for a fee range or something. So we're seeing incredible pressure pushed downward on fees for projects. 7%, 8%, eight, 9% fees for complex renovation projects with eight, nine, 10 consultants that we have to manage when we're prime are now pushing down to five, six, and seven." [#FG1]
- The Black American male owners of MBE-certified goods and services firm stated, "In the private sector, I have lost over \$250,000 doing clubs, doing events, concerts, parades. So we do all those things, and all those have been canceled. I do keep a track of everything that I lose, and all the cancellations that I've had, through the events and the parades, and all the concerts and things. And so right now, we're over 200,000 in lost revenue for that." [#FG2]

Four interviewees noted that COVID-19 has had little to no effect on their business. [#11, #17, #59, #68] For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, "We're considered essential. Maybe just a little because things slowed way, way down there, especially right at first people were kind of scared." [#11]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I haven't noticed it as much for us. The reason is because most of our work is outside. I've talked to another contractor who is similar but bigger than us and does a lot of stuff in

Monroe County. And he said that his business hasn't been modified because, but they're still just as busy. But what they're doing is people are having them work on outside projects, but they are not getting as many indoor projects like bathroom and kitchen remodel kind of work because people don't want them in their house. But to his point, it is affecting his business from the perspective that kitchens and baths are pretty nice cash cows." [#17]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "It's made it a little busier because it's been tougher to do work. But in terms of the model work, it has not changed. We have contracts out. We bid stuff two to three years ago that we're doing now. We've not done much bidding in the past few months. For us to slow down doesn't happen immediately like a restaurant. I'm guessing next year it's going to be pretty slow." [#59]
- Twenty-six interviewees shared that COVID-19 has been beneficial for their business, noting increased sales, higher revenues, and more business opportunities as a result of the pandemic. [#5, #10, #14, #17, #21, #38, #42, #43, #44, #59, #62, #64, #68, #70, #71, #AV, #FG1, #FG2] **For example:**
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "I tell you, nothing's a barrier to me. I've been in sales so long. But when somebody says no, that's like saying sick 'em to a dog, I say before I leave, we'll do something. You can't get discouraged. I'm telling you, I know a lot of people today with this coronavirus deal, so depressed and down and so on, but you got to keep your head up and just keep chugging on. It's not the end of life, or hopefully it isn't for some. And even if you die, if you're ready to die, you're ready to meet the Lord, what do you got to lose?" [#5]
- The female representative of a WBE-certified construction firm stated, "They talk about essential workers right now. We are just as much essential as anybody else is. And our plumbing is forgotten when they talk about essential workers. But you know, everybody needs to go to the restroom, everybody needs to have water to drink, and make sure that all the lines are safe and not broken, and things like that. So, what they do is very essential. Not near as much as we thought, but we also have this period coming up where all these bills have to be paid for everything that we're doing. So, it could still be affected, you know what I mean? We're staying busy. Our guys are getting, most of them are getting, they're getting between 32 and 40 hours, if not more, a week. They're staying full time. We have masks for all of them. We had them made for all of our guys. And then they also have gloves. And they're required to wear their masks and gloves and their suit protection into every home and business." [#10]The Black American male owner of an MBE- and DBE-certified construction company stated, "We were pretty busy before COVID, and fortunately they consider construction essential, so if our customers were working, we were working. So, we've been able to stay pretty consistent. The only market that kind of went away on us was the casino market because they just shut them down. For the last eight weeks, or 10 weeks, 12 weeks, I lost count, we've had all of our office people working at home. In the last couple weeks, we've brought them back, but we brought them back in shifts. Some work Mondays, Wednesdays, and Fridays, and some work Tuesdays and Thursdays, that kind of back and forth. But we've been working pretty steady in the field, and we love that. We've been able to use the technology today, and things of that nature, we were able to keep up from home. I was pretty surprised at the results. I told them if we would have planned to do

that, we would have talked about it for a year. In a week's time, we sent people home with laptops and some equipment, and told everybody to go home and figure it out. Of course, we have IT people, but then I went home and figured it out." [#14]

- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "Well, I'm getting a sense that that is what is happening because I have a very large number of contacts whom I work with and basically, our collective assessment is that yes, the energy related issues are going to be affected, but in different ways. But however, our assessment is that COVID-19 is sharpening the interest in energy implications to health or energy implications to the economy and probably certain aspects of work that is needed, including consulting work in the area of energy is likely to proceed despite COVID-19." [#21]
- The Black American male owner of an MBE-certified professional services firm stated, "Well, actually, I'm more busy. That's a good thing. It's good to be busy. I cannot – you know, it's like every day – and it's great. It's great. Because I'm super busy. I'm getting projects. I'm getting calls for projects. If anything, that's what's happened to me in the last month or so, is it's just really been busy. And what I've kind of heard through the grapevine is they're – because I am on the frontend. You know, you gotta get your design figured out. You've got to get your things laid out before you can get to the point of getting a project completed. And what I've kind of heard through the grapevine is now that things are kind of at a standstill, clients and owners want to kind of try to play catchup a little bit. Because typically this happens in the winter. This typically happens in the winter. You know, December, January and February – where I'm really busy on the design end. And then by this time, spring starts coming, okay, now I slow down because they've got to get out there and start actually building it. Well, now, since they're stopped, okay, now they can sneak a few more – a little bit more time in on the design side. At least that's my thought process. to answer your question, the pandemic has seemingly made me more busy." [#38]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We have had a little bit of a scare with it, just simply because funds were being reallocated to the response. However, we were able to really support our clients in transitioning to offering telehealth solutions, and we're now working on a platform to make telehealth accessible to patients who are disadvantaged and don't have access to reliable Internet or video-ready devices. We've been able to sort of lean into the response and become helpful to our clients in making sure that they're able to serve their patients as best as they can. It has been a positive experience for us, overall." [#42]
- The non-Hispanic white female owner of a WBE-certified goods and services company stated, "Well, we are considered essential, and so we are open, sales are down, and staff are on edge and we're trying to keep them safe but, you know, a little hard to control. No one is 100 percent sure. Nobody knows 100 percent how that virus is getting spread around. What else? Let's see, we did get a couple of customers that needed things very quickly: fire department, hospitals needed some extras but, you know. What else? Mostly the staff being on edge. We've taken the time to relearn, to prepare for when things get a little bit back to normal, to reach out to some customers, by the phone, you know. But everybody's pretty much staying put so all my reps can be on the road, makes it challenging to do fittings, try and keep people safe because, you know, you've got to like do fitting for vests, for example –

you've got to make sure the person wearing the vest is safe, so they're wearing a mask and you're wearing a mask. You have to be up close to them, you know what I mean? So we're trying to do our best with those, with those things." [#43]

- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Part of it is everybody just didn't know what to do so, for example, my point is because we do electrical work and we're on the roof with the green roofs, you know, we're really not coming into contact with people. But school districts didn't know what to do, so for about six, eight weeks we were kind of, you know, we were really struggling. But now they realize that they have to get the work done anyway so we're back working. Well, one of the things we do - everybody gets tested. We take our temperature every day. Everybody's dressed with gloves. Everybody has a mask on. Most of the guys use respirators and the type of respirators that they use have replaceable filters. And that's something that we would use anyway, so it was just a natural for us to go out and get some more filters and we were able to do that. Sort of when our guys are out working, you know, they're wearing respirators. They're wearing hats. They're covering their face. They're covering their hands. And we did bring in as much of a handwashing or sanitizing system so that when they break for a break or break for lunch, they can clean their hands and clean their face. So, so far, we've been lucky again, knock on wood, that by following the measures that we see on TV so far everybody's been safe." [#44]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "What we do is done by computer, we're just doing what we normally do. We've been getting a lot of calls, lately. It's very interesting, because they're for hospitality, and it's primarily people re-tooling because of the COVID-19" [#62]
- The male representative of a majority-owned professional services firm stated, "Here in Indiana, no, not so much. We have - we work in many - in almost all the states across the country. But from a standpoint of here in Indiana, we - and even across the country, we're considered as an essential service. So, we may have slowed down a little bit at the very beginning but, other than that, we've been full steam ahead and we're as strong as we have been in the past." [#64]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "To me, we've had a tremendous growth in the COVID, because we are in health care. So because we provide the nursing, therapy, and hospital staffing, so we were able to provide more services to the hospital, and really, that led to our growth. From March till like last quarter itself, we had a major growth because of the COVID. We are in health care, so hospitals and nursing homes need a lot of nursing care, and so we were able to provide our staff to help them. So that led to more growth, and we were able to hire more people." [#70]
- The Black American male owner of an MBE-certified professional services firm stated, "Not at all, with the exception of working remotely, generally not at all. It's actually grown substantially during this time frame. Which seems counterintuitive," [#71]
- A comment from a WBE professional services firm stated, "COVID has led to need to be more creative." [#AV]
- A comment from a majority-owned professional services firm stated, "Business is good for us, even during COVID." [#AV]

- A comment from an availability survey stated, “Our business has been good and steady through the pandemic.” [#AV]
- A comment from a WBE goods and services firm stated, “Even through pandemic our business has been very good.” [#AV]
- A comment from a majority-owned goods and services firm stated, “Great business since COVID.” [#AV]
- A comment from a majority-owned construction firm stated, “ [We] are very busy at this time.” [#AV]
- A comment from a majority-owned construction firm stated, “We have had high demand during the pandemic. It’s a low tax state.” [#AV]
- A comment from a WBE professional services firm stated, “Pretty busy because of COVID.” [#AV]
- The male non-Hispanic white partner of a majority-owned construction services firm stated, “I would say, at this point, this is some of the best times for construction I have seen in my career. This has going to extend for a while. We’ve got major projects that are getting ready to come out of the ground at the first part of next year. I’m just still in disbelief with a worldwide pandemic that the industry is doing so well, but in the construction industry, the adages, we are the last to feel an economic downturn and the last to feel an economic upturn. Because of the things that are already financed, you continue to build during that economic downturn, but there’s a slowdown on finance projects, designer projects. So, it takes a while for us to get back up... But I’m just saying, I’m not seeing work this good since we built the new airport, the Lucas Oil Stadium, and the Honda plant all at the same time.” [#FG1]
- The Black American male owner of MBE-certified goods and services firm stated, “To be honest, COVID-19 has been a blessing for my security company. Well, we had one security guard because of COVID-19. Now we have two. When we did apartments and buildings, we had one security guard at night. Now we have two, 24 hours a day, because nobody’s in the building. So, wherever we are at, we are doubled now, because of COVID. And so, to be honest, my revenue has tripled since COVID, personally. I think that people are going to be more safe, at least for another year. So, we will, this will keep going, at least for another year, I feel. Through our projections and talking to our customers, it’ll be another year before this slows down.” [#FG2]
- The Black American male owners of MBE-certified goods and services firm stated, “But as far as me, I’ve been doing pretty good, we haven’t had any fall offs. But I say, for some of my clients, since I handle so many clients and their websites and things, a lot of people that didn’t have sites, and wasn’t on social media before, are reaching out and trying to get those things solidified now, like Uber Eats, or Postmates, LinkedIn, a lot of people was never set up the right way on those things. So, just giving people the right tools for social media, and a platform on a website for them to make sales is, I think it’s making a lot of people that are, who was in business 20, 30 years, it’s bringing them a new light when they get a website, and everything’s there, and people that has been coming to their store have a place to go

now... The government work has definitely picked up with them. The work we do with them has definitely picked up. [#FG2]

2. Relief programs for businesses affected by COVID-19. Interviewees shared their experiences applying for and receiving programs to reduce the impact of COVID-19 on their businesses. Most firms noted that they received some form of financial support through federal or state programs. Other firms described the type of support that would be most beneficial to their type of business during this time.

Twenty-seven interviewees described their experiences applying for and obtaining COVID relief programs. [#6, #9, #10, #12, #13, #14, #16, #22, #23, #36, #40, #41, #42, #43, #44, #46, #47, #48, #59, #60, #62, #63, #67, #69, #73, #75, #76] For example:

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "We applied for the federal PPP, the Payroll Protection Program. We applied for that. So, we're going to try to keep guys working with that if we end up getting finalized and approved for that deal. But that's only eight weeks. We don't want to borrow money. 10 grand, it sounds like a lot, but essentially, pardon my French, but that's a pinch of shit to keep the doors opened up fiscally." [#6]
- The Native American male owner of an MBE-certified construction firm stated, "I mean the SBA money that we were supposed to see, we didn't make that funding round. So we didn't lay anybody off because they said, 'Don't lay nobody off. You get your money back on the SBA.' Well, it ran out of money, so I paid about \$19,000 in labor that I have no production over, and I didn't get any SBA money either. now, we've reapplied again, but my financial institution has got so many backed up inside their system that we may or may not get inside there again. We applied now to four or five different institutions to make sure somebody gets our application through. We don't know if we're going to get funded or not. My financial institution alone said they had as many backed- up applications or more than they paid. So, the feeling is there's not going to be enough money again. They won't even get to do applications before the money runs out. That's all forecast, right? I don't know what the real answer's going to be, but I know that there was a lot of problems in that first package where a lot of these large businesses got a lot of money. Pelosi, she kind of messed the first package up real bad through the hospitals. So they had it for small business originally, and when she threw the hospitals in, it opened it up to large business. All these institutions said, 'Oh, well, I'm going to fund big projects. Instead of 20 little ones, I'm going to fund one big one.' It makes sense for them to do that for me. I would do it if I was a banker." [#9]
- The female representative of a WBE-certified construction firm stated, "Like payroll protection, we did [apply]. So, we have that and you know, it's a blessing to know that it's there if we need it. And we're only using it if we need it. If we don't, then at the end of the eight weeks, we will be giving all of it back. We use it for payroll and utilities. Well, let's say I borrowed \$100,000, and I only used \$50,000 of it. Fifty of it is forgiven. I have the paperwork to back that up. And then the other fifty, I either give back and pay nothing, that I had it. Or I keep it, and I make payments for two years, zero percent interest." [#10]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "I don't have my computer right in front of me right now, but I'd say we ended up losing \$50-\$60,000, and then some of it was made up by the PPP loan. But then we also

had to pay, because we had bought stock to deliver to all the schools, so I had to pay for all of that inventory that's sitting in my freezers now that I'll have to wait until October to get rid of. I did and I got them, and I qualified for them, and everything else. The loan should be forgiven so, that was very helpful, actually. But it took a lot of extra effort to get ahold of those, too. I literally had to complain to everybody about that. Who did the application, my wife had to do her part of it, and then she was never able to get online to finish it, because you couldn't get to the website, it was disappeared. You couldn't even get on it. But then about, it was right after I got done with the PPP one, then I don't know, about a week later, I get a notification from a bank that I had gotten the whatever, the EID loan one was. It was basically based on the number of employees we had at the time. They gave us \$7000. I mean, a loan's just going into debt to do what? You know what I mean?" [#12]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We applied for that. And that has been just a God saver. God sent to us, honestly, to help us through this project or this time. Just the best shot in the arm we could have gotten. I have to applaud that. It's going really well. And because of them extending it, like they have, it's just awesome. It's helped us a lot." [#13]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "We did apply for the PPP. We were successful in being accepted. Whether or not we'll use it, or whatever, is still yet to be determined. The way that program works is the day you're accepted, that kind of sets the time clock on that program. So we just kind of got to the end of the road with one of the companies, and the other two are coming up in the next couple of weeks, so in the next few weeks we'll be through that eight week period." [#14]
- The Black American male owner of an MBE-certified construction company stated, "I applied for \$5,000 but they sent me \$1,200." [#16]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "Yes, I did. But it's not, in absence, they calculated PPP. The first one, the EDL, if I'm correct, I was too late already. I've been applying for it. I was applying for that but somehow it was first come, first serve basis. And I was too late already. There was already a lot ahead of me. So I applied for the PPP. And yeah, I got lucky there because they extended it too. But it wasn't enough since, again, there's only two full time therapists and a couple of part times. It wasn't enough to really help me. It was just enough to retain my employees." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "We got the [PPP] money. to be honest with you, I'm still an honest wreck with the [PPP]. I just don't want to come out of this thing owing nobody about stuff. It's a loan with a forgiveness program. See what I'm saying? Any time, I tell people all the time, they didn't say, 'Hey, this is free money.' They said, 'This is a loan you're taking today, sir. If you spend it correctly, this portion of this loan could be forgiven.' It got really hairy with me in the hospitality and being the staffing, they based it off your '19 payroll, they send you all this money, and then I had to, I was able to pay myself and pay my internal staff, pay a few folks, but I'm always concerned that I was able to pay people at a higher rate than I typically... I wasn't able to pay as many folks as the 2019 budget had seen. We just didn't have the work. Then the people were already on unemployment, once they got the money. That just make me nervous, that's all." [#23]

- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Being a franchise, they did a good job with letting us know what is out there for franchisees." [#36]
- The non-Hispanic white male representative of a construction company stated, "So, we're trying to make – you know, we're trying to make sure everybody gets paid and we're still paying them because of that payroll protection." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "We applied for the CARES Act. It's on my list today to apply for the other disaster relief loans through the SBA to see if we can get support. We were trying to just ride the tide. We were waiting to see what CARES was going to look like. Kind of frustrated with that. Just trying to make the best decisions for our workers. If they can draw unemployment and then receive an additional \$600.00 a week in addition to that, that's more money than they would make if they were working, because our workers are part-time. They are not high-wage earners. None of them are making \$600.00 a week when they're working. So, we were just really waiting and trying to discern what is best, understanding that, well, if they draw unemployment, that's going to affect your SUTA rate down the line even though you've paid SUTA for as many years as you've had employees and had very few people draw. But because the system is so severely overloaded, they're going to have to boost the rate in order to replenish the fund. Because I'm sure it's probably running on government surplus at this point. So, I've just been just really trying to – talking to our accountant and talking to the reps at the SBA and trying to really decide and discern what's really the best way to go. So, we applied for the CARES Act. Then a couple of days prior to them saying, 'Well, it's out of money,' which we knew that was going to happen. So, we probably won't get that because there isn't anything to get. So, we'll hook back around now and apply for the other disaster relief. The thing that made the CARES Act attractive – there were so many pros and cons with that. A portion of it's forgivable. I can get the assistance with rent. I can bring people back on payroll. The downside of that is they gave you an eight-week window to use it. That was just an unrealistic straitjacket that they put on that because I need to be able to use that when I think I need to use it. As many small business owners have been saying, it's not in my best interest to pay people when they're not working, when they're at home and I can't utilize them. I'm going to need to help when things begin to fall out and we begin to go back to work. It's going to take time for me to generate to do the work, generate the invoice, get paid from the client. Meanwhile, payday is coming on two or three times. I'm going to have to pay my people before I get paid. So, again, I'm in the hole. That's – you didn't ask me that. But that stipulation was just a straitjacket." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We are aware of the federal funding opportunities. We're also aware of the state tax opportunities, as well, and our CPA is guiding us in when and how to take advantage of those programs. We are applying. From a state point, I'm not sure what we're applying for just yet. We're not taking advantage of any of the tax filing extensions or anything like that. All of our taxes and whatnot have already been filed for the year, so I don't know what we're taking advantage of on the state level. We are pursuing the Paycheck Protection Program from a federal standpoint." [#42]

- The non-Hispanic white female owner of a WBE-certified goods and services company stated, "Yes, we did get the PPP, which is a miracle. Of course, you know, nothing's for free, so even if – even if we're money we don't have to repay – you know, if we make this through, I'm not stupid enough to think that money doesn't come out of my pocket somehow. I mean I appreciate it; I don't want to sound ungrateful because, you know, are grateful and we didn't know what to do, really." [#43]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "We did get a [PPP] check that's going to help quite a bit. We were on top of that early so that helps out quite a bit with regard to COVID so that's where we are." [#44]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "But I filed for the employment – what do you call it? I don't remember what exactly it was called – for your employees. The wage protection, I never heard back. And then about a month later – well, actually it was about a month ago, I started getting e-mails, saying that 'Your loan is in process.' I didn't ask for a loan; I asked for a bailout. They had approved me for \$28,000.00 and some change, and then a week later there was \$1,000.00 in my bank account. No e-mail, no nothing. And it said it was from this Better Business Bureau, it was the employee protection. Well, \$1,000.00, that wasn't going to bring my employee back, or it wasn't going to last long. I did call her back, but \$1,000.00, I mean that's nothing. That was ridiculous; they should've just kept it. And then last week I opened up my bank account and there was \$25,000.00 in my bank account from the Better Business Bureau. And then I got an e-mail that said it was a loan at 3.5-percent over 30 years and that my monthly payments would be \$125.00 starting next year, so I didn't have to make a payment on it. But by then – I'm so far in hock right now, that \$20,000.00 didn't even make a dent. So, it's been difficult trying to stay open. But I'm making my goals actually. It was just those first three months was horrific. Horrifying. But, you know, three months you get in debt up to your eyeballs. Your vendors – some of my vendors were very kind and were letting me to continue to order scrubs and not charging me for 90 days, but then you're just building a bigger hole, you know? I didn't get a bailout; there's no more money, and I'm kind of pissed off at the government for – well, I don't know if it was the government, 'cause the government gave control to the SBA to handle this money. The SBA relied on the banks to dole out this money to people in need, and as you can see, they seem to have given it to their favorites, people that had big accounts. You know, Ruths Chris should've never gotten those; that's a corporate restaurant. That was totally unfair. And some of these other restaurants that got it. You know, these mom and pop stores are never going to recover because these big companies – or Bob Thomas, who is a car dealership here in Fort Wayne. He has I'm guessing somewhere between 18 and 19 car lots throughout Allen County and in Ohio. He had a lot of balls applying for that. He got \$1.8 million. I couldn't even get \$10,000.00. He had a lot of balls applying for that. He could've done a lot of other things. He had other resources. People were still buying cars. Even though the lots were closed he had other avenues; he could've sold them on Facebook, he could've done a lot of other things. He had a lot of other capital he could've worked with, where us small mom and pop stores did not. That was a total betrayal, that whoever he banked with – my understanding, it was Chase – favored him over some of these small mom and pop shops and doled out \$1.8 million, and the rest of us were stuck in the wind. You know, I wasn't asking for a lot of money. I just wanted my \$10,000.00 that was owed to me, that was supposed to given to all

of us small businesspeople. And as far as I know, nobody in my strip – we all applied on the same day – nobody got it. It all was gone. So, we're all left out here to fend for ourselves. And he didn't give it back like some of these other people that got shamed. He didn't give it back. You know, he's got a big lake house that's probably worth about \$3 million, \$4 million up on the lake. He has two houses here in Fort Wayne. There's a lot of other things he could've done. He could've taken out a home equity loan, like I had to. I had to take out a home equity loan to float my business. So, I'm kind of ashamed about how this all went down. There's a lot of small businesses that are not going to recover from the greediness and the mishandling of this money. That's all I've got to say about that. don't know what I'm going to do if there's not another bailout, or if there is another bailout, if it will be better supervised, and get it to the people that actually need it, and that's the greedy ones that don't want to use other avenues, that had assets, where we had none. All those things should've been taken into account, you know, how big was the company, what were their assets at the time. Instead of just saying, 'Oh, they applied for money. Let's give it to them. Oh, they want \$1.8 million? Here you go.' Did they look to see if they had assets they could've sold off? Or maybe just not given them that much. Or taking the whole pie and saying, 'Okay, we've got 580 small businesses that we have to save in Allen County' – just throwing that out there. 'And let's take that pie and divide it equally.' That's what should've happened. That's what should've happened instead of first-come-first-serve and the rest of you suck an egg. Or the relationship that you have with your bank was the priority. It's very unfortunate that the leadership all the way down are putting the money, 'Here you go, Small Business Administration, you're in charge of disbursing this money.' That was quite an undertaking without having an oversight committee over it to make sure that it got into the hands of the people that needed it and not just the lazy assholes that could've done with less so the rest of us could've had some. Everybody was entitled to that money. Everybody. Not just the favorites. And that's what it feels like to the rest of us, to me. I just think there should've been a better oversight committee. Again, I'm just stressing that I think that was a big burden to dump on this Small Business Administration and just say, 'Here. You deal with it.' It was shameful how that was done. And they stepped up to the plate, but, you know, I just don't think that they had the resources to figure it out before they started unleashing the money. I think they were depending on their partners in crime, which would've been the banks, to dole out this money fairly, and that didn't happen. They got caught after the fact. I believe Wells Fargo, Chase – there were six banks that are now being looked at, at the federal level for playing favoritism and giving out more money to their favorite accounts over the rest of us that were the bottom dwellers, I guess. But I don't know whatever's going to come of that. I don't think anything is ever going to come of it, other than they're going to get a spanking, you know. Woo-hoo. Are they going to pay a fine? Maybe they should pay a fine. Maybe those banks should have to pay a fine, and those fines should be doled out to us that didn't get it. That's a thought." [#46]

- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "The loans that have been out there we've done those. Pretty painless, actually." [#47]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "[I] think that we've heightened our client response and attentiveness. We've gotten much more aggressive about getting our name out and getting, you know, doing webinars and

tracking grant funding opportunities. It was very positive [applying for COVID relief programs]." [#48]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We applied for the PPP loan but not the state. I think that's more federal but not unemployment. I don't know what other state programs there are, but we have not [applied]." [#59]
- The female representative of a majority-owned construction company stated, "Yeah, well, we got the PPP loan. Wasn't too hard. I mean, we had a financial advisor help us through the process. It wasn't that hard, that – you know?" [#60]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Actually gonna be submitting for the first time an application today. I've found that working with the SBA and other typical lending financial institutions never seems to work out for people like me." [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We have been fortunate enough to receive a PPP loan from the SBA. And I've never needed assistance. So, I always felt like that was my job to find the work and get the revenue. But in the light of what's transpired, we did feel like we needed to apply, so we did. Well, we applied the first time, the day that it was approved by Congress, and that was too late. So, that was a bit disappointing. But then there was a second round, and, in that case, we actually applied the day before it was approved by Congress, and our application was accepted. But, really, it's been painless, once we filled out all the correct forms and gave them all the information that they needed." [#63]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Yes, my husband – I'm actually married to my business partner, and he, as soon as everything started happening, he applied for a couple of those things through our bank, which was really good and it was a big help. I know it was difficult because I think it was difficult for everybody because it was not very well-organized and it was a scramble. We were calling, we were trying to – nobody knew what to do. The forms – it was very confusing; I remember that. And we were just doing our best, like everybody else, to see what we needed. 'Cause we still had people – you know, we used freelancers, so we had to maintain being able to pay them. We didn't know what the scope of our business was going to be like. But I remember – he's the CFO of our company, and I know he was the one that was jumping through all these hoops, and it was very confusing to find that path to get the right answers to know what to do, to know where to apply. So, it was not an easy process; I do know that." [#67]
- The Black American male owner of an MBE-certified construction firm stated, "I took advantage of the SBA loan. I didn't think that it was up to – you know, because when you do things – there's a whole lot of scans and everything online. And I was like I was a little hesitant about it at first, and I sat down and me and my lady talked about it, and I went ahead and applied for it. And I did get it, but I only put in maybe I think it was \$22,000.00 and I was like, 'Man, I should've got more.' Or it seems like – now I talked to my lady and she was like, 'Well, we need to call and talk to them,' 'Cause we didn't think it was going to go through. So right now I'm in the process of actually going back through it again; it's a

waiting period, to get what I need and what I can do to proceed with the business and so forth, keep everything up and running.” [#69]

- The non-Hispanic white male owner of a majority-owned construction company stated, "I heard some of them. I get help with one of them, but that was it for two or three months. It was very good. It helped a lot." [#73]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "Not state assistance. We went after the assistance through the federal government and were able to get a PPP loan to keep things going. But not anything from the state." [#75]
- The Subcontinent Asian American representative of a business development organization stated, "The PPP, many of them took advantage. At the same time, I also heard that a lot of people didn't even know how to apply, because it turned out to be round one, a lot of them got rejected. Or I guess ran out of the capacity... Some people that always are not going to get it, and some people tried second time, and they got it. Some people never tried it again. PPP was in my mind; it was a great program. I see it was not very well ... people did not have good education about [it]. Informed, they were not informed very well. I know their banks were working very hard, but I think banks were really running out of [resources] to help every client, depending on how big client you are. Often that also matters. I think PPP in general was a good program, but I don't know if everybody took advantage of it. For example, a lot of I heard ... I was talking to one person, and they said, 'I already got rejected once, I won't even try second time.' The chances are very limited. In a way, it's good turnaround, and not every business owner is that quick in their responses and everything. That's why probably some people said, 'Oh, yeah, I can do it.' And they said, 'Oh, we ran out of the money, and then of course there was a second round, and ... ' I think some people just missed the timeline I thought." [#76]

Three interviewees did not apply for or were not aware of COVID relief programs. [#7, #17, #33]
For example:

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Actually we've heard about the small business ones and since my partners insisting, I apply for it. But from what I understand, it's still being held up on a house vote. Yeah. I'm still reading up on a lot of them. Been devouring the emails from my bank that tells me about it. It was like, 'Okay, I got to get motivated and get this stuff applied.' Then I get an order and then I'm like, 'Well, do I?'" [#7]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I haven't looked into them. I've kind of been watching them as they're coming across. I don't see how they're going to help me because right now, my people that work for me, I can make payroll. I can pay them, and I've not laid them off or I'm not going to, that kind of thing. So, the PPP thing is not helpful. And then I did take advantage of extending my tax deadline. I did also take advantage of a project that came out because of COVID stuff was at the IU Kelley school. They have, I think I told you that they had that HOPE Project. So that website you looked at. A month ago, I would not have had that. Those people provided that for me free of charge and they worked with me for two weeks. About every other day we had meetings and calls and two students that were, they did that because those students were losing their internships for the summer. They created my website and then they

coached me on how to change and I made some changes and stuff to it, but they did the grunt work of it." [#17]

- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "The only thing that I'm aware of is the low-interest loans for small businesses to meet payroll, mortgages, things like that." [#33]

Ten interviewees shared suggestions on the most beneficial types of assistance their firms could receive to reduce the effect of COVID-19. [#6, #7, #11, #13, #33, #36, #47, #60, #62, #63] For example:

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Have a general meeting with the gas company and tell them they need to keep us open no matter what? The best kind of assistance we could get right now is everything kept going. That's all." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "The kind that it's going to allow me to keep the phone bill paid, the electric bill paid, and make sure that I have the money to pay taxes and still come out enough to make my house payment and keep it. That kind of assistance, keeping the doors open assistance." [#7]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Good help, actually some decent employees." [#11]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I think if anything, to do that again, you're holding up some businesses and we again have been very, very blessed because we just keep beating after whatever we need. And that is exactly what we're doing." [#13]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "Something along the lines of loss of business average, something like that." [#33]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Financing assistantships, loan guarantees, inventory, financing... I would love that right now. Right now, with the current virus situation, it would loosen up our working capital for payroll. It would loosen up a lot. It's just tight right now." [#36]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "The only thing that I can think of would be have more testing available for our employees." [#47]
- The female representative of a majority-owned construction company stated, "I mean, the bidding of different jobs, I guess. Right now, it's mostly infrastructure and the roads in sanitary districts. But I mean, there's not really too much remodeling and carpentry unless it's further out." [#60]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "A grant." [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, the biggest assistance would be to have some more projects. If public and private entities could find their way to start some more projects or finish the ones, that would be

helpful. But I know, at this point, everyone's budget is kind of up in the air, so. That's really it. I think we just need to loosen some of the project investment – investments, I should say.” [#63]

3. Past marketplace conditions. Interviewees offered thoughts on the pre-pandemic marketplace across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the state of Indiana’s marketplace that they have observed over time.

Fifteen interviewees described the pre-pandemic marketplace as increasingly competitive. [#7, #22, #33, #39, #43, #60, #67, #AV] For example:

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Corporate buy-up has been a big issue. That is one of the things that's affected my company more than anything is a company that I've done business with, our company has done business with for 25, 30 years now Gets bought out by corporation and now they have to order everything from corporate office. I end up losing that customer because now all their little business cards forms, letterheads, [and] envelopes are coming from corporate office. I've had four of my clients in the past year and a half get bought by corporate. I have not yet once been able to get the name of the lady that is in charge at their head office. Once a year or so I'll get that call and guess what, head office didn't have any clue how to do this and they need something. “ [#7]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "It's just that I have a competition, a really tight competition to where the clinic is. But I can tell that doctors are willing to refer to me if only I'm consistent with marketing cause I have several word of mouth patients that I've been seeing and their doctors are local doctors from where the clinic is. And they're also sending people to my competition and they know what those clients, their clients that I'm seeing as well, they know how their patients like the care that I gave them. And actually, they had the experience of care before from my competition and I've been hearing a lot, better words from the care that I gave them. Going forward, I think if only we're given a chance to compete with big companies in the sense of we can get to do a bidding or something like get the chance to affiliate with hospitals, I think it will be a better future for us. But right now, since it's really hard, if only reimbursement are mostly balanced out and not there's some insurance that pay less to the point that it's not even sufficient for us to stay in the business.” [#22]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "What I'm finding is a lot of people, my clients, are looking online, which is in direct competition to what I do. Ninety percent of the time, they will do their shopping and then come to me, and I can either find them a better item or a better price, but a lot of the online shopping for product is a huge competition.” [#33]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Right now, they're terrible. But, normally, I mean it's seasonal, again, with the type of business we do, especially big corporations and companies. They get their spending capital, it's around a certain time for when they can buy furniture and stuff like that, so we have some seasons where the market could be dead, nobody is spending money on furniture or whatever, and then we have times when it's just erupting. Everybody is

moving, they're growing, so it's up and down, especially in my business Well, again, like private, they can go any time. But, when you have public, especially with school systems, they have times when they're open, they're buying, they've got a government job, they have different times when they get their money, as well, so it varies." [#39]

- The non-Hispanic white female owner of a WBE-certified goods and services company stated, "I think the biggest frustration over the years is the fact that small businesses, whether you're a small business or you're a small business or a minority business, or getting hit really hard by large companies that have advantages that we don't have that are funded – you know, you have these investor-led companies, you get these online companies, you've got state not valuing what we bring to the table in terms of tax dollars. You buy out-of-state – they don't seem to make the connection between buying from a large distributor and sending their tax dollars out of state and purchasing locally and having that come back to help the state So for example – no they just don't make the connection. It used to be 'Buy American.' The only people that buy American anymore are USPS, where they have really stringent rules, and they have to stick by them. But other than that, nobody really cares anymore. They're all buying outside of the country; they're all buying out of state. They don't seem to relate to the fact that we employ people, and we pay taxes. It's super-frustrating. It's super frustrating" [#43]
- The female representative of a majority-owned construction company stated, "I mean, there was money made from the federal government – they had money in those authority programs to do a lot of the remodels and demos and redo things. And just like with the Purdue and university, I mean, there was money put into those to go ahead and do projects, which there are a few out there, but not as many. But there's so many people or companies trying to bid at once; it's hard to compete" [#60]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Our industry, I feel what's really flying right now are young digital marketing companies. I think sometimes the – I mean we are a traditional agency. We are that old – we're the old agency, okay? We came up in the ranks. I mean we didn't have websites, we didn't do all that. We were very different. I feel what's changing in our marketplace as far as [competition] I think is a lot of digital marketing companies. I mean we do that, but I think our industry is changing as far as what people are taking out there for customers. Because customers need different things now. So as far as our type of industry out there... I think our industry has changed a little bit; it's not the traditional old ad agencies like we were for the last 30-some years. I think there's a lot of digital marketing companies popping up. Our difference is we're strategic planners, so that's been a good niche for us. I don't know if that answers your question." [#67]
- A comment from the availability survey stated, "Very difficult. Saturated with trucking. We get outbid by larger companies who are undercutting us." [#AV]
- A comment from an Asian Pacific American owned MBE professional services firm stated, "It's a tough market very challenging to enter anywhere in Indiana." [#AV]
- A comment from a majority-owned construction firm stated, "Wouldn't want to start a business like ours because of lots of competition and capital costs." [#AV]

- A comment from a majority-owned construction firm stated, "Landscaping is a saturated market now." [#AV]
- A comment from a WBE and VBE goods and services firm stated, "It is competitive in Indiana." [#AV]
- A comment from a Black American owned MBE stated, "Everything is tight right now." [#AV]
- A comment from a WBE professional services firm stated, "It is difficult to start a business in any industry in Indiana... especially due to COVID-19." [#AV]
- A comment from a majority-owned construction firm stated, "Too much competition." [#AV]

Fifty-eight interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses. [#1, #2, #3, #4, #5, #6, #12, #14, #15, #17, #18, #25, #26, #27, #29, #30, #35, #37, #38, #44, #59, #60, #66, #76, #AV, #FG1] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Things are a little bit crazy. And then we had this highway bidding and we immediately got 20 jobs, probably 16. Then, this morning I got woke up by a customer who needed a little quote. I woke up but... two of them, the first call of the day I was still at home. Lafayette's an amazing place to do business because the economy here is booming. Our biggest problem is we can't find people because we're competing against Subaru, competing against... GE is building high-bypass fan jet engines over here. We got Saab who's coming to town." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "In just phasing out of Obama there's a significant amount of money that going in heavy highway infrastructure. We want to play in that space, we've got the capability to play in that space in the state of Indiana, we just need a fair opportunity to play in it. I see the market as growing considerably." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Robust. I mean, particularly the technology community is just going gangbusters. I think the state's doing a lot of great things to help incubate new businesses." [#3]
- The non-Hispanic white male owner of a construction firm stated, "It was good, it had been two or three jobs a week and had a full schedule three months out in advance." [#4]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Oh I'd say it's been good. I don't know what else to say other than that." [#5]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Booming the last two, three years. All right. We didn't come to a slow down until we had this COVID-19. I think mostly should reach out to you would say that business has been booming. The housing market was better than ever. Everybody should've been making money if they were trying." [#6]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "It was going great, actually, up until the coronavirus thing. We were having,

was going to be a record year, actually. I think it was the economy. It was the price of gas. People were more positive about everything. Everybody was employed. It was the Trump economy, honestly. I track this stuff all the time. The thing that I can see the most, we were paying, what? A buck 50 a gallon for gasoline. Or under \$2 a gallon for gas. People had extra money in their pocket, so then when they do that, as long as the kid would ask them on the fundraiser, they would buy from them on a fundraising. That was the biggest difference, I think.” [#12]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "It's like any other construction business, it kind of ebbs and flows with the economy and the weather, but we've been pretty fortunate and pretty blessed, and we've got good people, and we've got good customers, and we try to take care of them. I think the use of technology is probably the biggest impact. We went from carrying around big rolls of drawings to carrying around an iPad, but we'll still roll the drawings. We've got iPads in our field superintendent's hands and things like that. So that kind of technology has allowed us to grow, and I think that's probably the biggest change in the industry. In the field, you've still got to put the product together, you've still got to pour your concrete, you've still got to tie the rebar. Not too much has changed in that area.” [#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "It's definitely grown over the last guy that was president. I mean, until the economy... I mean, there was nobody doing anything hardly up until about four years ago and now it's going real good again.” [#15]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Overall it's been very good. If I had these three guys, my son and his two friends from the fire department, if we had them full time and we'd be making a lot more money honestly, but we wouldn't have any lack of work at all.” [#17]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "Right there, we were doing real well as a business here in Indianapolis prior to COVID and we had, I would say, some of our best years that the local branch has ever had over the last four years” [#18]
- The Black American male representative of a construction trade organization stated, "Yeah so pre-COVID we had been generally hearing that business is good, right? There's work everywhere, the pipeline work, projects are coming down the pipe and I think the main strain was just figuring out what projects you were going to bid on and then if you were successful on getting those then not stretching yourself too thin. So, for the really big companies like an AECOM or a Turner that operate on a national or international [scale] they're bidding on everything, right? They're trying to get the biggest, largest possible projects. For companies who are a little more in the mid-range, then they have to be a little bit more selective, they can't put themselves at too much risk. The key is to bid themselves out and acquire work at the maximum level that they can perform. So, I would say yeah, everyone was happy, right? There's a lot of work out there, there's so much work that you even had to be selective about what you apply for.” [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "The marketplace here, from what I've seen it's a three-level marketplace structure. A, right

now it seems the City of Indianapolis seems to be stepping up when it comes to basic salaries that they think that we could live off of a livable wage, just for their own employees at a minimum of \$15.00 an hour, which I command, because that is a big step when \$10.00 rarely gets anybody in the door. \$15.00 is still better than \$10.00, but it's getting people to a minimum wage they even want to come to work. On the federal side, their standards from what I've seen over the different gigs, their price allotment structure for average salary is even better than the City of Indianapolis when it comes to meaning it's federal – it's the jobs here, location, different buildings and so forth pay a lot better wages as well. The state stuff seems to be the most lagging behind and it seems like to be all about the bottom-line dollar, what are we saving, what are we saving. And it's kind of sad that, like I said, the driving factor is the cheapest, the cheapest, the cheapest. And at what cost is the cheapest hurting in the long run? Private sector is I would say on average it's about on the parity level of what I've seen with the city. You can get a good prime contract or a prime bidder to understand that you can't get a worker at \$10.00 an hour and pay taxes and everything else and bill something like \$15.00. Those days are five years ago or longer. If you're not billing at least \$19.00 an hour to pay somebody, you know, \$12.00 to \$15.00 and then tax and everything, you have a price margin of at least \$2.00 on the hour, for one, it's not worth our time. And two, you're not going to get a very good candidate to do that job.” [#26]

- The non-Hispanic white male owner of a professional services firm stated, "I don't see a big difference. Part of it is that, as an agency, we only have maybe 18 clients. It's not like we have 150 clients. So, when we add a new client, that's a big impact. If we lose one client, that's a big impact. It's hard to get good clients, the sort of clients that we're after. So, it's – with a firm like ours, we can – everybody else can be struggling but we could be doing great, and it could be vice versa. So, it's hard to necessarily tell what the environment is because of our circumstance. Certainly, this umbrella RFP that came out for the state is a change. It creates opportunities for us. So, that's a good thing. We have had clients that have been bought up by other entities. So, that, obviously, has an impact on us. But I mean, generally, the economy seems to be doing pretty well right now.” [#27]
- The Black American male owner of an MBE-certified goods and services company stated, "So there is inflation and deflation. But in our industries, again, food, it doesn't matter what's going on in the economy. You still have to eat. If you're laid off, some people eat more. Okay. Pharmaceutical, bad times, people self-medicate more. Cosmetics, when you're feeling bad, you do more masquerade some folks. And so, we chose to be in the food, pharma, cosmetic industries, and that would represent – yeah – 90 percent of our business. The economy has not really impacted us. It has impacted our sales number, but we still have the same customers supplying the same products. Yeah. Inflationary times, yeah, it jumps up. Instead of our average growth of ten percent, 12 percent, maybe it grew 25 percent. And then the next year it was down because of that.” [#29]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Obviously, the marketplace conditions currently are a little bit tumultuous. But excluding the current situation, the advantage of working with governmental agencies is that the volume of work is consistent, but the margins are low. In terms of outside of governmental agencies, it's pretty much the same so that would be my comment on that. The change in technology has affected my firm and firms like mine. The use of electronic communications has dampened the demand for my particular product. The ability to provide ancillary

services to the client other than direct print which then requires a whole different labor force and a whole different skillset. Those are market changes that are affecting my firm specifically and obviously would affect many firms like my firm just due to technological changes.” [#30]

- The Hispanic American male owner of an uncertified-MBE construction firm stated, "We're in the electrical – you know, the electrical specialty niche that we do within the electrical trade. There's always new stuff coming out and they're always keeping us busy between the State and municipalities. So, we're not just your average electrical contractor. We specialize within different things within the electrical trade and it makes us a unique contractor.” [#35]
- The Hispanic American male owner of an uncertified MBE construction company stated, “[I] don't think it has affected me negatively, because it kind of has been good. Even today, I'm still doing some work. I don't know what's going to happen in these coming days, but the economy has been good. The only thing is that probably I don't have enough presence in the market. I don't do advertisements, so I probably could improve, but that has been one of my issues, that I really don't know where to advertise myself. I don't know if that's answering the question. Every day, I receive calls from different companies that they want me to pay them to advertise, and I really don't trust anyone yet, so the market has been good.” [#37]
- The Black American male owner of an MBE-certified professional services firm stated, "I would say if anything, the public sector– for me–has picked up a bit, just a bit more.” [#38]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Well, everything was like everybody else. We were great even because we started after the decline of 2008-2009 when everybody was in trouble. And we rode it up until just about eight weeks ago when we ran into this next crisis.” [#44]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Obviously, we were really busy in the peak of 2007-2008 when the homes were up. It was down a few years until 2010. Then we moved over to commercial apartments. Apartments have been booming from 2011 and onwards. So, it's been pretty busy. We're in a mixed market of multi-family or apartments. Apartments have been booming since 2012 because of the interest rates until now. So, it's been really busy. It's been good but I do see it slowing down. They've built out apartments all over the place. I think they're overbuilding. Just in terms of our business, I think it's going to slow down. We bid less. We look two to three years in advance. I did a lot of bidding three to four years ago. We've been extremely busy the past two years. But the bidding has been slowing down the past year, which means next year will most likely be slower” [#59]
- The female representative of a majority-owned construction company stated, "Well, there was a lot of funding going through the housing authority, which that's our main bread and butter. So, they were remodeling and redoing a lot of their HUD homes and stuff like that, which as I said, that's our bread and butter.” [#60]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I would say just the business climate in Indiana. Our industrial sector – just investment was booming in Indiana before COVID hit. The entire industry was busy. It was a battle for

talent. The kids coming out of college had no worries about getting jobs. So, I think Indiana did a really good job combined with business-friendly practices from the federal level that resulted in industry wanting to be here and we service industry. Whether that's – it could be a pharma market. It could be a manufacturing market. It could be another support market. I mean higher ed has had lots of growth in the last few years as far as just the amount of work that they're putting out. Most of what we do is construction projects, whether they're renovations or new facilities. So, it's been favorable.” [#66]

- The Subcontinent Asian American representative of a business development organization stated, "Pre-COVID, the conditions were good, depending on the industry. Like those who were in the hotel and the food industry has really suffered. Those who were in the nail salons and beauty products, like for example, African American beauty supplies, those stores, they're mostly owned by Chinese and Koreans. In general, all those [in] retail basically I would put. We have a lot of retailers. “ [#76]
- A comment from a representative of a Hispanic American owned MBE goods and services firm stated, “ [I] bought the dealership 6 years ago and now has 3 other dealerships, so that says the business is there if you go for it.” [#AV]
- A comment from a majority-owned professional services firm stated, “Business is good, we're expanding.” [#AV]
- A comment from a majority-owned construction firm stated, “Currently conditions are booming along!” [#AV]
- A comment from a WBE professional services firm stated, “Seems to be a thriving economy for the most part.” [#AV]
- A comment from a majority-owned professional services firm stated, “I think the business marketing is good in IN. There is plenty of potential and I wouldn't hesitate to tell someone to start a business.” [#AV]
- A comment from a majority-owned goods and services firm stated, “Indiana has the best market conditions, is very business friendly. In our part of Indiana, we are the early indicator, manufacturing, and things are going very well, despite the pandemic.” [#AV]
- A comment from a majority-owned goods and services firm stated, “The market in Indiana is going well--we purchased this dealership in November and it's doing fine. Indiana is picking up economically.” [#AV]
- A comment from a majority-owned goods and services firm stated, “The marketplace is very healthy, and heavy with opportunity.” [#AV]
- A comment from a majority-owned construction firm stated, “Business has been really good for the last 3 years.” [#AV]
- A comment from a majority-owned goods and services firm stated, “The economy has been good and jobs, property value is strong and real-estate values are strong.” [#AV]
- A comment from a majority-owned goods and services firm stated, “Indiana is a friendly state to do business in.” [#AV]

- A comment from a majority-owned professional services firm stated, “Currently the economy in Indiana is very robust.” [#AV]
- A comment from a majority-owned professional services firm stated, “I think Indiana is a prime market area with a great governor.” [#AV]
- A comment from a majority-owned professional services firm stated, “There are plenty of construction management opportunities all the time in Indiana in spite of COVID-19.” [#AV]
- A comment from a Native American owned WBE and MBE professional services firm stated, “The environmental industry is between stable and growing in Indiana and nationwide.” [#AV]
- A comment from a majority-owned construction firm stated, “Business conditions are pretty good in Indiana.” [#AV]
- A comment from a majority-owned construction firm stated, “Business is going very well in the state of Indiana.” [#AV]
- A comment from a majority-owned professional services firm stated, “There is lots of opportunity in Indiana.” [#AV]
- A comment from a Black American owned MBE professional services firm stated, “The opportunities here in Indiana are decent/good compared to other states in the Midwest. Business has not been drastically affected by COVID-19.” [#AV]
- A comment from a majority-owned construction stated, “Obtaining work is favorable right now.” [#AV]
- A comment from a majority-owned construction firm stated, “We are looking to expand at some point even though we are comfortable at this time.” [#AV]
- A comment from a WBE and VBE construction firm stated, “Right now work is plentiful. Been in the business a long time, the name is out there so it is easy to find work. Not so easy to start business in.” [#AV]
- A comment from a Hispanic American owned construction firm stated, “Indiana is very profitable, especially in Fort Wayne because it is a growing city.” [#AV]
- A comment from a majority-owned construction firm stated, “We are in a boom time of grow; we need to keep up with the industry.” [#AV]
- A comment from a majority-owned construction firm stated, “The economy is very robust currently in Indiana.” [#AV]
- A comment from a majority-owned construction firm stated, “I believe there is enough work to go around. Whomever is doing a good job with good work ethics will find business.” [#AV]
- A comment from a majority-owned construction firm stated, “Northeast Indiana is very busy now in this industry.” [#AV]
- A comment from a Black American owned professional services firm stated, “The economy is good enough that we can pick and choose who, when, and where we want to work Indiana is a really great for starting business for marketing. lots of opportunity.” [#AV]

- A comment from a majority-owned professional services firm stated, “As long as the economy stays as it is, business has been great.” [#AV]
- A comment from a majority-owned professional services firm stated, “Indiana is a pretty good place to work. Our firm has been pleased with the business conditions and opportunities in Indiana.” [#AV]
- A comment from a majority-owned professional services firm stated, “It’s been great we’ve been very busy.” [#AV]
- A comment from a majority-owned professional services firm stated, “The climate’s good for expanding in Indiana.” [#AV]
- A comment from a majority-owned goods and services firm stated, “Interested in growing and expanding outside of Indiana. Indiana’s market has been very successful.” [#AV]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, “Indiana has been steady and very strong, super well-run state. So public work has been consistent and good at all the universities, at government for a long run now. Pretty steady say seven, eight years.” [#FG1]

Nineteen interviewees observed that marketplace conditions were in decline. [#10, #23, #63, #73, #AV] For example:

- The female representative of a WBE-certified construction firm stated, “I think it’s definitely affected our market up here is the auto industry being shut down. We have had some people who have had to postpone remodels and things like that, because they’re laid off. So, we did have some things that have been put on the back burner. I still believe they will do it; they’re just waiting to go back to work.” [#10]
- The Black American male owner of an MBE-certified professional services firm stated, “We got decimated. The training business for me has been on a downward decline since, I’ll be honest with you, since Donald Trump went in office. They took the funding the department. That company is driven by the funding provided by the Department of Labor.” [#23]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Well, a decline – I think because I do a lot of work with [Indiana Public Schools] – their funding has been, I guess, difficult, to say the least. So, a lot of those projects have really floundered. They just don’t have revenue, and they’re struggling to keep the education system going. So, I think some of those kinds of things are probably more obvious to me than they would be to others just because I – as a small firm with a client like that, an on-call contract, and not being able to perform. That’s probably a big issue. The commercial market has pretty well dried up. It’s really just residential. We don’t really do multifamily. Not that we can’t. We’ve done ‘em in the past, but we’re not in that marketplace right now. So, we’re pretty much into just single-family residences. We’ve done a few condos, but they’re small ones. The commercial investment is pretty scarce. And, now, the public side, at least the part that I’m familiar with, has also been hit pretty hard in the last couple years. So, I’m fortunate that I do residential work as well. I just finished a pretty large distribution center here in central Indiana. We just – that one was just three weeks from being completed when the client just put a hold on absolutely everything they were doing. And we finally got it

back and they closed out the project. So, I don't think they're going to be doing the next project that I was starting on. It's just a wait-and-see proposition, I believe, in the public and private sector.” [#63]

- The non-Hispanic white male owner of a majority-owned construction company stated, “The rate went down for what I’m doing for the trucking. It went down almost 35 percent.” [#73]
- A comment from a VBE professional services firm stated, “North Central Indiana area is economically depressed after losing a lot of manufacturing businesses from the 1960s through the 80s.” [#AV]
- A comment from a majority-owned professional services firm stated, “The farm economy is depressed, that bleeds into the watershed business. When farmers' money is tied up, they do not do drainage projects.” [#AV]
- A comment from a majority-owned professional services firm stated, “Our market is dwindling since we support a lot of coal fired combustion sources, and since that's being phased out we have to find other things to do.” [#AV]
- A comment from a majority-owned goods and services firm stated, “The conditions are very poor. Farmers don't have the capital and market volatility is all over the place.” [#AV]
- A comment from a majority-owned professional services firm stated, “Indiana is a terrible place to do business. Indiana doesn’t support [us].” [#AV]
- A comment from a majority-owned professional services firm stated, “This industry seems to be declining... radio stations... The government has put a lid on installing/ building new radio stations.” [#AV]
- A comment from a VBE professional services firm stated, “Business is pretty terrible for national security” [#AV]
- A comment from a majority-owned construction firm stated, “Difficult to expand our business.” [#AV]
- A comment from a majority-owned construction firm stated, “It is hard to get work. Our firm has a competitor out of Ohio who gets the business from the State of Indiana... instead of Indiana using Indiana companies.” [#AV]
- A comment from a majority-owned construction firm stated, “Because the coal-mining industry is depressed at this time, business is a bit slow at this time. Our firm is looking for other avenues.” [#AV]
- A comment from a WBE construction firm stated, “Our firm has difficulty finding work within our own community. Customers go to companies outside the State of Indiana.” [#AV]
- A comment from a majority-owned professional services firm stated, “In the advertising industry, it is difficult to get accounts. It is more difficult because of social media.” [#AV]
- A comment from a WBE professional services firm stated, “Obtaining work is difficult when you step outside of what you are originally known for. Architect business appears to be slowing down. It is difficult to obtain work if you’re are not on the initial list in Indiana.” [#AV]

- A comment from a majority-owned goods and services firm stated, “Difficult to start a business. This is a dying business.” [#AV]
- A comment from a majority-owned goods and services firm stated, “Do not start a printing business. It is a dying trade. Since 2010, 60% of all printing businesses in the US have closed.” [#AV]

4. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the Indiana marketplace, in their respective industries, and in general. [#1, #2, #4, #5, #10, #12, #13, #25, #26, #27, #30, #31, #32, #33, #36, #38, #39, #41, #45, #47, #48, #49, #60, #63, #64, #71, #FG1]

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, “I don't want to sound trite here, but you got to have your A game every day. You got to come in here with the mindset that just because you quote ‘work’ doesn't mean you're going to get it. Sometimes you just have to be smart about every job. I mean, you have to know your marketplace. You have to know your competitors. You have to know your customers. You have to know everything to make it all work. I mean, you can't just throw a number out in the marketplace. You got to know where your competitors going to be price wise. You got to know what your customer expects of you. I mean, if you quote a certain type of work, you got to know what he really expects you to do for that so that you don't get in a fight with him afterwards. So it's about experience, knowledge, relationships. And on the other side, you got to make money. That's tough. It's a tough business. It really is.” [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, “Relationships with manufacturers ... Quality of customer service, delivery model. Responsiveness.” [#2]
- The non-Hispanic white male owner of a construction firm stated, “Honest quality work and fair pricing. A lot of, you know, when I was in the plumbing business and worked for other companies, one company I used to work for was we need to be... Our prices need to be what California's charging for something. Our prices need to be up here and it's like, why, we're not California, we don't need to be that high.” [#4]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, “Talking to people, letting them know what we have to offer and how I can be of help to their business. You got to, you got to educate people of what you have and the value of what you have. So, in other words, if you treat people right, they become fairly loyal. And that's what I've, you lose some, you lose some through death, you lose some that maybe find someone else with a better price and that's what they want to go with. But that's okay, let them go. I'm not going to beg them for their business, I mean it's up to them.” [#5]
- The female representative of a WBE-certified construction firm stated, “I attribute that to [the owners]. And the reason that I say that is because [the owners] are amazing people. I want to stay here until I retire, let's put it that way. They treat their employees with respect and appreciation, and there's nothing that they ask us to do that they won't do themselves. And they push us to have that same attitude with our customers. ‘What can I do to make this right? If you're not happy, I want you to be happy before I leave this house, or before I leave this business. And tell me what I can do to make it right.’ And I think when that kind of

attitude... And also, [the owners] aren't trying to cheat anybody, either. They keep their prices where they can make enough money to eventually give raises to the employees that deserve them and to take care of the trucks and the overhead that you have. And to make a little money themselves. They're not in it to get rich. They're in it because [one of the owners] loves what he does." [#10]

- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "We treat other people the way we'd want to be treated, and so that's worked really well for us, in the short run, long run and everything else. So, our business has grown over the years." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Are you willing to pivot and change as you need to?" [#13]
- The Black American male representative of a construction trade organization stated, "One's one, not in any particular order is, how much capital do they have on hand, right? So how resilient are they in general? So how are they able to... What sort of access to capital that they have at the moment, the next thing would be how much revenue can they generate even in a crisis era? Third would be what sort of credit can they maintain in a COVID era. So, if you have limited access to generate revenue that's going to make it harder to have lines of credit or establish credit." [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "The main thing to be competitive in this line of business is the quality of your employees. Because, you know, if you don't have a good quality candidate to do the job you can't demand a higher rate. And I tell people all the time that, you know, I don't want to be cheap and I want to be the best. And I do this a lot, we're not going to undersell price-wise just to get a job, because in the long-run it's going to be a nightmare because you're not going to get the candidate you really need to keep your frustration level down and the headaches. I'd rather let somebody else do it and let that client at the time realize what a nightmare they created. And eventually they come around and maybe decide to put up with it just to save the bottom dollar." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "Different agencies seem to specialize in different areas. In some, they have more of a public relations-like emphasis. Like others, they, for instance, may have an internal team that could do telemarketing or could do video production in-house. We don't have those sorts of capabilities in-house. So, I think the answer is different for every agency. We try to be really good at what we do and kind of stick to that. I think it's like any other business, is meeting clients' expectations and really, hopefully, getting them to be big fans of yours. Then they talk to other people and you get referrals." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "First, good management in terms of making sure that you meet the client requirement; secondly, the ability to provide a network of vendors who can provide services that you cannot so that the client can have a one-stop shopping experience. The relationship between you as an owner and those vendors is paramount and then secondly and most important the relationship between you and your customer in terms of making sure that you understand what their needs are obviously would contribute to your success." [#30]

- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "The quality of the work because honestly, it's even more important than the price a lot of the times. If you can depend on. I mean, we're all pretty much right around the same prices." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "'Look,' I said, 'this is the way you gotta do whatever it is you do. So good till nobody can do it better.'" [#32]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "I think the customer service is really the best thing that I can do, making sure that the product is imprinted correctly and delivered on time, and the price point is there." [#33]
- The Black American male owner of an MBE-certified professional services firm stated, "Work hard. There's no secret. You just you get a project, 'Oh, I need this next week.' And most people are like, 'I can't get that done next week.' I say, 'Oh, I'll get it done next week.' And it's just been working hard. I mean, a lot of times I'm working, you know, 60, 70, 80 hours a week. I always work a little bit on the weekends. It's just there's no secret. You just work hard. You do a good job, you're very attentive. Communicate as much as you can with the clients and owners, understand what they're trying to accomplish. And you just work. Well, again, you just got to be willing to work. You've got to be willing to be and do things on a quicker turnaround. Because a lot of times I'll get calls like I said, they call me, and they called others, but others couldn't do it in that particular timeframe. And you gotta be flexible. You know, small firm, you know, but you got to be flexible and you got to be willing to work." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "To know people. It's all about who you know. Unfortunately, that boils down to. I mean, of course, after a while, you've got to be able to handle the work that you scope out and do a good job and stuff, but basically it's who you know, who can get you in the door, and give you the opportunity to do work for these companies, because they tend to still do business with the companies they build relationships with." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Our philosophy is somewhat different and may be growth prohibitive. But my perspective is to do the absolute best job with the clients that I have, being faithfully, dependably consistent. If we do that, then the work will come to us that we can handle. One of the things that I say all the time to our workers is that we have the job because someone lost the job. They lost the job because they didn't do what they agreed to do. So, I think in order to be competitive, you have to have a good reputation that's based on your work ethic, your established work ethic with other clients. But, additionally, you have to stay abreast of processes, techniques, changes, and upgrade equipment." [#41]
- The male representative of a majority-owned goods and services company stated, "Good service, quality product, and, of course, price." [#45]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "Technology and the ability to help a client understand that more." [#47]

- The non-Hispanic white male owner of a majority-owned construction firm stated, "I think you have to be very technically competent and very responsive and attentive to clients. And then there's price competitiveness, which is a challenge." [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "I think you need to be knowledgeable and respected in your line of work." [#49]
- The female representative of a majority-owned construction company stated, "You've got to kind of do a lot of the jobs yourself instead of hiring subcontractors. You need your own people, employees to learn more of the trade, I suppose. That's my opinion." [#60]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "That sounds rather trite to some people but in our profession it's not as common as you might think. There are a lot of people in our profession who look at clients as benefactors for their own design philosophy. And I think that's – that's something that I fought against my entire career, is – I think people just need to work a little harder, take a little more accountability. That's really – You know, what we do generates work for contractors." [#63]
- The male representative of a majority-owned professional services firm stated, "Really just provide a complete and accurate product on time and on schedule. Or on time and within budget." [#64]
- The Black American male owner of an MBE-certified professional services firm stated, "Think you need to be good at your trade. Yeah. Well, competitive and good at your trade. Too, in my view, I think you need to have a competitive fee, in terms of your service, 'cause obviously if you're three times more expensive than the next person, you won't be hired. At the same time as you say that we're competitive, you wanna be competitive 'cause you also don't want to undervalue your service, which... See that happening with some folks a lot as well. So I think those two are two of the biggest. And then I think in any profession having advocates for you, whether they are as clients, or friends or whomever, individuals who are recommending you, talk about you as a potential firm in doing work or what have you, "I think that's very important. And that's just from building relationships." [#71]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "Ultimately, it's the diversity of their practice." [#FG1]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "I have always been in firms that are very generalist. I've never been in a real specialty firm and the downturns I have weathered have mainly been because we have been able to do whatever markets were doing well at the time that they were doing well... I see success in design, in the future, in many ways being able to pivot and do a lot of different design work or address a lot of different issues within design and greater diversity of gender income, background, ethnic, all of those things will only add to the ability to be versatile in many different realms." [#FG1]

H. Barriers or Discrimination Based on Business Ownership

Business owners and managers discussed a variety of barriers to business development and any experiences with discrimination. Section H presents their comments and highlight the most frequently mentioned barriers and challenges first:

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 or other materials and supplies;
8. Prequalification requirements;
9. Experience and expertise;
10. Licenses and permits;
11. Learning about work or marketing;
12. Unnecessarily restrictive contract specifications;
13. Bid processes and criteria;
14. Bid shopping or bid manipulation;
15. Treatment by prime 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; and
19. Other comments about marketplace barriers and discrimination;

1. Obtaining financing. Thirty-eight interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses. Examples of their comments are included below. [#1, #3, #4, #5, #7, #9, #12, #14, #17, #22, #25, #26, #27, #28, #29, #30, #32, #33, #34, #35, #37, #41, #42, #44, #47, #48, #62, #64, #65, #69, #70, #72, #AV, #FG1, #FG2] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, “[In 1984,] I didn’t even know, I didn’t have any money. I had two houses that I owned that owed some equity. So I took my sub contract in hand and I wrote up a plan and a cashflow statement and I went to a couple banks and got turned down So I went there thinking, maybe that’ll help. And they said, no, we don’t really make that kind of loan. But this guy named Phil, what was his last name? I can’t remember what he, he said, I really like you and I think I maybe can find somebody that will help you. So he called a friend of his So I went over there and they made me a \$45,000 SBA loan. But getting good rates and getting good terms. Like I said, we have this taint rule. So we were able to borrow based on our accounts receivable. But if any one account falls behind, then you have to exclude all of them, that company, which in the case of [client A], they’re probably 25% of our AR right

now. So we're going to have to reduce our eligible accounts receivable by 25%. And then we turn that number into the bank monthly and they tell us how much we can have in a line of credit. so that is an industry problem." [#1]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I do believe that obtaining financing is, I perceive it as a barrier for new businesses, particularly minority- and women-owned businesses." [#3]
- The non-Hispanic white male owner of a construction firm stated, "Yeah, because if you don't have any credit lines set up or if you don't have the best credit in the world, a lot of small businesses are based on a person's personal credit." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "So as far as obtaining financing, yes there has been barriers. Not owning the company long enough. So, there was no established credit for the company when it first started out. So, I couldn't do finance loans to get things. Small business starting out has been the biggest barrier, not so much of the woman" [#7]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "The money is the hardest part. It's all the start-up stuff. There's so many barriers to that. It's getting the cash to start it up, and it's also the knowledge, too. I mean, there's a lot of things that you don't realize. It's always a problem. I mean for everybody. For any small business, it's always hard to find money. You have to have your own money to start off with, and usually you put your house up. That's what I did do in the beginning. Even though I had customers to go with me, I had to put my house up in the beginning. And then cash flow was always a problem. It's always one of the hardest things to do" [#12]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "The biggest challenge is just customer relationships and finding people, and including figuring out how to grow, access to capital, and bonding, that stuff really is important. Early on at least, somewhat of a limiting factor, but we've gotten to the point now where it's not as limiting, bonding funding. When you need it, you can't get it; and when you can get it, you don't need it." [#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Our cashflow is not this little curve up and down, it's a big curve up and down. It's, okay, the flip house sold, now we have a bunch of cash in the bank and we have our line of credits open. Okay, now we go buy big materials for two buildings. Okay. You know, it's a big bounce. I can't say one way or the other, that it's a barrier as me as a small business or a woman on business to gain financing. I believe the barrier is my knowledge about what's available, let me put it that way. We borrowed that money through [a small credit services institution]. Well, that was just because I knew I could get there. I knew I could get that money and that we could get that done and get it done fast. The interest rate sucks. It's terrible. And I should, once we get our business case together, the whole event planning process and what we're going to build, I really do need to take and put together a business plan and approach some different financial institutions about the whole project and changing it because I'm paying way too much in interest for what I bought. We have only used our local knowledge of farming and found avenues through that to be able to finance our businesses. So, expanding into other... There might be a woman owned business loan or

small business loan rates that would be better, that we could get the capital, could maybe finance it. We financed this thing for 20 years. Maybe, maybe there's something out there that will go 30 for a business because it's government backed or something and would help our cash flow." [#17]

- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "A challenge, well it's really hard for me to claim a bank to get a loan That's the biggest challenge and what happened, I keep on destroying my credit history because there's no other way for me to find a loan but doing those loans that usually you see in the internet. That's why when I started, I actually go to ask for a loan through a bank, but we just started with our own money until it was all gone, and we need additional funds. And that was a really bad position on our part because we thought that we'd be able to manage it with our own money. But it wasn't sufficient, or it wasn't enough. Cause when you go to the bank, usually it takes a long time to process and if you're already in the business, if you already started, then the faster you get the money, the better." [#22]
- The Black American male representative of a construction trade organization stated, "Some of those national companies I talked about earlier, I expect an AECOM, Hunt or a Turner to be able to survive no matter what. They're working on these big projects all over the country and in other countries then they'd probably have the lines of credit or adjusted business model, they might have to lay people off or they might have to scale back. But at the end of the day, they're going to survive sort of thing. I think the real challenge which even in a normal, healthy market are the mid-sized companies that if they take on too much risk and something goes amiss, they're out of business anyway. So, I think all of that is just accentuated in a COVID era. The other thing is, particularly small companies, I might say your XBEs, so your women owned, minority owned companies, historically speaking they have less access to credit than other companies, even of the same size. I know that other disparity studies have concluded that, they'd say minority owned companies they are less successful in acquiring credit and they get authorized to receive less credit than say women owned companies, or white women owned companies. Of course, women owned companies, they're not successful in acquiring credit and they get lesser amounts of credit than let's say white male owned companies. So, then I think in the XBE market that becomes even tighter when things slow down economically." [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "One of the main barriers a lot of times I think that stop a lot of companies, and myself as well, is you may look at a contract, it may be sizable, but you know you're going to create the revenue to make the payroll if you were lucky enough to get past the paperwork pile to fill out to even get it. So that would be discouraging within itself, to make you not even go after it because you know you're going to be 60 days or a minimum 60 days. And then if they find one glitch in that paperwork, they may hold it for another 60 days because you have to maybe revise something. So, the number one barrier is financing. The secondary leg of that is ensuring final paperwork stuff and maybe to fill it out correctly without it getting sent back saying, 'We need you to answer this question' or 'This wasn't' – you know, so paperwork is a set of that same barrier." [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "A lot of times you're out there on your own pretty much. Because they're not

loaning money to black businesses. I have an even – they'll find some reason to turn you down. What we're gonna need, especially the vehicles that we're gonna need, I plan on just maybe having some of my relatives to help me out with some of that stuff." [#28]

- The Black American male owner of an MBE-certified goods and services company stated, "Went the first five months and didn't make one dime. And we received eviction notices three straight months from our bank. When we started the business, I went to Huntington Bank, which was the number one as far as giving SBA loans in the – in Indiana at that time. At least that's what they said. When I went to them, they said they're not interested in funding a startup. They only loan money if you don't need it. That was what they told me. And so, what Huntington had said was that for me to even get \$100,000.00 SBA loan, I need \$50,000.00." [#29]
- The Black American male owner of an uncertified MBE goods and services firm stated, "That was never – for our firm that was never an issue because of the way our vendors accept payments. In our business vendors basically finance you for that first 35 or 40 days, so unless it was something strange or unusual, we never had a capital cash crunch. We did run into some capital issues when we initially started the contract with [client A] because there was a delay in payment by the State of Indiana for around 126 days." [#30]
- The Black American male owner of an uncertified-MBE construction company stated, "And I started off going uphill, meaning to what I learned since then, that to start a business is just like starting a farm – if you don't have no seed and fertilizer, you can't start a farm. You can dream about it. So, in my case, when I put that in perspective with that, I had to start a business without the proper capital to put all the pieces in place. From that point forward to now, it's been an uphill struggle. I asked of my banker a few days ago – I'm in Gary, Indiana, and they were doing some infrastructure. As a matter of fact, the city is now starting to be rebuilt, if you will. And there was a big job going on, right out in front of the bank. And when I walked in, I told the manager, said, 'Y'know what? You know the difference between myself and that contractor that's doing that job out there?' He said, 'What's that?' I said, 'Money.' I said, 'Now, I have the same kinda license that he's got, and probably more licenses, because I'm a licensed plumbing contractor; I'm a licensed sewer contractor; I'm a licensed general contracted unlimited, just like anyone you wanna name in the country.' So, I said, 'but the difference is my access to money.' I said, well, not to be redundant, but exactly what I was talking about earlier, about the bank. Let me use a little station, like I like to do when talking about things like this. You give me a, you can feel a brand-new Bugatti, and say, 'Okay, [name of owner],' whatever. 'Here you go. Here're the keys. And it ain't got no gas in it.' And you don't give me no money to get any. So now I got a problem on my hands. I got a big old Bugatti sitting here, but I can't go nowhere. And so, it's sorta like me, as I was telling about the job. But I look at these jobs come across my computer all the time now. 'You're invited to bid. Invitation to bid. Invitation to bid.' But when I get into that, then that's when the reality shows up. Here's what you gotta have to even be able to be considered, y'know. Yeah, well, you know the rule of thumb with financing is this. It's all about collateral, y'know, whether you are certified in anything, or nothing. If you don't have some kind of collateral. And where I used to work at US Steel, if I could use an example, we had a credit union where if an employee wanted to go buy himself a new car, he had two or three guys, he'd get 'em to go to the credit union and co-sign for him to get his car, and keep on stepping, no problem. But we get out here in this field, this water of construction, now

it's a different game, now. Because if you're gonna get that bid in time and say it's a bid of half a million dollars, and right in the specs it's gonna tell you you'll be bonded. And so now, you've won the bid, but now you've gotta put up that bond. Now you've gotta scuffle to find a way to do that. A letter from the bank, or a insurance company that would put up the bond. That's been a big hurdle for everybody that's tried to make that move from a handyman to a contractor.” [#32]

- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, "Actually, that was a huge barrier when I bought the business. I did not buy a brick-and-mortar, I did not buy any real estate; I basically bought a book of business, a list of customers, their past order history. To get a business loan to purchase the business, that was a little tricky. I ended up having to go to a different financial institution just for someone who could buy into the idea, that I really didn't have anything tangible that I was purchasing, it was more of a business list.” [#33]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Not before 2008. It was always pretty easy. I had bankers that I dealt with. Just dealt with him and I got whatever financing I needed. After 2008, the banks look at your like – I feel, this is my opinion, that they're going to loan me the money and I'm going to take off to Mexico with it and they'll never see me again. I've always paid back my loans. Yet, to try to get a loan now is like pulling teeth. Just to hold me over till the next payroll. We always seem to have \$150,000.00 line of credit. When I paid it down, we didn't need any money, maybe around 2008-ish or so. Maybe – I don't remember what year. But we didn't borrow for a long time. The banker says, 'Hey, you've got to borrow some money, man. That's not patriotic. You've got to borrow something.' I said, 'I don't need any money.' But then, eventually, you need it. The cashflow doesn't work out and you need it. Yeah, lately it's – the last ten years, it's become difficult to borrow money. I always feel it's kind of racially motivated. They don't look at you – I go to bank and they don't treat me like a person. They treat me like a number. Sometimes – and maybe they treat all their customers like a number, but being of Hispanic descent, I take it personally. Maybe I shouldn't. But I don't know.” [#34]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "The bank didn't want to give us credit because we were so new of a company. If we did get a loan, it's a high interest loan. You have to pay them out with high amounts, payment amounts, and stuff like that. So, that was a big factor for so many years until you have enough cashflow and credit built up and after those years and kind of proving yourself. But that is a struggle point for any owner that starts from the ground up.” [#35]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "Well, a barrier, it has not really been, because I don't have big jobs, so I am able to handle them. Most of the time, I will ask for money in advance, so no. I am also careful not to work for people that I don't really know or trust well, because I don't want to get into issues where I'm not being paid or cannot do the job.” [#37]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "So, I'm aware of it and I believe it can be discriminatory. I think that's because obtaining financing is based on credit history. It's based on your ability as a business to provide lending institutions with certain documentation. The reason that I think

it could be discriminatory is because many minorities don't have the knowledge or the systems in place to make sure that they can provide that documentation or the consistent pay your bills on time so that your credit score is better because you don't have the revenue, because you have the low-paying job. All that trickledown. If you don't make – if you're living paycheck to paycheck, penny to penny, and you have a crisis, then your money's short. So, when you're short on money, then something doesn't get paid on time. When something doesn't get paid on time, then that reflects in your credit history. So, there's this on and on and on and on process. The reason why I think that it can be discriminatory because if I wasn't in the low-paying job in the first place, if I was able to break through the glass ceiling, so to speak, then I would have more income. So, from a lending standpoint, I wouldn't have those barriers. Now, personally, I don't think I've experienced it because we've been fortunate enough to not have some of those barriers.” [#41]

- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "That was difficult for us for a while. Actually, I have a call with our bank today to revisit that. Now that our gross revenue is up a lot, I feel that we won't have very many barriers. But we started our business fairly young. I think we were 21 and 22 at the time that we were starting this company, and so it was very difficult to get people to take us seriously, especially when it came to financing. We just self-funded. When we realized that we weren't really going to make any traction because people would not take us seriously due to our age, we just decided to self-fund. We pivoted and would take on projects that were not necessarily directly related to what we wanted but they were valuable, and they were able to give us the start-up money that we needed. We just bootstrapped and invested our own capital into the business.” [#42]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "I do know that there's an issue with some minority-owned companies with trying to get financing to run their business and I do know that that is a real issue. I do know that I have some colleagues that have run into funding issues and I don't think that they have all checked into the various locations or maybe sometimes companies grow so fast they grow faster than the bank is willing to give them money” [#44]
- The non-Hispanic white male representative of an uncertified WBE goods and services firm stated, "Two of our competitors in my local community have gone out of business. So, I'm assuming it is an issue.” [#47]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Well, when I first started my firm – I'll just give you an example – we had a contract for \$67,000 to do work with the airport. I went to the bank that had been my family's bank all of my life and tried to get a loan for \$20,000. My credit score at that time was I wanna say 690. It wasn't 700. It was a FAA contract. I was trying to get a third of what the contract value was, and I was declined. And so, after that, to be frank, I've never sought financing in that way. A couple years ago, I worked with another company, went through the process, but you have to have 90 days of no bills behind, and when you're a small business, that's kind of difficult.” [#62]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Not just yet. But it's something that I've looked into, and access to financing

would be useful as I grow. But I think we have the Small Business Administration zone that I think just – in any business finance is always important. So, it's like you get something; you can never have enough. And ease of access is the hardest part, especially if you don't have a business credit history.” [#65]

- The Black American male owner of an MBE-certified construction firm stated, "Just like the truck I just got done getting maybe about a month ago. I literally had to – and that's where the majority of my funds went to. I literally had to put it – I had business credit for maybe over two years, but no one would put anything in my business name, so I had to go to personal, put my truck in my personal name, and then once I get done paying it off put it in my business name and then accumulate business credit. I don't think that they actually – if no one is going to give me a chance or give me a card or give me a gas card or give me a business credit card to go out and do my business and I'm working all this on my own, that's a big eye-opener myself, and that's a sign of determination that a person wants to make it. So how would I actually go out and get business credit if you're never going to give me a chance, but you're always going to bring personal into it? I'm not perfect, you know what I'm saying? Two loans and everything is eating me up, so therefore I'm trying to go out there and get the money and work and get the money honestly to pay student loans. But on the flip side of things it's like don't want to give me business credit. So that's something I had to really work at and go to an outside company, which is the crisis in the world today. It really actually helped me out, but then again it didn't help me, because it's not a grant; it's a loan, so something I've got to pay back. But the interest rate on it is pretty low, so therefore I can afford to go ahead and do what I need to do. And I think that puts a damper on a whole lot of minority Black women and men, business owners, because when they see loan they back up, 'cause they don't want to do a loan, they want to do a grant. And grants tend take so long nowadays, and the bank, with business accounts, you do so much for them and you run your money through them and then when you go to them and ask them for a loan they tell you, 'Well, we' – I went to the bank and I will give you a good example. I went to the bank with a \$30,000.00 vehicle and I said I was going to put \$15,000.00 on it. This has been my bank for who knows when. I said I want to do it up under the business name. They come back to me and they say, 'Well, according to your credit, your credit score is pretty low.' And I was like, 'Well yeah, because of the COVID-19 came, I didn't pay bills on time.' It's at a 585. I get it. I said, 'I understand that, but I needed this vehicle so I can go ahead and produce and do more. All my money is in this account, all \$22,000.00, \$23,000.00.' So I realized at that point in time they told me no, they couldn't do anything in my business name or do anything in my personal name. So I said at that point in time, we have such thing as a collateral loan, where you can take out on a vehicle and you can just take the money directly out of that account. And she was like, 'Yeah, but let me check on that.' Why was I ever told that? So I was denied on a loan for a business and I was denied as personal, but you're going to look at the collateral and see what you can possibly do of my savings and my checking together, combine them, so hopefully it comes up to that amount of that vehicle. So I can't touch it until it's paid for, but then again, it's there and I have the vehicle. I totally get that, but I ignored all that and I went to Chrysler dealership and I asked them, you know, we sat down and we talked about it and I said, 'Hey, I've got \$15,000.00 to put on this vehicle.' They said to me at that point in time, 'Well, if you've got \$15,000.00 you can get that truck right there. We're not caring about your credit. You're showing the status of your

employment. But what we cannot do is put it in your business right now, because that you'll have to come up with a little bit more money.' If that's the penalty that I'm going to take for that then okay, put it in personal and when I get done paying it off I'll shift it over to business and go from there." [#69]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Finance? I do have barriers, for sure, because right now we are using our own finances. But it would be helpful if I didn't take as real income yet. I'm pretty sure I will be qualified, but I want to know more. Because if I go to a bank, they say this and that, but it's been harder with the banks." [#70]
- The Black American male owner of an uncertified MBE construction company stated, "That's definitely been a burden because, you know I'm saying, like I told you, a lot of places and a lot of things, a lot of companies and banks and stuff don't want to take chances due to – because of the pandemic and they know not a lot of money being recirculating, you know what I'm saying? So it is kind of rough, and it has been a burden to me." [#72]
- A comment from a WBE professional services firm stated, "Now is probably not a good time to start a business. At this point, they would have to rely on their own financial assets." [#AV]
- A comment from a Black American owned MBE construction firm stated, "Indiana has been good to us as a minority owned business. We have not had the opportunity to get the financing some of the other businesses have gotten. Trying to get a loan is nearly impossible." [#AV]
- A comment from a Black American owned MBE and WBE construction firm stated, "There should be a better way to get a loan to start business." [#AV]
- A comment from a majority-owned construction firm survey stated, "Difficult for new companies because of financial requirements: bonding, etc. and size of projects, and political ramifications." [#AV]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "Capital is huge. Being able to grow... again, that's not in every firm's vision or mission, but being able to acquire, merge, and grow to have more resources to cover a bigger geography, I think, is something that can't be ignored in our industry and same with construction." [#FG1]
- The Black American male owner of an MBE-certified goods and services company stated, "But most black businesses, just to be honest, don't have enough collateral or enough relationships with banks to have a line of credit. One, we're not taught on how to have a relationship with a relationship with a bank. That's one. Number two, if your credit is not 650, I mean, you can't even go into a bank So I mean, those sort of things are hard to work with. And I mean, that's just black as black people in general, not just black businesses, but black people in general, and trying to have a good credit. If you got a good job, and you leave your job to start a business, your credit will fail. I would just say, work with a bank that will be willing to work with you, I mean, or work with the financial institution. Because they have some that are not actually banks, but there are financial institutions that are willing to work with you and grow with you. You got to have that backing before you just jump in and

start a business. Because, either you can have a grand opening and grand closing, all in the same three months, if you don't have that financial piece. And I think that's what stops most black businesses from flourishing, is because we don't have a financial piece to what we do." [#FG2]

2. Bonding. Public agencies in Indiana typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds. Securing bonding was difficult for some businesses and fourteen interviewees discussed their perspectives on bonding. [#1, #4, #9, #11, #14, #15, #17, #23, #32, #35, #44, #48, #59, #PT1] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "If you can't qualify for a bank loan, you probably can't qualify for a bond because it's all financial, 90% of it." [#1]
- The non-Hispanic white male owner of a construction firm stated, "I haven't had any problems with those, the counties just want, they just want that money basically. I've done some jobs where I crossed the sidewalk with a piece of equipment, and I had to go get \$50 permit saying that this \$50 is going to cover the damage to the sidewalk if it was damaged." [#4]
- The Native American male owner of an MBE-certified construction firm stated, "And bonding. Money and bonding. Yeah, bonding companies are... What's the word I'm looking for? So unreliable. Every time you need a bond, it's a hit or miss. It's a maybe even though you got credibility with them. The bonding company looks at the risk level, and they have a criteria that they evaluate the project to. It's a maybe. It's a maybe. If it is a maybe, that comes with an amount of cost, right? So, every time I turn around, I get a bond, they'll bond me, but my bond may go up to 6%, 10%. I can't be competitive at that. What are you guys thinking? Who's regulating this bonding system? They're requiring bonds. Who's regulating it? Your contract's at a 10% bond rate at a profit margin of less than six, six or less, your bonding company's making more on the contract than you are. Then the customers come back and say, 'Well, your price is too high.' Well, no shit my price is too high. I got a 10% bond rate in here because the bonding company is playing games. here was an incident just the other day. I have a \$375,000 generator project. We do generator projects all year long and have been for seven years. Never had a failed project. Never had a missed schedule. Never had a budget issue. I went to go get a bond for a \$375,000 contract and got the bid bond. Then the payment performance bond came in at 11%. You think I had 11% in my bid? No, I didn't have 11% in my bid. My bid bond came in, and then I got the price of the bond after the award. I can't accept the award at this point. I don't have the money in there for the bid. I'm trying to figure out how to talk with the CEO to figure out how to get this correction. What he said to me is that, oh, if it puts you over the next bidder, it's got to go to the next bidder. So I called the bond company back. I said, 'Hey.' I said, 'We've been doing generators at 3% bid, payment performance bid with you for seven years. Why, all of a sudden, is it 11?' 'Well, nobody's lending money because of the corona.' I'm like, 'Okay. I didn't know you had to lend any money for a payment performance bond. I thought it was just a guarantee.' 'Oh, no, but we secure that with the lender.' Oh, well, I guess I learned something. I guess you don't have the money in-house. I guess you go to a lender like a loan and pay them 1.5%, and they keep 1.5%, right? I wished I knew somebody that knew

bonding, the industry better because it seems to me that you don't know if you're dealing with Al Capone's brother out there is the way it seems. Like I said, it feels like you go to the mob for the money. It's like, 'What are you guys thinking?' I've talked to my competitors about this and asked them how they deal with it. They said they just quit bidding bondable projects. The SBA offers a lot of bond partners, but I've never been able to get a deal with any of them. They want the companies that got deep pockets." [#9]

- The non-Hispanic white male owner of a majority-owned construction company stated, "It would be actually if I was trying to do more union type work. I think the union, at least the International Union of Operating Engineers, they want businesses that would hire out of area halls to be bonded so that could be a potential issue." [#11]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "We're affected by the weather sometimes, sometimes we're lucky enough to be inside, but the biggest challenge is just customer relationships and finding people, and including figuring out how to grow, access to capital, and bonding, that stuff really is important. Early on at least, somewhat of a limiting factor, but we've gotten to the point now where it's not as limiting, bonding funding. When you need it, you can't get it; and when you can get it, you don't need it. When you're going and ... you're talking about working as a subcontractor, you're not signing contracts directly with the state. You're working as a subcontractor under another contractor. So, in order to protect themselves, they may require you to bond the job, so you've got to have the ability to have bonds. But the thing that's always tough is that the markets that we're talking about, isn't necessarily what I would consider incubator markets for small business and minority/women owned businesses. It's a tough market to survive in. They money's slow, the profit margins are thin, working for the state is very challenging. So, it isn't a place that I would suggest that a new emerging contractor would dabble in. He would have much better success, and we have had much better success, in the commercial markets because commercial markets are a little bit more flexible, you know what I mean?" [#14]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Deaconess projects we have submitted bids. But [we] didn't get selected and so you had to be able to be bonded. And usually when you go in with a general contractor, they're the ones that have to carry all the bonding and the performance bonds and bid bonds, and they carry all that. And we don't have to, but when you get into these things with these construction managers, then we have to carry it too. And it's not our idea of a good time to shell out several thousand dollars just to get a job. Some of them [projects that require bonds] we just don't do, some of them we tell them if we can get, if they decide to use us in the contract, we will take care of the bonding. And we find out from our insurance company how much the bond would be and handle it that way because it's... We've tried it a few times and 'cause you don't get your bid bond back, the money you paid for the bid bond." [#15]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "That has been a barrier from not knowing how to do it. So, when I went to that [City A] job I was telling you about for the dam project, before you could even bid on it, you had to have a bond. I do not understand bonds. That is so outside of my scope of anything I've ever dealt with, and all I did was finally found somebody that would give me a bond so that I could have the bid or whatever it was. I don't remember what it was now, but and I had to give

them all my information, give my firstborn child and everything else to get them to put that on so I can have that on my bid." [#17]

- The Black American male owner of an MBE-certified professional services firm stated, "To be honest with you, to get right to it, it's causing issues in my family. Let me tell you a little bit about it. I get 99% of my clients for my training business come from get paid for by a third party. Right now, everybody's getting paid for by the next level job training program, state run program. They're getting paid through community-based organizations, extremely rare for somebody. I've had a few grandmas come and write a check for \$4,000 for a young man to take welding. What the state mandates, and I totally understand this, they mandate that the training institution must have a bond that is, if I just pack up and run off with people's tuition in the dark, they can claim on that bond. The interesting thing about the bonding company, because I'm a young man, I'm 42 years old, heck, I'm married, got married, got divorced, and by the end, rather not marry again but living my life, I had cash, but I did not have the equity and fixed assets. To qualify for that bond, I had to get my mom to sign on it. My mom is a 68-year-old retired factory worker, union worker, when you talk to her, she thinks that she's just like basically cosigned my business. I can't get her to understand, too, I don't even have anybody. Most years, I don't have anybody that would qualify to even claim on the bond. I wish that, I understand why it's there because you got these scumbags that would do things like that, but I wish those bonding deals could possibly be a little easier. I know that's bonding company, that's bigger than the state, but I did have to have that bond. I guess it would be nice if the state separated out how much... Maybe after your first year in business, or two years in business, whatever, because I report to OCTS, my numbers, so let's say I had \$300,000 in tuition, and none of it was private pay. I have got a bond to cover \$300,000 in tuition even though if I took off and ran off in the night, I just wish that they would separate the tuition out in my deal where if they could look at it, say, okay, well this guy doesn't have that. We're going to bond for maybe lower money, and then that way, well, I wouldn't have to have all these assets and stuff." [#23]
- The Black American male owner of an uncertified-MBE construction company stated, "If you wanna get into a sizeable job, you've gotta be able to get pavement bonds and that kinda thing. So, it's back to the bank again. So, if you don't have that, you just gotta stand on the sideline and look, like we've been doing. I don't know if there's anything the state can do about that, but I think it's well worth considering." [#32]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "Yeah, in the beginning years, I couldn't do any tougher jobs that require so many state bonds and stuff like that. Because obviously, with the credit for the company and everything like that. So, that's been a struggle. But we've overcome those. You know, getting the company credit to a certain level that's acceptable to both different – on bonding companies, getting a company that is willing to work with you from the bonding standpoint and the surety bond, and stuff like that. Then finding a good agency that being with a broker is just to search the best for what you need." [#35]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Bonding is very much an issue, very much an issue because again the way bonding works for us, again, we have to come up with that money upfront to secure that bond. So, let's say the bond is a \$200,000.00 bond. Well, we have to come up with – show that we have the

\$200,000.00 set aside for the bond so that is a big issue. If there was a way to work around that somehow and I don't know how you would do it because, you know, I don't have an answer. But if there was some way to deal with that, that was probably the biggest issue that we're faced with. And I don't – it's minority issue because this is a small minority company, but I don't know if it's a minority issue exclusively. I think it's anybody who's doing business in construction deals with, you know, that's one of the largest barriers that you have to deal with. How can you get that project bonded so you can go ahead? We can do the work. Everybody if you're in construction, you're laying concrete or you're putting up drywall or you're laying pipe for plumbing, whatever, we can all do the work. The biggest obstacle for all of us I think – small business, not just minority-owned small business but all of us – is how do we compete with the market for bonding?" [#44]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We've had a hard time getting jobs that require bonding. We've stayed away from it just because we don't need that type of work. So, yeah, I guess that has been an issue, plus a lot of paperwork. Until it's required, I'm not going to go through hoops to do something like that." [#59]
- The female owner of a professional services company stated, "Especially on the bonding situation. Some small businesses are locked out of opportunities because of bonding. A lot. So, if that could be, you know, I don't know the answer to that question. I know we -- our company has established a relationship with another minority business who can take on bonding because they are so big, but that is -- that is not only just from a contractual standpoint but maybe it needs to be looked at from a liability standpoint so that companies are not asking for too much because of fear." [#PT1]

3. Insurance requirements and obtaining insurance. Twenty-four business owners and managers discussed their perspectives on insurance. [#1, #2, #6, #9, #13, #15, #17, #18, #19, #23, #26, #27, #30, #39, #40, #41, #42, #59, #61, #64, #72, #73, #AV] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "No barriers, but insurance is one of those things. It's kind of like your cell phone, if you don't manage your plan all the time, it'll hurt you. If you're not calling your insurance guy saying, 'Why are they charging me this? I don't need terrorist insurance.'" [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "We pay out the yin yang for insurance, general liability, that kind of thing, because I've got equipment and I've got that kind of thing. I pay \$3,500 a month for insurance. 80% of that is because I wanted to work for INDOT. The government don't care if I have a truck to deliver the products in Florida, Alabama" [#2]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Requirements have went up dramatically. A lot of these places we've got to have 10 million in coverage to work for them. Our insurance with workman's comp 100,000 a year. So, we have insurance requirements, general liability has went up a lot." [#6]
- The Native American male owner of an MBE-certified construction firm stated, "Stupid price. Stupidly priced. I just renewed my insurance. I just renewed my workman's comp

insurance yesterday. \$5,400 down payment. There's only three insurance companies in the country that'll insure us. What we do, yeah. Because we deal with high voltage from 30 feet off the ground, there's only three companies in the country that'll insure us. " [#9]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "The insurance requirements are just our healthcare is just a very, very big debt for us every year. And we, as a company have been a very healthy company. Our people participate, we had Humana and we participate in the Go365 where we had a young man who got cancer. And he actually died last year, but we were just ripped. They took our money the whole time we were healthy. And then when we got unhealthy they didn't want us, so we had to move from Humana to Anthem and we could barely even get it. And now we're paying the price still trying to get back to where we were. So that's our biggest payroll and insurance is our two biggest skill sets we have here" [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We work with a local insurance company and they've been good to us as far as... we pay a lot for it, but we have all the umbrella coverage and everything like that, you know, that they require on these big job sites. That's been a few things that a few times, since there are separate contracts, something that's through a construction manager, they don't cover the whole job. So, they expect you to get the same like \$5 million liability, yours is only maybe a hundred thousand dollars or something. And when they get really ridiculous like that, it's just like, 'You want us to do what?' And they want you to [get it] and some of them want you to carry it, your warranty in your insurance for five years after you did the work." [#15]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Well, well, it's a big barrier for me, but we finally got it done. I don't see how people go into business, honestly. So, we have had our personal farm, our home, life insurance has been with State Farm Insurance forever. I mean, since we got married, so we've been married 30 some years, 30 years with this company. Never had any major claims. I mean one or two little car things, but that's it right? No house burning down. No, nothing, nothing. Spent tons and tons of money through the insurance companies as you know, and we walk in, we say, 'We want to be covered as a small business. I need some general liability insurance for [my company]. We're going to have construction. We're going to remodel some homes. We're going to do this. We're probably going to, we got a little bulldozer. Didn't have a bulldozer, had little excavator, little mini excavator. We're going to work on some septic here and there.' The insurance agent, who's our friend, I've been friends with her since high school, worked her tail off with her company, fought like a banshee to get us coverage. They still denied us. They would not take on our business because they only do handyman kind of work and things like that. Even though their little sign says life, auto and business, they do not really do business insurance. I had to find something, right. So now I'm just our asking people, 'Where do you get yours? Where do you get yours? Where do you get yours?' They sent me down to one lady down here in Bedford, which she's fine. I mean, I'm probably paying too much, but at least I have it right now. And so, it was all because of small business, so I'm talking to this agent at this place. I'm telling her all the stuff I'm doing, and we have to go through and finagle all kinds of information for her. Have to decide what percentage is construction. What's going to be septic. I'm like, 'I don't know. I'm just starting up.' I'm like, 'Maybe the septic thing will shoot off. Maybe this.' I said, 'I know I have one big job coming, maybe.' It's like, 'Okay, maybe my business is 33, 33, 33 in these three categories.' So, we

head down that path. And so, she has to shop me out on the market, right, because she's an independent agent. She just helping me with all these different agents. She could only find one, one that would take me. And I have no claims. This is no claim people here. Right. So, I mean, that just drives me crazy. I'm like, 'Why can't I get insurance?' She finally finds a company, [Insurance firm A] is who we ended up with, who I don't know if they're cheap or not, and now I have it. And the only reason they're taking me is because the lady on the other end of the line is willing to take a chance on me as a woman owned business and that I'm in construction." [#17]

- The non-Hispanic white male representative of a majority-owned goods and services company stated, "There's a lot of insurance requirements. When you think about escalators, those have a lot of moving parts and occasionally, you hear, maybe somebody in another state or another country that lost their toe on an escalator or something like that. And then an elevator, a lot of moving parts, etc. So, there are definitely insurance requirements and that differs from customer to customer. [Firm A] has one set of rules and a church down the road here from my house has a different set of rules. So, it's really making sure, you just understand each facility for what they want and what they are" [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I have errors and omissions insurance through my day job, but it doesn't include work that I do on the side, but I've never had errors and omissions on my side work. If you read the rules for architects, errors and omissions insurance only goes so far. Architects are special in the fact that when you stamp a drawing, you're personally liable for that, regardless. They can come after you. They can take everything from you. No matter what errors and omissions you have, it's an old timey deal. It's an 1800s way of doing business, because when you put your seal on the drawing, there's been an increased liability there that is not even covered by insurance" [#19]
- The Black American male owner of an MBE-certified professional services firm stated, "Yeah, it's expensive and I know the worker's comp, there's state stuff involved, I don't know all the ins and outs of course, with that. I know that the labor, the worker's comp is our most encompassing cost when it comes to the staffing." [#23]
- The Black American male owner of an MBE-certified goods and services company stated, "Some of those benchmarks may be so high, you know, \$5 million policy for something that you only carry \$2 million, puts you out of the park and you can't really afford to pay for a \$5 million policy that you're not generating work from. So, I think, like I said earlier, if they really want some of the smaller MBs and stuff that will work for this, I can see you bidding a job and it's then contingent on obtaining this insurance minimum requirement, and that would give people a chance to get the bid and it would show whoever, the bank or whatever, like 'I have this job coming up and I bid to pay it. Can we get a short-term infusion for 60 to 90 days to pick up our insurance and make payroll for one or two cycles?' And then you offer money." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "That can be a challenge. There are certain requirements that are kind of a part of boiler plate contracts that come from the State and come from other places. Some of the insurance that they require really is not that relevant to us. We generally can get them to take it out of the contracts." [#27]

- The Black American male owner of an uncertified MBE goods and services firm stated, "We did have an insurance requirement that I felt was excessive. We were required to have \$2 million worth of insurance for a project that didn't do \$1 million and had no – had low levels of potential for exposure in terms of damages or potential liabilities. I thought that was crazy." [#30]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Now, insurance, different companies ask for a higher insurance rate. They want to make sure you carry so many millions. Some other companies, again, when it boils down to office furniture, I mean you're not really rebuilding the building or anything. We're just putting furniture together, and stuff like that. It shouldn't really matter but it does. Some companies want you to carry \$3 million in insurance. There were a couple of companies that told me we need to carry a \$5 million insurance policy under our business, so it does matter." [#39]
- The non-Hispanic white male representative of a construction company stated, "Sometimes the people that we work for, the actual insurance requirements that they have can be quite extensive. But as far as getting any coverage, no." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I have not had that problem with obtaining insurance. We've maintained general liability insurance and Worker's Comp and an umbrella policy on whatever we've had to get or do. So, I don't – I have not experienced any discriminatory issues with that. I have heard other African Americans in conversation, 'You can't get the insurance,' but generally, I don't think it's necessarily so much – I don't know that it's so much they were discriminated against as they just didn't know how to go about walking through the processes and applying. Then when they did, they either did or did not have the monies available to make those down payments to secure those certificates of insurance." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "We've had no issues really with that. The biggest thing is just that we do a lot of different types of work, blended work, so it's hard to find carriers who will provide errors and omissions policies for organizations like ours, where we're providing both hardware and software and consultation services." [#42]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "The other thing is the biggest thing with labor is health insurance. Health insurance costs are high. People are looking for health insurance. You could find labor if you put a lot of money up but it's hard to get health insurance for employees." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I mean, when you walk in the door in a major company like Middle or Southern Company or Dominion or any of them, you're required to have \$5 million worth of insurance just to walk in the parking lot. It's not good. Something needs to be done about that, Because that stifles competition greatly." [#61]
- The male representative of a majority-owned professional services firm stated, "On small occasions where we've had to work for railroad companies, a lot of times they'll require greater insurance. So, in some instances, we've had to pass on some of those jobs." [#64]

- The Black American male owner of an uncertified MBE construction company stated, "I'm definitely going to have problems in terms of with my insurance because, you know, by me being a new company it makes me high risk, you know. And on top of not being an experienced truck driver for the time that the insurance company be looking for. So, you know, my insurance rate's going to be extremely high because I'm looking at the business part but also being in the business part of it I got to have, know I'm saying, the experience of the driver within myself as well. So yeah, my insurance going to be extremely high if I'm going to have insurance." [#72]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Insurance for trucking is a little bit too high." [#73]
- A comment from a majority-owned professional services firm stated, "Healthcare is extremely difficult to enter because of traditional insurance plans as well as Indiana Medicaid and the 3rd party administrators that they use for benefit determination." [#AV]
- A comment from a WBE professional services firm stated, "Biggest concern is health care costs. Insurance is through the health exchange. Recently, premiums have increased." [#AV]

4. Factors public agencies consider to award contracts. Nineteen 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. [#9, #13, #21, #26, #27, #28, #30, #34, #39, #44, #48, #62, #67, #76, #AV, #PT1, #PT5] For example:

- The Native American male owner of an MBE-certified construction firm stated, "Yeah, cancellation of contractor's payment is a problem. Yes, that's a huge problem. To bid a project, and they cancel it for convenience. No, that's a huge problem. If they put an RFP out, they better award it. Now, if I lose it, that's one thing. With canceling it, that's crap. But discrimination comes on the financial stability of the company, right, so they will be DQ us, and DQ is for disqualification based on financial responsibility. I don't think, personally, if it's a contract and I have a responsibility to perform, I don't think that they should be discriminating us because we don't have so much money or something in the bank. That cash flow goes up and down every day. I don't think that should be a validation requirement." [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We've never gotten any business from the state We don't know. I've done everything I know. And just like the Census Bureau up here, they told us to go get that WOSB contract. And if we got that, like if they had daily things that came in and they needed help with them, that they didn't have to bid those, they could give it to us if we were ... Because we were considered a smaller business and we were right here by them, but that hasn't ever happened either. And we followed that up till we're blue in the face. And we just don't know what we're lacking here, what we're doing We just were told, 'Hey, get this done. We need to do this right now. And we can give you some business.' So, we got it done. And then I don't know what happened, but we just keep calling back and they came for a tour and we bid on farther fulfillment of business. And what happened with that was we did this. It was \$895,000 contract and we lost about \$5,000 to a company that wasn't even a warehouse. It was someone who builds warehouses. And they just somehow came up with the bid at the

last minute. So, it was kind of a shady thing to me Census Bureau we kept calling and asking up until the very end. It was like, 'We're coming with you all.' We literally were measuring skids and laying out our warehouse, the everything for them. And then all of a sudden at the last minute they decided to give it to a builder who was building a warehouse and came up \$5,000 less than us. And I think it's because he didn't even know what he was bidding somehow, somehow they got the price in there and just came in a little lower." [#13]

- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "In terms of competing against much larger organizations or bias in terms of certain organizations, whether it is electric utilities or whatever, and the tendency that they may have to look at or to favor organizations from outside of the state or what have you. I think it would pretty much be the issue of pricing and also the issue of basically preferences that the group that is basically organizing the bidding process might have in terms for certain bidders" [#21]
- The Black American male owner of an MBE-certified goods and services company stated, "Sometimes the state, you know – I've often said you can't let dollars be your driving force as to what you pay on the job. Sometimes cheapest isn't always better for the job site. You get what you pay for. And then the secondary arm of that is if you give a big leg of the majority of the work to some companies in another state, at the end of the day that money's going out of state and they lowballed the price and made the money and took what's left back out of the state. Yeah, they may have a field office here, but at the end of the day that field office is only a small percentage of the revenue they generate. And at the end of the day the main tax dollars, payroll dollars, whatever, the revenue's going back to our corporate offices. And a lot of times that's not here. So that's one of the biggest disadvantages I find out, that the state needs to look and say, 'I'm not going to let overall cost always be the driving force as to what we pay on the job,' because a lot of times small businesses can't compete with the bigger ones 'cause the bigger ones work on volume." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "Well, certainly, historically, the RFP process has been very – at least for me, has felt like kind of a black box where you kind of get into an RFP and you're not – there's not an opportunity to have much of a conversation with the people who are looking for the agency because it all goes through procurement. I think an era that has happened in our industry is that there is a thing called a markup on media and that, often, the agencies will select – the State agencies will select the vendor that has the lowest markup when, in fact, that markup is not high enough to support the type of negotiations and management of the media buy that really is going to save a lot of money. So, they actually – even though they're spending less money, they're actually spending more money. So, again, it's the law of unintended consequences. Sometimes you can try your best to try to do something good. But it can have unusual effects. So, I think that would be one thing that I think would improve or could be improved is not just to look at those numbers but to get – to look at the qualifications of the people first, and then maybe meet with those people and ask them, 'Why is your rate this and the other rate is this,' and to make sure that you're actually buying the best partner for a particular type of work." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "We did the PO and submitted it for the entire state, which at that time we were the

lowest bidders, but we didn't get the contract. Reasoning behind that was they said that we didn't acquire enough background or enough experience [after working on the same contract for four years]. And so that for about – I guess for about a couple of years went by, and I did – this came up for bid again. I decided not to go through this process 'cause this was a long, tedious process. And from prior experience I figured that we was not gonna – we was wasting our time anyway. at the time there was a community corrections that was up for bid. We bid on that. We was the lowest bidder on that. We didn't get it. I believe – I don't know who got it, but I – we looked at the prior company, what they bid were, and we were lower than them on that bid. So, I don't know what they go by. Or if they said in the bid if it's a tie or they have the right to give it to who they really want to give it to.” [#28]

- The Black American male owner of an uncertified MBE goods and services firm stated, "I did not feel that the factors were discriminatory. They were applied to everyone who wanted to bid on the contractual requirements. The process might have been discriminatory based on the size of the business.” [#30]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "It used to be that you just submitted – somebody would hire you and you'd submit something to the State Highways to get approved. That was years ago, barely 2000. Then I think to keep smaller companies from getting state work, the lobbyists for the bigger companies – this is just my opinion. The lobbyists for these bigger companies – of course I don't have a lobbyist. So, the bigger companies have a lobbyist. They devise ways to have questionnaires that prohibit smaller companies from even getting the work. So, I mean we're pre-qualified with the State of Indiana to do certain things. We can do more. But you have to be pre-qualified to do certain things. Sometimes it hurts us because we're not pre-qualified. But we try to stay away from doing any State Highway work.” [#34]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I think so, because when there have been certain projects and stuff, when they want to have a certain name or a certain product, they'll sit there and say, 'We're bidding this, but it's got to be Steelcase.' Even though we have furniture that will match up to it, looks exactly like it and everything, because it's not Steelcase, we can't bid. I don't know if that falls into the line or not, but name branding, when they do name branding of stuff, some places, they'll tell you it could be close to. But most of them, they'll tell you, 'If you don't carry that brand, you can't do no work here.’” [#39]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "When we lose, it's usually because somebody else had a better bid, so somebody can do something cheaper or it really comes down – I believe it comes down to us with equipment because there are times when we have to bit on a job and let's say we need an excavator and we don't own an excavator so we have to hire the excavator. Well, we might be bidding against a larger company that has two excavators and guess what – they don't have that charge. They can in and win.” [#44]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "They don't understand, though, that our portion in the process, the development process, our contribution is at the very beginning. You have a developer, and the next step is the architects. We're architects, you know. It's not a bidding process, you

know, it's not a submittal of pricing. It's an arbitrary decision made by the decision makers.” [#62]

- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "The world's changed. You know, people don't want to shake your hand and know you. And I don't know how people can choose companies to work for just over a bid that's submitted without meeting somebody. How do I know I want to work with you unless I sit and talk to you? So, I think our world has gotten very fast because of – there's two sides to that, it's kind of nice too, 'cause you can expedite and just say, 'How much would you charge' – I mean it makes us able to do business from far away, because we'll have a referral, so maybe you don't have the opportunity to meet. But I just think personal relationships have changed. So, there's good and bad, I guess. I shouldn't say it's all bad, 'cause sometimes it is nice to get a client – I mean my call this morning was with a client with a guy, and I have never met him in person. I see him on Zoom every Tuesday morning or every Wednesday morning and he's wonderful. We made a relationship that way and he likes us and we like him. So, there's good and bad to it, but I think personal relationships are hard to come by now; people just want to know what your bottom line is, how much you're going to charge them and how fast you can get it done.” [#67]
- The Subcontinent Asian American representative of a business development organization stated, "I think government contracts, it's really, I think ... that's an interesting area. There is the tendency for reassigning contracts to the same people over and over.” [#76]
- A comment from a WBE professional services firm stated, "It's been a real challenge to get business in the field that we do -- those with deep pockets seem to do the best--we don't have the budget to contribute to political parties.” [#AV]
- A comment from a Hispanic-owned MBE construction firm stated, "Small businesses were not given much opportunities vs the bigger companies.” [#AV]
- A respondent from a public meeting held in Greenfield stated, "Understandably, for a lot of contracts, corporations are looking for cost effective solutions, but a small business is not in a position to come in at the least cost.” [#PT1]
- The owner of an MBE-certified professional services company stated, "Quite frankly, as you embark to talk about the cost of doing business with minority owned companies, I think one thing that varies is that it's a myth, it is always not more expensive to do business with a minority owned company. The state of Indiana versus if you are working for a corporate entity, I have worked with both, there is different sets of guidelines, so therefore the myth that working with a minority company is going to be more expensive, I think there needs to be some readjustment of the mindset and discussion that hopefully we give first and foremost contracting's mindset at looking at how I can include -- be inclusive of the minority owned companies.” [#PT1]
- The female owner of an uncertified WBE goods and services firm stated, "They started an RFP process. So, they score you and they score you up to 25. We get the numbers back and somebody can't count, and it says you got a 24 out of 25 because you didn't have your company for over ten years. We have been in business 30 years.” [#PT5]

5. Personnel and labor. Sixty-eight business owners and managers discussed how personnel and labor can be a barrier to business development [#1, #3, #4, #5, #6, #7, #9, #10, #11, #12, #14, #16, #17, #18, #22, #23, #25, #26, #31, #32, #35, #36, #37, #40, #41, #42, #44, #46, #48, #59, #63, #66, #71, #AV, #FG1, #PT3]. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Our biggest problem is we can't find people because we're competing against Subaru, competing against... GE is building high-bypass fan jet engines over here. We got Saab who's coming to town. So it's hard to find people. Plus, our work environment is not exactly perfect. I mean, we're asking people to work weird hours. That's a problem right now for the industry because the public officials want you to do all your work at night so you don't cause backups. Well, some people don't want to work at night, see their families, so that's a problem." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I do think there's a ton of pressure coming from Salesforce in particular, driving up salaries- big time. They're buying talent, they don't care what it costs. And all the rest of us are competing and their benefits are crazy good. And so we're competing for this talent and it's putting a lot of pressure. I think the state maybe wants to keep their rates static or whatever, but they really have to look at how are salaries being impacted by bringing these companies in? So workforce development, that's the big deal for us. I feel really responsible, not just for the state to do it, but for us to figure out how to develop the talent pool faster. We need it really bad. I mean, we have what, 2% unemployment or something, right? I think, I mean, it's really, really low. And so it's super hard. I mean that, for sure. And really, we have explosive demand for our services right now. And so the only barrier is fulfillment, right? Like to get to hire people fast and then to scale our team." [#3]
- The non-Hispanic white male owner of a construction firm stated, "I mean sometimes it's hard to find laborers. I'll just have a week where I need help for a week and sometimes it's hard to find labor and then you go to the temp agencies or try to and then they want you more, they want you to sign up for more than just a week. And then they constantly call you all the time and it's like, I'll call you back if I have work where I need a person." [#4]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Well, it's not as easy to obtain help these days as it once was. And I honestly, I know, I blame that primarily on the government for this reason, I've got some duplex apartments right next to my place and there's a couple that live over there that are less than thirty years old. Both of them, they're not married, but both of them are on disability and plus they get everything else, food stamps and everything, why work?" [#5]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Personnel and labor has been a bit of an issue. We would have picked up a good plumber last summer or possibly another welder if we could have but they were not available." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "That one's difficult because finding qualified people that I could trust to do what exactly the way I need it done, not a lot of people are willing to do that on a part time or fall in basis." [#7]

- The Native American male owner of an MBE-certified construction firm stated, "That's always a problem, qualified personnel and labor. A lot of projects, we use the HAL on. Even they're so thin, it's hard to get help. I can't get qualified help anymore. It's just like these kids don't want to work, and they don't want to go back to the trades. They all want to sit and stare at computers. That's why our industry's hurting, hurting bad." [#9]
- The female representative of a WBE-certified construction firm stated, "That is our main issue. Most people don't want to be plumbers. It doesn't smell good." [#10]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Good help, actually some decent employees It's a problem for this whole industry" [#11]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Always finding employees is hard. That's always a difficult thing." [#12]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "We're affected by the weather sometimes, sometimes we're lucky enough to be inside, but the biggest challenge is just customer relationships and finding people, and including figuring out how to grow, access to capital, and bonding, that stuff really is important." [#14]
- The Black American male owner of an MBE-certified construction company stated, "I'm a minority company and I definitely should have minorities working for me but, I got one non-minority that works for me and he comes to work and he sticks with me, even when I'm not working, he will help me out around here and stuff. I'm battling a situation with cancer. It's hard to find... I'd love to have some young people, minorities, that want to learn a skill and are willing to work. That was partially my goal when I set out because it's hard for us to get in the skill. It's a play. They won't want us making that money" [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "It is a problem and it's going to be a problem because these other two workers aren't going to want to quit their job. They're still going to want to just work two out of three days. And then [an employee] has already tried to reach out to find just a general labor person. And we can't find anyone. I mean, it's really hard Now we've done a little bit of searching on the side and they're really hard to find. And I had a guy tell me, this was about a year ago, he was talking about workers, and he's a really small business, but he's trying to hire a guy here and there every once in a while, and this is what he calls it. He calls it the 20/50 rule. He says, the 20-year-olds think they deserve \$20 an hour just to start off to be his drywall helper, which is too much money for that kind of position to start. And then the 50-year-olds think that they should be 50% owner of the business when he hires them and there's nobody in between. I'm like, 'Oh, that's interesting. The 20/50 rule.' I'm like, 'Wow.'" [#17]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "It's a skilled trade where the union or whoever else, they have the organization to get apprentices in and all that stuff and we pick from their pool as needed. But I do know there were three or four times there where there was nobody in that pool in the state of Indiana. When we were all growing, the barrier was getting good quality technicians because that pool was completely empty. So that was the barrier a year or two ago." [#18]

- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "It's hard for us since we are farther from where usually therapists are staying or living. And, of course, the pay as well, they want to be paid higher since we're farther away." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "That's my job is to find people, because that's what companies pay us for. That's what we do, it's always tough to find people." [#23]
- The Black American male representative of a construction trade organization stated, "I think the biggest challenge particularly for people who had to perform work was meeting the work force shortage." [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "There are more jobs than are employees; it's making it more challenging right now. Just because if you don't have people willing to pay the increase then it's hard to get candidates to fill the job. But I think that's everybody out there now sort of sees that, even, you know, people at McDonald's now making \$12.00 an hour and you want a security guard to go put himself in harm's way, where he's got to be the buffer, you know, and pay them the same as McDonald's. Well typically, you know what, it's a lot safer to go dodge hot grease than dead bullets. So I'm like, 'I'm not doing that for \$12.00. I'll just go to a warehouse or I'll go to McDonald's.' I mean yeah, it's McDonald's, but I won't worry about verbal assaults and possibly physical assaults. I mean sometimes, you know, some of the work that we've done in the past where we try to work at a certain level with the work where they've done. And I'd like to get back into it, because I've found that that's a bigger obstacle for recidivism in the criminal justice system. And one of the sections of work that I really think that doesn't require a lot of scrutiny as to your past is when we do a lot of traffic and choke flagging on the roads. 'Cause whether you were ex-drunk driver or ex whatever, domestic violence person, directing traffic really has no real correlation as to what your crime is." [#26]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Just a shortage of skilled laborers or people going into the trades." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "Mine is so simple, if we put it all in a little nutshell. There's been the lack of money, and the lack of qualified minority personnel. Now, they took all the shops out of the schools in there where I live. It used to be that. So we got kids now get out of high school, coming into the area where I live, in the ghetto – that get out of high school and don't know how to use a shovel. So what do they become now? Candidates for these privatized penitentiaries. And, y'know, say, 'Hey, that's the way it is with us.' So if we gonna get into the business of building well for the next generation or whatever, we got to have a new set of tools. The fix of this gets bigger, much bigger. That's why I'm starting a school now, see? So that we can develop our personnel now, so that we have access to real qualified personnel to do plumbing and electrical and HVAC, whatever. Because just as sure as me and you are talking, that's the curtain that keeps the little guy out of the big arena. And what I do is, I recruit guys that need another chance. This brings in the ministerial portion of my business, if you will. And I take these guys, and I get 'em ready for the apprenticeship. 'Cause if you did a study now on the percentage of minorities in the mechanical apprenticeship, it ain't good. It's not good at all." [#32]

- The Hispanic American male owner of an uncertified-MBE construction firm stated, "You find some good guys and you find a whole bunch of guys that don't want to work. They think their work's so much money and they don't want to do certain things. So, yeah, unskilled. They still in the union, but we find a lot of unskilled people coming out of the union as well. We have to go through a whole bunch of guys to find – out of five guys, I could find one decent guy to do what we do. But it's always a burden and troublesome to find a decent guy that's willing to do what we need to do and anything. These guys get paid well." [#35]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "That's a hurdle, definitely. Just the industry itself, or just the condition of the workforce, it hasn't been a good situation. If we had more people, if we had better people, it would be even bigger and better. We initially had done all the job boards and tried that way, and it just hasn't been working for us, so right now we're just using referrals from other team members with HOODZ Right now, the referral program is working best." [#36]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "Personnel, I haven't grown much so I cannot answer well that question. I do have two of my sons that are electricians, too, so they can work with me anytime. Apart from that, I have one or two guys that just come in and out, so personnel could be a little issue as we grow." [#37]
- The non-Hispanic white male representative of a construction company stated, "It's hard – in our industry, it's hard to find qualified HVAC technicians and installers. And then, also, with licensed plumbers. Because usually once they're in a company, they are not looking to move. And a lot of kids are no longer going into the trades, so it is hard to find qualified personnel. We just put out a lot of word-of-mouth. We contacted the schools, the trade schools and asked them to post our names and information. We basically do headhunting. We try to contact other people that we know that are working in other industries to see if they'd be willing. And then we also do inhouse training and stuff like that. We also have an apprenticeship program for our plumbers." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "There are definite issues with labor and personnel. There is some ethnicities that will not work with us. Without question, I'm pretty sure, it's because we're African American. They just won't. I mean we're – there are all of these pre-conceived opinions and perspectives about African American people that is just not true. No ethnic group of people are the same across the board. It is just not true." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "That wasn't difficult, either. I think Indiana has a really great program. We've taken advantage of the INTERNnet, so a couple of our employees have actually come to us through internships, and that was a really great resource to sort of start out." [#42]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Not an issue because, again, the personnel is not an issue because we're union so the union trains everybody and then when they come to work for us, we train them on how we want them to do it. And if they don't make the cut, we send them right back so we don't have those issues." [#44]

- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "That's an everyday ongoing, before even COVID-19. I mean the employee that I have now is – there are days that I just want to strangle her. I cannot believe that I spent so much time training her and she still makes the same mistakes, to the point where I've had to write her up twice. And I've never written anybody up. The job's not that hard." [#46]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Labor has been tough recently. It's been really busy. It's easy to find labor but it's hard to find qualified labor." [#59]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, it has to do with the education in college. I mean, I don't think a lot of kids come out of school that have degrees in architecture that know what the real profession is. And, unfortunately, we had to kind of educate them. And we have to reeducate them. They've been thinking the profession is all about design only, and it's – we have a lot of legal responsibilities, contractual things, and they don't seem to understand that. So, I think finding people that want to learn, that. And then the other thing is, you know, not everyone needs to be a registered architect. We have a lot of trade schools that teach drafting and construction management and things of that sort. I think it would be very helpful if there were more opportunities for young people to enter professions by having more vocational, if you will, opportunities." [#63]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "As we grow, we have found that the best success in growing the staff is from the entry level up and letting them mature. When we bring in, I want to say seasoned veterans, people who have been in the engineering business for a long time, they don't – we haven't had as good success there." [#66]
- The Black American male owner of an MBE-certified professional services firm stated, "think one of the harder things for people of color, MBEs, XBEs, in my view, can be that there's a – We paid well, but we also were able to draw, and have been able to draw, good associates working with you. But I've noticed with other XBEs that either one, they may not pay well, and there may be majority firms that may not pay well, as well; but also the level of expertise that they may be finding with their associates, their staff is not, my view, not on par with a lot of their majority counterparts. So with any firm, I think you have your A team, B team, C team, D team, whatever. I've noticed, and I believe that with some of the XBEs, they may have an A team, but then they may immediately jump down to like a D team. Where with majority firms, you still may have that B and C, and I think that's more so due to the fact that either pay or interest or ability to just draw to a small – Most XBEs are smaller firms by comparison. I think that may be somewhat of a challenge." [#71]
- A comment from a majority-owned construction stated, "No labor, I would expand to the moon if we had a labor force." [AV]
- A comment from a majority-owned goods and services firm stated, "We have difficulty in hiring good personnel." [AV]
- A comment from a VBE professional services firm stated, "The lack of work force makes doing business impossible--too many entitlement programs make people not want to work." [AV]

- A comment from a VBE construction firm stated, “There are no qualified drivers in trucking- - no one wants to pay truckers for unforeseen circumstances or for healthcare--truckers have not had any pay increase for the last 30 years.” [AV]
- A comment from a majority-owned construction firm stated, “Hiring is very difficult.” [AV]
- A comment from a Native American owned MBE professional services firm stated, “There is plenty of work available, but not enough people to do it.” [AV]
- A comment from a majority-owned construction firm stated, “We try very hard to hire over the road drivers in Indiana but we’re not able to retain them. We train them and they leave in under 90 days. We’re not able to retain them because they want local work in Indiana, they use us because we have a good training.” [AV]
- A comment from a majority-owned goods and services firm stated, “We need people to want to work.” [AV]
- A comment from a majority-owned professional services firm stated, “Labor is in short supply.” [AV]
- A comment from a majority-owned goods and services firm stated, “Employers are having trouble finding employees who want to work.” [AV]
- A comment from a Hispanic American owned MBE construction firm stated, “We can’t hire enough electricians for the amount of work we have.” [AV]
- A comment from a majority-owned construction firm stated, “ [We] need workers and employees.” [AV]
- A comment from a Hispanic American owned WBE and MBE professional services firm stated, “In our area we have a surplus of jobs available but we do have skilled labor. It’s not a technical issue its a trade issue.” [AV]
- A comment from a WBE professional services firm stated, “Obtaining qualified employees is our first concern.” [AV]
- A comment from a majority-owned goods and services firm stated, “There is desperate shortage of qualified diesel techs and we are well staffed with qualified heavy truck [technicians].” [AV]
- A comment from a VBE professional services firm stated, “Getting work is not our problem but getting people to come to work is hard.” [AV]
- A comment from a WBE professional services firm stated, “Hiring college graduates that are from Indiana, keeping employees in Indiana most of our employees move to a different state.” [AV]
- A comment from a majority-owned goods and services firm stated, “Find me some workers.” [AV]
- A comment from a majority-owned professional services firm stated, “I need employees more than anything.” [#AV]
- A comment from a majority-owned construction stated, "Need some young people who want to learn how to do physical work and become smart blue collar workers." [AV]

- A comment from a majority-owned construction firm stated, “Labor force is a problem. Difficult to find people who want to labor/work..” [AV]
- A comment from a VBE and MBE professional services firm stated, “Extremely hard to get workers in the state especially during the winter months.” [AV]
- A comment from a VBE professional services firm stated, “There is plenty of work available, but people do not show up for work because they're receiving unemployment.” [AV]
- A comment from a Black American owned MBE professional services firm stated, “We need more diversity in my industry.” [#AV]
- A comment from a Native American owned MBE construction firm stated, "Is difficult to find people who qualify to do this type of work. Summer interns are found in job fairs and are brought in and trained. Grow business by using internships from state Indiana colleges. Biggest hurdle is obtaining labor, even though there is plenty of work. Not enough labor. licensing & qualification is a challenge.” [#AV]
- A comment from a majority-owned construction firm stated, “Trades are hurting not enough responsible ppl. not enough skilled techs.” [#AV]
- A comment from a majority-owned construction firm stated, “finding qualify project manager.” [#AV]
- A comment from a majority-owned construction firm stated, “It is difficult to get good employees: employees who have a good work ethic, and also those who are trained and experienced.” [#AV]
- A comment from a majority-owned construction firm stated, “There is an issue of finding qualified staff. There is a lack of training.” [#AV]
- A comment from a majority-owned professional services firm stated, “Difficulty- there’s a shortage of people in engineer[ing].” [#AV]
- A comment from a majority-owned professional services firm stated, “hire more people to help upgrade development trade.” [#AV]
- A comment from a majority-owned professional services firm stated, “There is a shortage of manpower in the industry.” [#AV]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "We are having trouble recruiting new apprentices. It seems to be not the sexy occupation that people want to go into... There are a lot of women in the architecture school world, but then when they get into the professional world, the numbers drop off precipitously. So much of that is due to things that are like childcare options, having time to be both a parent and a professional.” [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, “It's just so pitiful in architecture and AIA, we have almost 100,000 members and it's half of 1% are black women licensed architects. I'll just throw out some numbers, a little dangerously there, but it's really low. Maybe 3% individuals of color. That's crazy. So hopefully all this work going on, 10 years, can those numbers double or triple, and that's still a far cry short from where they need to take, it's going to take time. Women represent, I

think, 50% to 60% of most university programs in architecture. But yet probably represent, not really go on a thin branch here, but I'm going to say something like maybe 15% owners of firms across the country are women." [#FG1]

- The male owner of a goods and services company stated, "One, we have a shortage of skilled labor. So, we have a lot of jobs that's unfulfilled, but at the same time if you reach out to fulfil those jobs, we have a climate here where if you are from outside the community you are not necessarily welcome to come work." [#PT3]

6. Working with unions and being a union or non-union employer. Thirty-three business owners and managers described their challenges with unions, or with being a union or non-union employer [#1, #2, #3, #4, #5, #6, #7, #9, #10, #11, #13, #15, #16, #17, #18, #23, #26, #31, #32, #39, #44, #61, #66, #67, #70, #71, #AV, #FG1, #PT5, #PT6]. Their comments are as follows:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We're union. So, our guys are working out on the road, all part of the laborer's union. It really helps you. I'll tell you why. It's the prevailing wage law. So, all of our people are in the laborer's union. The prevailing wage rate is \$25.49 an hour. I don't care if you're working for INDOT. If you're on any public project, that's the prevailing wage. It's subject to this law called Davis-Bacon, okay? So, you're also required to pay about 50% more, which would be 12 five, \$12.50, in fringe benefits, okay? When we're in the union, we pay our guys this and this amount goes to the union every month, so based on the number of hours they worked. If you're not in the union- This goes to the employee and then taxes are taken out. But if you're not a union company, you have to pay this to the employee, and it's treated as wages by the government. So, and what do you pay on wages? You've got FICA that's coming out. So, you've got 715%. If you pay it to the union, it's not subject to FICA. So, for every hour that you work, you're saving, which you're sending it to the union, you're paying 0.0715 times 12.50 you're saving 89 cents for every hour. Well, if our guys are working 2,000 hours a year, that's \$2,000. And if we got 30 guys working out there on the road, that's \$60,000. So, by being in the union, we saved \$60,000 a year. Well, if they're not union, they're going to have to pay the FICA. But as union guy, you don't have to pay it. So, it has an advantage. And the rules are the same because it's still Davis-Bacon prevailing wage. You got to pay the same thing and why not save some money." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I guess you could say because I can't get certain work, I can't pay competitive wages, so that could be the domino effect of it. The answer is that's a concern." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Other than this building is owned by the Teachers' Association. To do work on anything you have to have union labor, and I think it all costs more money for us to do improvements here. But other than that, I don't have any problem." [#3]
- The non-Hispanic white male owner of a construction firm stated, "Yeah, it can be a problem because people that union don't want to work with people that aren't union. I've

done some jobs in the past for previous companies that weren't union, and we were on union jobs, and it wasn't the greatest situation to be in." [#4]

- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Well, I'm not union but I have suppliers that are union and normally if it was through a union, they would prefer to have a union made product, which we can normally accommodate them with." [#5]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "We have worked in Bloomington, but it is rare. I know that there's a lot of opportunity down there to work. I do get asked to go to Bloomington. But once again, for us it's a different local on the piping side of things. It's a different piping local, so I'm only allowed a two-man portability and then I've got to hire out of their union hall to do work down there. That's really not the route I want to go because what happens to me on the union side, which you wouldn't care anything about this. What happens to us is we're the new guy in town. So, then we'll get all the [folks] that are sitting on the bench. We don't get the good help off the bench at the hall. That pretty much ruins my opportunity to make a lucrative project. They do tell how many of our men we can take into somebody else's jurisdiction, which in a way does limit me because I don't want to get in trouble with the union hall and sign contracts with them. Not racially, but union or nonunion employer, yeah. When you're a union employer, your rates are higher because you guys are paid better, and you often benefit. But at times there is an issue. There are places that you will go that they don't want union people there. A lot of these private factories and stuff like that, they don't want union people there. So, we're real quiet about the whole union thing." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "The only thing is they request that you would have to carry the union bag. So that is a barrier as far as getting union work is because they want you to be a union shop. I am a nonunion shop, but I did at one point belong to, they call them the graphic art industry union. But the union basically told me at the time that I joined them that I had to pay my fees and my dues, but I wasn't allowed to go to work. That made no sense to me. So, I dropped out of them." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "Well, we're what you call an open shop, okay? So, we have the choice. Because Davis-Bacon wages, we have a choice to either use union contract or hire out, so they call us an open shop because we're federal. Now, Indianapolis work, we have to use union. Purdue, we have to use union. Yeah, they don't have good resources. They're all busy or it was all busy. We'll see what it like when we go back to work, but before, we would call the HAL, and they would send out Mo and Chuck that nobody else wants them either. We keep them separate. We definitely don't mix and match. No, we don't let union... It's all project-related and specific to a project. We don't allow union into our core business. So, it's project specifically." [#9]
- The female representative of a WBE-certified construction firm stated, "We don't do anything at any of the union shops. And I don't know why. I don't know if there's another company that they're more comfortable with or that they've known longer. You know what I mean? So, we do have quite a few union shops here in Kokomo. We don't do anything with them that I'm aware of." [#10]

- The non-Hispanic white male owner of a majority-owned construction company stated, “It's kind of tough to work for union companies because it's so expensive. If you were to hire employees out of their hall you'd have to pay; it's very, very expensive. I'm not really an employer per se. I'm actually in the union just as an operator myself. That's because I have to be, if I wasn't sort of forced into I wouldn't. Unfortunately, they want you to be and they want you to pay to play, I guess.” [#11]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, “Nothing here takes me more than for us to give contracts to people you know, outside of our state and even our political people to make sure that their political mail is being done in their state. The Republicans seem to get that, the Democrats don't, for some reason. I don't know what's going on with them and I'm a Democrat, so it's a little frustrating to me. And I talked to them anytime I give them money telling them that. And they're so hell bent on using a union contractor and right in our area there is none. So, we just do without the business here and that's to me is not right. Well, we've looked into the company and shop because of the Democrat Party. But any union shops that we've talked to that are union partners they don't do it. They just say it's not helpful to them. They put some of them out of business because of it. And I try to be good and fair with my employees. I don't want anything holding my hands to give the people who work really hard and study really hard to give them better raises. And I give someone else who's been here longer or something. We have pretty free reign on that. And we are a lifelong learning company. So, if they continue to learn and want to grow faster you might have a mom of three kids who can't do all that, but you might have someone without any kids who wants to grow faster and your hands are tied in a union shop where everybody gets paid the same, no matter what. So, that I don't think works in my business. I really prefer not to do that. And don't like to say that out loud too much, because if you're a real union supporter, then they don't like that. But it's worked for 30 years and I think we run a good, fair shop in that time. We typically don't work with too many. We do have a printer and Louisville that we work to help with our political mail, but it makes no sense to me that now if I do get Indiana mail, I take it to Kentucky, take Kentucky taxes and then bring it back to Indiana and then the smile work onto it. I'm like addressing it after they print it. So, it's just, it's cumbersome.” [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, “They all have to be union and they all have to pass all the tests and everything. You know that pee in the cup test. We had one guy who was working for us on a large project. We had 11 guys working on the project and he kept taking the test. So, we had to pay \$200 every time he took this test. Come to find out he'd been at a party and there had been some smoke there and he apparently smoked some and it was only two weeks out until his test. And I just wanted to smack him in the head because he kept having these tests done. I'm like, ‘why are you doing this? If you know you smoked it, why did you do this?’ Well, a lot more of the epoxy and the painted floors, stained floors are going down and we don't do that because that's the paint union, you know? And so that has cut us out of lot of work, but you know, you do what you can and... Because it's a whole ‘nother animal. We were doing Deaconess Hospital back in 2005. We had a little job in somebody's house, and somebody reported this to the union. Because we subbed out the labor on that job. we didn't use union. Because we had everybody at the hospital, and it was like going to be like a two- or three-day project. Because once they get pulled up a job site, like a commercial job, there's a

different pay scale for residential work. And so, we had somebody else do the floor and do the installation on it and the union has made us some promises over the years and they've not come through with them and they're not our favorite people." [#15]

- The Black American male owner of an MBE-certified construction company stated, "I wanted to get established so I can get young minority men the skill of painting. They even have a school out there at the union hall, and they hardly ever send any minorities through there. And I just happened to, when I came here, they gave me my license just like that. No, I was going to be a signatory contractor. They tried to throw up some barriers. I can see it, because I knew someone else who tried their own business, I don't know if they're still in business or not, but I would listen to how they wanted to bring him down. I don't know what's going on. I work for them, and even if I wanted to be union, the way they do, they want your money and they want you to haul all of them, and they're defeating the purpose. I'm not going to pay them to pay somebody else to pay good insurance and the packages they provide. They want \$60,000, it's even more than that, to be an employer." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I hadn't deal with that yet. That's another thing I don't know that will help me in the future is when I'm bidding on these contract jobs or the federal government con jobs and stuff, and they have the wage requirements, am I required to use union workers, or do I just have to pay the wages in that wage scale they provide us? Because when I pull off the information on some jobs to bid on off of FBO Jobs or whatever on the federal website, part of the synopsis has the whole 400 pages about wages and I'm like, 'Holy crap.'" [#17]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "Yeah, there's elevator technicians all over 49 field personnel. They're all in the elevator union and there's an apprenticeship that they have to go through to get their card in order to touch an elevator. So, they have to have licenses per the state and city, state guidelines. You really can't just go out and find somebody that has that. Most technicians are really pretty much always in need, especially in the last four years where we've had a lot of growth. It's a skilled trade where the union or whoever else, they have the organization to get apprentices in and all that stuff and we pick from their pool as needed. I would say the only thing that I can think of has to do with the union. Maybe that might be deemed to be the "Good Old Boy" network. In my opinion, it's just tough to get into that union to become a field technician. I would say that's the only thing I would say that's possibly being in that arena" [#18]
- The Black American male owner of an MBE-certified professional services firm stated, "I don't know who the responsibility is, I'm just a regular boy from south side Indianapolis, you know? What's hard for me is trying to figure out, figuring this out, man, it's just tough. It's really one of those builds where you're just trying to figure out to meet the right person, find the right opportunity. I just don't know how much nonunion labor can work on the union side, or how much partnership can happen there." [#23]
- The Black American male owner of an MBE-certified goods and services company stated, "I've found that to be not really a good fit anymore. We had a bad experience with a union trying to drive – well, it did drive away one of our biggest customers we had over the years, and it's just frustrating because what I've found is a lot of times you're leveraged between the customer and the union, but the union screws with the little guy, and you're the little

guy, to try to impact the pricing on your customer. And the customer is on the other end of the spectrum, where they don't want to look like the bad guy, but they don't want to pay union rates. So, you're in the middle, where you're stuck trying to provide a smaller price margin or the union's screwing you over, and unfortunately charge higher rates. So, I've found that for me, I prefer not to do any more work through unions just because the return on our investment... It just isn't there, but it's hard to make your employees understand that, you know, that in the '50s maybe it was a great deal for health and safety. Now, because I mean some unions are all about just money. I'd say we've been on both sides of the fence, and if I had my choice, I would stay out of most of the unions now." [#26]

- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "They're also union members except for my business partner and I. They are full time in the regard that when the weather allows, they're working. All seven of them we try to keep busy most of the time, the foremen. Most of that 20 to 25 stay busy at least nine, 10 months out of the year. They file unemployment when they're off which is just how most union guys do. We are a union contractor and we most generally don't have a lot of trouble. Last year, we were in a different jurisdiction than what we usually are and so that caused a little trouble because our operators are a different union than where we were working and so, that caused some trouble. Then, the other thing we struggle with the most is that wage variance in the counties the wage variance from La Porte County to St. Joe County is almost \$10 for some of the trades. No, higher in La Porte. And so, your regular guys you wanna pay the high wages all the time. It just adds some stress to the situation." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "They raised the bar above too far for me, just by saying it's a union job. Now, that might be technically out of order, but if I don't have this, what we talked about earlier, I can forget about trying to get engaged in the process, 'cause that was a waste of energy. Now, it ought to have been, should have been, where being a certified contractor in the state of Indiana, or in the city, there ought to have been a open pathway for me or somebody else like me to participate in that job going on right there, right now. Four hundred million dollar." [#32]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Now, sometimes we do jobs in Chicago, and we ran into a problem, and I don't know how you can quote this, we have our furniture that if we don't move it and put it together and stuff, they lose their warranty on it. They're a real strict company who they sell to and stuff. We went to Chicago to do an install, and they told us their guys had to take it off the truck, they had to put it in the building and everything, and that's a red flag for the company. When I called them, they told them, 'If anybody handles that furniture other than your guys, there is no warranty on it.' They don't care if nothing happened or whatever. If we weren't the ones that carried it in, we weren't the ones that took it off the truck, then the warranty was not valid. Yes, we ran into discrimination on that, yeah, when we do jobs in Chicago who have unions and stuff like that." [#39]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "As far as the state, as far as the two counties where we – and, see, another thing we're union and so we're signatory to primarily three counties in Indiana, which means we can do any job in those counties. Now, when we start going outside those counties, then we have to

work within the confines of the union. It's never an issue with the state. It's more an issue with the union." [#44]

- The non-Hispanic white male owner of a majority-owned construction company stated, "I've had craft labor, if you look at the labor group, they're almost paid what a millwright is paid, supposedly a trained millwright, you know. And man, I tell you what, they're – you're not getting what you're paying for. You know what I'm saying? I mean, to pay somebody \$100.00 an hour to push a broom, come on, give me a break. And it cuts into your profit. Being an owner, I can kind of request different people, if I have a preference for a person and want to use them. So, I called the hall, put him through the training program, and I'll tell you what. I heard it firsthand and I've seen it firsthand, because I used to hire them in the mill. So, he'd go through the welding program. He didn't know how to start the machine. And I said, didn't you go through welding training? Oh, yeah. I said, well, you don't know how to weld, you know? And he says, I know. I said, well, why? And he says, well, the instructors don't know how to weld, either, and they're teaching us. I said, you're kidding. So, I went to the hall. I walked in, you know, went through the training program, and I watched what was going on, and oh, my God, it was – it's a buddy system, you know? They've got an old guy that's a business – former business agent, and he's getting older, so they make him a teacher. Well, that's not doing me any good. You know, if I have people that don't know what a crescent wrench is, or – you know. So that was a pretty bad experience for me as a business owner. There's certain groups that are trained very, very well... I mean, those guys can weld. The boilermakers, they're trained very well. And the reason they're trained very well is because the state puts requirements on somebody welding on a 2,000 pound critical or super critical boiler that's almost 4,000 pounds pressure, making a weld and doesn't know what he's doing, you know, you're going to kill people. And we have killed people. And you go to some of the other crafts, as an example, millwrights, okay, the training just is not there. And you pretty much out of three – well, the local I was with... that was my home base local – out of 350 employees, I would say maybe 15 of them knew what they were doing. The rest of them, you have to be there and watch exactly step by step what's going on. Otherwise, they'll put the hurts to you. By that, what I mean is they'll do something that they shouldn't be doing and cause a machine to not work properly, and then who's holding the bag? The contractor's holding the bag, right? Unions don't care. I still have to send their benefit checks." [#61]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The projects that we design for our owners, some of them have unionized plants, which they may or may not have agreements in place that the construction projects have to be built under union contracts. Then we have other clients that are – they're open to best price/most qualified." [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Sometimes, depending on – now this is when we're in the public sector, even down to if we were printing a brochure for say Arcelor Mittal, or Bethlehem back in the day, we had to sometimes with some of our clients, not all of them, we had to get a union printer or a non-union – you know, it just depended on the job that they would require union printer or a videographer that was in a union. It depended on who the company was, but occasionally – excuse me – we would have to make sure that a union was either involved or not involved, depending on who the client was. And that wasn't a lot of times, but that was

sometimes we had to be careful about that. It was a barrier sometimes, because sometimes we would have a local company that was affiliated with the union or not affiliated, and whoever the client said I have to use them, but they did bad work, but we were stuck with them. So sometimes it was a barrier because we were forced to use maybe a printing company – I guess it would be more in the printing area that really, we're not very good at what they did, but we had to use them because there weren't a lot of them around and we had no choice. So sometimes it's a barrier when you're stuck and you have to get that union bug on something, but yet who you have to use is maybe not – we're very particular about who did work for us, and sometimes we were stuck having to use people that did not do the quality of work that we expected. But it wasn't a big problem; it was just something we had to work around sometimes." [#67]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "No, we do not have any unions, or we do not work with unions, because certain states have unions, but our employees are travelers, so they don't belong to those states. Like California and New York, they have unions, and you have to be a part of union, but our employees, if they're part of unions, we basically do not hire them, because we don't need all that." [#70]
- The Black American male owner of an MBE-certified professional services firm stated, "The only "issue" would be the tendency in construction – is that if it is a union job, there tends to be a cost premium on that union job compared to nonunion. I was just gonna say a union job could run anywhere from 20 to probably more so like 25, but 20 to 30 percent more in terms of fees, compared to a nonunion job." [#71]
- A comment from a WBE construction firm stated, "I don't feel that I am able to bid because I am union." [#AV]
- A comment from the availability survey stated, "The only problems are when there is a union in the area. The unions have been known to harass and sabotage job sites." [#AV]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "Some of our largest contractors in the Indianapolis area started out as apprentices and the plumbing union and the electrical workers union, major contractors in our area all started out as apprentices. A successful business that I have noticed are ones that start from the ground up. We're always reaching out to have opportunities for underrepresented minorities to get into our apprenticeship programs. Currently 20% of our apprentices are minority apprentices statewide. We pretty much mirror the state population as far as our demographic makeup across the state. So, we're making great strides in increasing the number of minorities and women in the industry." [#FG1]
- A respondent from a public meeting held in Greenfield stated, "Another major issue is especially dealing with INDOT and other state contractors, being nonunion, that's a big one. And so, I don't know if the State can do anything about that or if the City can do anything about that, but that is a major hurdle. That's kind of a glass ceiling that's unspoken but they won't use you if you are not union. So that's one of my major gripes." [#PT5]
- A respondent from a public meeting held in Greenfield stated, "I can tell you we have been discriminated against because we are a non-union company even though we could provide the same service at a lower cost." [#PT6]

- The male owner of a construction firm stated, “Marion County would select the living wage rates that the union would put as opposed to the American Association of Builders and Contractors. To give you that kind of disparaging example, the union rates would show that if you -- and this was back in 2015. It was a HUD project on the east side that if they wanted general labor just to pick up trash, move supplies and stuff, you are going to have to pay him 25 bucks an hour. That's fine. We will pay that. Obviously, they are going to have a markup because of the insurance that that they pay for these general labor people to come in. The thing though was if you were a certified welder, you were only getting paid \$4 more. So, a general laborer, you were supposed to pay them \$25, but a tradesman who is highly experienced and licensed was only supposed get \$4 more. So that right here tells me that it was a way of keeping outside laborers from just doing something basic like pick up trash because the general contractors couldn't afford to pay that difference. Now, if it was with ironically the ABC rates, they were stating like if that was in one of the counties outside of the City of Indianapolis, it would have been \$15 an hour and they could easily basically justify their cost and build it in to allow guys that need work, some of these folks were homeless and really wanted to work, and the contractors didn't have to worry about picking up their own trash. It was a win/win situation. But since the state itself doesn't have a uniform way of deciding what is a living wage, when it comes to prevailing wage jobs, the majority of that money for government would seem that would be in huge metropolitan areas, mostly Indianapolis here in Indiana, it was keeping out a lot of and actually hindering construction. So, you think about it, I would rather have a plumber doing their job as opposed to a plumber walking around the site picking up trash. But they couldn't afford because it was union wages, for what the union said it was to pay.” [#PT6]
- An owner of a DBE-certified professional services firm stated, “INDOT does the same thing, you have to pay prevailing wage. Now, as a -- we are a DBE and the regulations for DBEs say that you are not allowed to discriminate against a DBE for union or nonunion status. Well, I complained to INDOT, I said why aren't you enforcing this, and they said, oh, we can't comment on that because we are not against unions or for unions. And I said I don't care about that, I just want you to enforce the regulation because what's happening is we won't - - we will get on the job and it will be lower, we won't get it because it goes to the union sub instead of the nonunion. So, they wrote to federal highways to ask them and they wrote to the federal government and they said, oh well, we don't discriminate. And I am like yes, you do. Why would you have this rule in your regulations if you are not going to enforce it? Why do you even have the rule? Why does it even say that? And they just blew me off. And I just don't understand why even say that if you are not going to enforce it?” [#PT6]

7. Obtaining inventory, equipment, or other materials and supplies. Sixteen business owners and managers expressed challenges with obtaining inventory or other materials and supplies. [#2, #6, #9, #12, #13, #17, #18, #22, #35, #41, #42, #46, #61, #66, #AV] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Yeah, they would simply say, 'Because you don't buy enough volume,' it's the chicken or egg. I can't buy enough volume because you don't give me good prices, but I don't give you good prices because you don't buy enough volume. Not a barrier, it's just, what are you paying for? If you want 10,000 feet of pipe it costs this much. If you want 150,000 feet of pipe it costs this much. I can't buy 150,000 feet of pipe unless you tell me

you are going to buy at least 140,000 feet of that pipe. That's where I am, that's my reality.”
[#2]

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "We buy our equipment outright. We don't buy it unless we can afford to buy it, and we don't borrow money on a whim. We don't get loans to purchase our equipment and then anything else, we rent it and we've not had any trouble with rental availability." [#6]
- The Native American male owner of an MBE-certified construction firm stated, "Yeah, I can't afford to carry \$60,000 truck payments. I just rent when I need it. [Getting inventory], it is [difficult] now. I can't get generators now because they're out making some sort of... My Cummins generator order has been delayed because they're making ventilators. I've only got so much credibility, right? So if my orders are larger than my credibility, I've got to come up with cash out of my pocket. That's a huge problem. It cripples my cash flow constantly. In my industry, I got to finance the project, hit my milestone, and then get paid. So in order to release a generator for \$117,000 generator, I got to pay 25% or 35% upfront because I've only got so much credit line." [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Are you willing to pivot and change as you need to? We have the latest and greatest equipment and that's been a big burden for us to make sure our equipment changes fairly quickly, and we have to have the ability to train our employees quickly for a new piece of equipment. And then to be able to move on from that piece of equipment without ... When I first started in 1986 you could put onto a piece of equipment for 10 years. Well now, the electronics on it, it has computers and moving parts and everything, and then electronics on it don't allow you to keep an older piece of equipment. Because when you're certified for security like we are, you have to have the latest and greatest technology on it. And if you keep a product for five years, that's a long time now. We're talking a half million dollars to a million dollars for our equipment now where I used to buy things 250,000 and that would be like a big machine for us." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "We bought a used dozer, we bought some used other equipment, things like that. So just getting ourselves to a point where we're able to bid on jobs because we have the equipment, and we don't have to go... We were going to have to lease a dozer, which is going to cost us about 8 to \$15,000, and [we] found one for sale for \$9,000, and he had it shipped from New Jersey, of all places. So now instead of paying a rent and sending it back, he has that piece of equipment for future jobs. It's not brand new. It's not beautiful, you know, but it's a big old stinking dozer, and it will move a lot of dirt. [Inventory], well we're going to be floating on material costs down at [firm A], but I don't want to stay extended with those suppliers we use because they're small businesses too. So I want to keep those relationships really good and clear. And I don't want to go into huge debt for operating cash. I don't want to... You know, I'm just real cautious about that because I just think that having too much of that quick available operating cash leads you to more debt that you don't need. It's expensive. The one barrier we have found, and this is COVID related, is we're having trouble getting supplies sometimes. We were working on a job and we had to delay over a week, which doesn't sound like a lot, but for us it is. Had to delay over a week waiting on Lowe's to

receive the lumber material we needed, which was a standard material, wasn't anything crazy. Both Lowe's, and Bloomington, and Bedford both were out, and the guys showed up, they told them one day it was going to be delivered. They were there the day the truck showed up to get it because I want to make sure we got it off the truck. I thought that was interesting. Not only was there delays in some grocery deliveries and things, but- we did get some delay on a couple of jobs because of material." [#17]

- The non-Hispanic white male representative of a majority-owned goods and services company stated, "Every elevator's a Frankenstein and what I mean by that is you might have two elevators right next to each other that you think are the exact same, just from a general layman type looking at it. But that technician that installed those might have different screws in different places or on one compared to the other because the building on that side was a little bit different than the [one] on the other side. So there's so many different Frankenstein parts to every elevator. There are onesy, twosy little parts here that we've come across where yes, there's a little bit longer of a lee time on getting some parts but for the most part, our part supply has been pretty much the same." [#18]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "Yeah, that's another one actually too, that holds me off getting equipment because they require your bank statements and how much your income in order for them to finance you with that equipment. But mostly, I was turned down several times." [#22]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "I started with one truck. I took money out of my annuity from being a union contractor. Took money out of my annuity. That's how I started paying for stuff. To this day, I've probably got about 20 trucks right now from the 10 years. Yeah, absolutely. We got different type of machines to put conduit in the ground and so forth. So, if we're going after a certain project that needs a certain type of machine, bucket trucks, we have to maintain our bucket trucks. After so many years, you have to get another one and so forth to keep up with the standards and stuff like that. But it's really costly to run this operation." [#35]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "You have to stay abreast of processes, techniques, changes, and upgrade equipment. You can't – that's one of the challenges for us, having the additional revenue. You can't – you need new equipment. You need to find out what new processes are. You have to be able to make those changes and implement those changes. Leaving the whatever you were using and switching to microfiber or if you apply a floor finish, it used to be, 20 years ago, you put the wax in a bag, in a trash bag, in a bucket. Then you used a rayon mop to apply it, to make that application. Well, that's not the case anymore. You use a flathead microfiber. You have to stay abreast of technology and changes. In order to do that, you need training. As a small business, you need training on your industry, what new processes are, the innovative ways of providing your service. Those things constantly evolve. If you don't have the time and the money to educate yourself, you're going to be left behind. You'll be able to provide service for someone, but those major clients that you would really like to have that would provide you with the revenue to really build your business, you'll never get them." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Equipment is not difficult. Equipment now is difficult, in the COVID

response and emergency state that we're in, just because all of the supply chains have broken down. But yeah, initially, as a business and as we were growing, it was very easy for us to find equipment and find vendors who are U.S.-based to purchase that equipment from." [#42]

- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "That's been a challenge for me. That's been a problem. Because when you're new guy on the block and you have no retail background, you don't have established sales, you know, they're taking a chance on you, that you're going to be able to pay that bill in 30 days. I've got one particular company, WonderWink, who is about 40-percent of my inventory in my store, and they refuse to give me credit. Healing Hands is 60-percent of my store and it took them almost six months before they opened up a line of credit for me. They wanted to make sure I was going to succeed. But WonderWink refuses to open me up a line of credit. The other two competitors have huge lines of credit with them, but they've been around forever. James Medical has been around for, oh my gosh, I want to say probably 25 years. You know, they have an open line of credit with Cherokee, Barco. I can't get open lines of credit with Barco or Cherokee. They want this obnoxious opening line of credit. So for me to get a credit line with Cherokee, they want me to have an opening inventory of \$6,000.00. My store isn't big enough to carry \$6,000.00 worth of Cherokee. I wouldn't even know where to put it. And I even said that them. They were like, "Yeah, well, that's what it takes."" [#46]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Just in my business, it's pretty expensive stuff, and I had to manufacture a lot of it myself once I got the shop up and running. But cash, yeah, cash was a limiting issue there. I mean, it's not like going to a car repair shop where you have half inch drive sockets. The nuts and bolts that hold a turbine together, I mean, you need a crane to pick them up. And to stretch them and stuff, you need special tooling for that. You know, to take them – screw the nuts on and take them off, it's all specialized equipment. And it takes time to get it." [#61]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Now, from a customer standpoint, we are starting to see much longer lead times on equipment, manufactured equipment. Whether that's HVAC equipment, pumps, lights, specialized wall panel systems, windows. The inventory that was stockpiled prior to the COVID shutdown is long gone. The production pace is running slower on these things, just because everybody's got constraints. Right? It's just harder to do things. There's scarcity in some things that come from overseas, components of different devices and that. So, we do see that with contractors giving us feedback that, 'Hey, we're waiting on this part. We can't get it.' Whether it's coming from the Pacific Rim or Europe, or even in the United States. So, we are seeing longer lead times on manufactured items." [#66]
- A comment from a Native American owned MBE construction firm stated, "The materials we use are scarce and a lot of people who have money use them and are more able to get jobs." [#AV]
- A comment from a majority-owned professional services firm stated, "Material costs are going through the roof." [#AV]

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. Twenty-one business owners and managers discussed the benefits and challenges associated with pre-qualification [#1, #2, #6, #19, #21, #27, #32, #34, #35, #38, #39, #40, #42, #48, #49, #59, #60, #62, #66, #AV]. Their comments included:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, “We’re pre-qualified with the state, which I don’t know if you know how prequalification works, but you can only have \$300,000 in work on your books at any one time if you’re not pre-qualified. And it’s a balance sheet audit. We have really good bookkeeping here. Our bookkeepers a CPA level. She keeps track of everything that goes to our CPA who has to be a CPA registered in Indiana and does an audit. Then we turn that into the state along with a bunch of other documents and they give us a capacity rating saying here’s how much work you can have. It’s got our financial statements. It’s got certifications that all our taxes are paid. It’s got our work on hand. It’s got our work that we completed in the last three years. It’s got our equipment list, everything we own. It’s got all of our loans and our loan documents, who we owe money to and how much we pay. It’s just a ton of information. That’s the amount of work you can have under contract at any one time. So, what, like right now at any one time, got 4 million under contract for this year. We’ll start to work that off next month. So, we’ll probably do five or 600,000 next month and then we’ll have 3.5 million and then we’ll get some more and it’ll just kind of come out of the back and forth and you’ll work it off and you’ll get new work. But you can’t ever have more than 800,000 at one time. [Other qualifications] ...not with the public entities, but a lot of bigger contractors want us to be safety prequalified. So, they have us fill out a several page questionnaire about our safety history and they want to know our EMR, which is our employer... It’s the safety rating that you get based on your reportable injuries and it comes from your work comp insurance carrier. So, if you don’t have any claims for three years, you can get a rating of less than one, which means they take your rate and they multiply that times that number and it lowers your insurance cost. But a lot of big contractors want to know your EMR rating. Prequalification requirements are difficult. You have to be profitable and you have to have cashflow in order be prequalified.” [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, “I don’t think the word is discrimination. It is not clear to me that I can see a specific regulation that says, ‘Here’s absolutely what you must do.’ To the extent it’s subject to interpretation it may be called discrimination, it may be pay your dues, it may be various entrants, maybe we get to decide winners and losers. If it’s discrimination I don’t know what is this discrimination based on. If I had a checklist like this and it says, ‘Here are the 12 things you need to do in order to be able to distribute.’ If it says any one of these you don’t do then you’re not a distributor. I understand that. If you check all 12 boxes, then there should be no arbitrary interpretation to say ‘You’re not a distributor.’” [#2]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, “We run into that all the time and that can be really taxing on your office work. I can have a lot of time eaten up doing all that. Prequalification stuff can be a pain. It can take somebody a couple of days in the office to do the prequal for some place and a lot of times that’s what keeps you out of working at a place, is the prequalification process. And it’s not only taxing for our office, a lot of these places just don’t want to bring in a new contractor because of their prequalification process. That’s not

the people at the top of those places. That's the people that's actually sending you out the paperwork" [#6]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It does, but most of us have been in business long enough. I have a pretty good resume and a history that I can rely on. And usually, a lot of times on the prequalifications if they like you, they're going to find a way to pick you anyway." [#19]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "That is an issue, the issue of qualification, but that's basically what every industry would have to submit to." [#21]
- The Black American male owner of an uncertified-MBE construction company stated, "Well, that's always gonna be an obstacle, 'cause that's what it was designed to be. And that's where the dollar piece come back into play again. Prequalification. How much money you got? How much collateral you got? Y'know. That's at the top of the heap." [#32]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "So, the bigger companies have a lobbyist. They devise ways to have questionnaires that prohibit smaller companies from even getting the work. So, I mean we're pre-qualified with the State of Indiana to do certain things. We can do more. But you have to be pre-qualified to do certain things. Sometimes it hurts us because we're not pre-qualified. But we try to stay away from doing any State Highway work." [#34]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "Typically, the jobs I usually bid on, there's no requirement for those. So, yeah, because I won't be able to qualify for those anyway. So, yeah, there's sort of aspects for those jobs, then we have to figure out how to fulfill those requirements. But typically, I don't go after those jobs, that is normal. Yeah. The State of Indiana, they had in the pre-qualifications for contractors, it can become – I think it was for the BB. Again, we start a process, and it can – the paperwork is just so overwhelming and just the time that you have to put into it, you need somebody dedicated for so many weeks to complete these documents. So, it's kind of almost discouraging for a small contractor to go after their work. I don't think they make that easy for the small contractor. For a large contractor, when you had 75 plus more personnel in the office and you had dedicated folks to do that, that can be fine. But for a contractor that's maybe 25 and less, that can be very hard to do." [#35]
- The Black American male owner of an MBE-certified professional services firm stated, "I would say it's a good thing. If they hadn't worked with you before and don't really know what your firm is all about or what your abilities are, I would say I think it's a solid way to gather information initially about a firm or an entity." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I mean, it's good because, again, they're trying to protect their company, as well. I'm mean, don't nobody want to just buy just because somebody is out there. They want to know the type of work they're going to get. Yeah, I agree with it." [#39]
- The non-Hispanic white male representative of a construction company stated, "INDOT can be – the Indiana Department of Transportation, they can be – when we first set it up, it was quite time-consuming. But, other than that, no." [#40]

- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, “I guess the pre-qualifications that were required were some pretty basic things, like whether or not we use – oh, I can’t remember the name of it now. The federal employee verification system, and that our terms of employment follow the proper drug screenings, and things like that, that are necessary when handling federal funds and things of that sort. Beyond that, I think the only other qualifications were just that we had a proven track record of success within the field that we were sort of proposing our project for. All in all, I didn’t think the qualification requirements were obscene. It was really no different than pursuing a mid to enterprise-level contract.” [#42]
- The non-Hispanic white male owner of a majority-owned construction firm stated, “It can exclude qualified firms.” [#48]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, “It just depends on what the bidding process is. Maybe one good way of explaining it, if you prequalify bidders then you have a better, I won’t say a better opportunity, but an opportunity to bid a bid with folks that are equal in your industry” [#49]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, “That hasn’t been an issue. We’re an older company. We have a lot of experience. So, that hasn’t been an issue. In a newer company, that’s a huge barrier.” [#59]
- The female representative of a majority-owned construction company stated, “I mean, it’s just getting your information to them. It’s not really hard at all. I mean, it’s something that a lot of places do. And just – if you’re interested in that job or that bid, you’re going to do it.” [#60]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, “When you provide a service where the owner, whoever you’re contracting with, has the choice as to who they’ll go with, how do you influence that, other than to show your credentials and qualifications? It often becomes a catch-22 in the sense that, well, you don’t have as much experience as this firm, so we’re not gonna go with you. Okay. Well, when am I gonna get the experience that that firm has? So, for myself as a small, minority, women-owned business, we’ve done more civic and government work at the local level. I think one thing that would really help my firm would be assistance with getting my AA certification, which is a federal certification, and getting in that vendor list. And then it just takes, you know, warm bodies to make the calls and follow up and do all these things. But you have to pay warm bodies every two weeks or every week.” [#62]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “That is a challenge. We need two types of skills. So, we have design engineers and, typically, that skill set is found through college degree programs and mechanical/electrical engineering. Sometimes we can find a designer. So, we would have a couple of different positions, right? So, a designer and mechanical or electrical or even architectural could work underneath a licensed professional that oversees their work. Right? So, those two entities are hard to find. Right? The right type of personality that just also – just the availability of them. If you go to a career fair at any of the state schools that have engineering programs, they are very well-attended by industry. The – what do I want to say? The success rate of the students in finding jobs prior to graduation is incredibly high.

So, there's lots of competition for the top students to be able to draw those in. So, we're battling with – we're hiring the same kind of people as Honda and Cummins and Lily, all the Fortune 500 companies in the state. We all need that same skill set. We're a much smaller business. So, we have to be competitive in the culture that we offer and our location and the variety of work, because we can't offer them a global experience. We can't offer them, most of the time, as much money on the front in their entry level. So, it's a tough market to find. Then the other type of position that we need is our draftsmen and women. That happens – it's all electronic now. So, it's either CAD or what we call BIM, and that's Building Information Modeling. It's 3D drafting. Those skill sets – Ivy Tech has a program. Purdue has a four-year degree in it. Outside of that, they are very hard to – I don't know who else is producing them. We need expansion of the trades, in general, at the high school level. But if we get computer-aided drafting into the curriculum for that, it really could be a post-high school education career for somebody, if somebody has an understanding of it. It doesn't necessarily have to be an associate's degree or a four-year degree to be able to do that job I think it's a good thing. Different projects require different types of skill sets and experience. I don't think that the state should have to accept anybody that comes along because that's not in the taxpayers' best interest. We should hire people with the right expertise to do what's needed. If it's a basic project, a firm with less experience can do that. If it's, say, like the Department of Health labs, then you need a firm that is well-versed in laboratory design and regulation. So, you wouldn't want the people that built your park restroom, necessarily. They may have the diverse experience. But the requirement for that versus somebody doing your lab is completely different. Not to say that the firm couldn't meet both requirements, but that's why prequals are a good thing. “ [#66]

- A comment from a majority-owned construction firm stated, “Slim down INDOT qualifications.” [#AV]
- A comment from a VBE professional services firm stated, “The pre-qualifications that are required make it difficult to bid on opportunities for young, up-coming companies.” [#AV]

9. Experience and expertise. Interviewees noted that experience and expertise can present a barrier for small, disadvantaged businesses. Experience is often compared to the requirements for prequalification. [#1, #3, #10, #17, #18, #27, #37, #41, #61, #FG1, #FG2] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, “Experience and expertise, yes. That’s a problem in hiring people with experience and expertise.” [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “I would say experience and expertise. So, where that could be a barrier is, that to bid on work you have to have done the same size and scale for a similar client, three examples. And that is prewired for a big company versus a smaller one, right? But still ... we haven’t done all things. I mean, still it may not be the size and the scale. Can we do it, do we have people who've done it before? Yes. But as a company, have we done it? No. Or the same size or scale where we've done this exact same thing for three companies that aren't state government at all. And it's not really ... they want someone who has done the exact same thing in another state. And so, you can't ... you're disqualified.” [#3]

- The female representative of a WBE-certified construction firm stated, "If there were starting up, and they had a brand-new plumber, that may be an issue, you know what I mean? But there's a lot of older people are like, and as I get older, I understand it. They look at some young whippersnapper, as they call them, and they're like, 'Ah, he's probably only been a plumber for about five years. Probably doesn't know nothing.' You know what I mean?" [#10]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I think the real barrier and the whole thing is there was a little bit of a female piece to it, but not much, I don't think, but I think the real barrier to it is that it is a startup. It doesn't have any history. Every time I go to bid something, it says, 'Give me three years of your tax returns.' Well, I've only been in business but two years. And I don't even have a tax return that shows any payroll yet. So, it's like how to move into that system and get accepted. I mean, you just have to fight the thing all the way. I was thinking four years, after I get a couple payrolls under my belt and get going, that I'll be able to say, 'Okay, let's reevaluate everything, let's reprice, let's re-quote, go after. We're an established business. We have a small payroll.' We've made money three years in a row. We've had no claims and we have no workman's comp claim." It's just like, we'll be able to be in a much better place in three years. Yeah. But this whole startup and it has a little bit to do with female, but not a lot." [#17]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "What happens is you get one or two technicians that are on, what we call the bench, they're a part of the union but maybe in their past, they've bounced around from one company to the next for whatever reason and they try to go out and they successfully start their own business. But like you were saying, it is a little tough for them to do that because you got to have that technical expertise of an elevator in order to work. Those guys really are savvy. Our field technicians, if you want to look at it, they're plumbers, they're electricians, they're steel workers all rolled up into one" [#18]
- The non-Hispanic white male owner of a professional services firm stated, "Experience and expertise, that's always a challenge. I mean I think we have great people working here, but that means that everybody else wants them, too. So, I think that is a challenge. I do think it is probably for minorities a challenge as well, just to – I do think there is discrimination. I had some experiences with African American friends of mine in the South where people just don't look at – don't have the same expectations of expertise as they might of somebody who wasn't African American. That becomes a struggle. I would say that that's an obstacle that they run into of being perceived as having lower. Not across the board, but just with certain people. So, that becomes a barrier for them... When I'm hiring people, I don't automatically disqualify people because they don't have a degree or they don't have a masters or some certification. If I look at their experience and if it seems relevant and if they're smart and they have good references, I'll hire somebody. So, I would probably, if I was hiring an agency, I'd probably use the same thinking." [#27]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "I would say that that's one of the reasons that it takes time to grow, to be able to grow in your relationships with other general contractors, it will have some time that they need to know you, and to be able to want to ask you for a bid, a quote, something. Just sometimes I have

sometimes presented myself and they say, 'Oh, we have our own electrician. We don't need. We'll let you know' and never finding anyone to call me. I think those are the pains of growing too. Maybe if I was able to get into a class or something that can help me to get more relationships, that people will know me better, that can improve my accomplishment of jobs or something." [#37]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Absolutely. Absolutely. Expertise, absolutely. There are so many aspects of business and running a business and techniques and training that I don't have. Unless I can spend the time, take the time, allocate the time to really educate myself on those things constantly, then I stay in the shadows." [#41]
- The non-Hispanic white male owner of a majority-owned construction company stated, "The turbine people, people that work on turbines of the country, it's a small group of people. If I go to California or if I'm in Texas or something on a turbine outage, there are people there, they know me, and I know them. So, you don't need to really market yourself. It's your reputation. I know all the bladers, people that do blade repairs, bearing repairs, and stuff like that. So somebody that wants to start tomorrow to do a turbine company, turbine repair company, they're going to have a tough time, if they're not known in the industry." [#61]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "In the construction industry, if you take someone that was selling shoes one day and try to put them in the construction industry, they're probably destined to failure. If you take somebody that has started out in an apprenticeship program, understands the ins and outs of the industry, they are on a path to succeed in the construction industry." [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "The barrier to large scale public work that's very specific, the RFPs are written, it's expertise driven. It is very competitive firms across the country are submitting on everything at Purdue, IEU, Indiana State... So not only are we dealing with that. It's okay for us to go to other States, but not okay for others to come to our state by the way. It's so competitive that the minority firms, but for a few, just it's going to take forever for them to establish themselves with that expertise that ranks high on those score sheets. It may be someone coming out of a firm that's been working for a long time and they can jump out and hang their own shingle and start from there, but just organically growing takes forever. It's almost impossible to have that expertise." [#FG1]
- A respondent from a focus group of MBE-certified goods and services firms stated, "But for people to actually really grow is, you have to know your business. If you know what you're talking about, and you can back it up, people are more willing to work with you. But you got to know what you're talking about, if that's your business. And so, what I'll always tell a business is to understand their business, look it up, learn more. You may think you know it, but I mean, there's so much more to your business than what you think it is." [#FG2]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Eleven interviewees discussed whether licenses, permits and

certifications presented barriers to doing business. [#1, #4, #12, #13, #17, #18, #23, #35, #48, #66, #69] For example:

- The non-Hispanic white male owner of a construction firm stated, "I don't run into any problems with my plumbing license because it's a state recognized license. I can work in any county or any city, the only thing I may have to do is obtain a license to work in that county or city and just pay a fee. To whereas other trades they may have to take a test. And pay a large amount of money. Yeah, there's some electricians that do work in like Crawfordsville, you have to be a licensed electrician in Crawfordsville, and you have to pay like \$400 and take the test. Like in Evansville, we were going to do a job in Evansville and the company I used to work for was a general contractor, well you had to go to Evansville, take an eight-hour class and pay \$800 to become a general contractor in Evansville." [#4]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "I mean, fireworks has a ton of stuff like that. Okay, now the state actually has not been horrible. They've actually been pretty helpful. Local, I ran into a bunch of stuff, because they told me that I couldn't sell year-round, and then when these other guys moved in, it was fine for them to sell year-round. Fireworks. Supposedly, yeah. Because I complained about it. I made a big stink about it, told the mayor and everybody else. I even made a stink to lots of other people too, like the community, about it. And then they came back and said, 'Well, you know, we don't understand why you're making a big stink about it.' Then, of course, there was different people in charge, too, then. It was a different mayor, it was different people, and then they just said, 'Well, we never said that.' I'm like, 'Okay, well, the people that were in charge then told me that I could not have fireworks year-round, that I had to store them in all these different containers. I had to have perfect storage, and now you guys tell these other people that it's perfectly fine for them to do it.' You know, they changed the rules." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "To be HITRUST certified it cost \$100,000. We were spending a million dollars a year to keep all of our Microsoft and all of our certifications, all of our licenses for all the equipment that we run here." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Permitting for a building construction, I've run into that in Monroe County. That's why we don't like to work in Monroe County. It took me three trips, 29, not really 29, but felt like 29 phone calls to get the permit to build a pole barn in Monroe County. Yeah. And then when I went to get the permit for the remodel of [a property] in Bedford, in Orange County, I walk into the city planner's office, I tell them what I'm doing, and they hand me the permit. I'm like, 'This took me an hour.'" [#17]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "The technicians get licenses. There are a lot of permits that happen, not only from our side but also my partner's side, our customer's side. So, every year, our customers have to pay the state, I think it's like \$130 annual permit fee. Per elevator, yeah, per escalator. You have that from that end and then from our end, depending on what the upgrade or what the repair is, there is a permit fee that we have to take out with the state to say, 'Yes, we're performing this repair on this elevator.' So, then we go in, we perform the

repair, and then we have to call the state and they send out an inspector to test the elevator in front of the inspector. And that's a part of that permit sheet as well." [#18]

- The Black American male owner of an MBE-certified professional services firm stated, "Now, the big barrier with that field that I'm working on and I'm trying to get some help with friends and stuff to help me, because I can't pay employee to help me, there is accreditation, accrediting body in Virginia that will allow me to be able to offer continuing education units for my welding course Now, one question may be, why haven't you done this earlier? You've been doing this since 2010. They keep moving the ball. The things change. It used to be the voucher was 100% voucher, then it went to 70% on the front end, 30% when they complete. The first two years of that, I'm arguing with case manager, what's completion? Is it if a guy actually gets certified, or he's there on the last day of class? If he's there on the last day of class, that's always a barrier to them because unfortunately many of the folks that are referred and need this opportunity are folks that don't necessarily start and finish things. I'm just being honest. Who gets penalized for people not starting and finishing things in their lives? The owner, even though I'm here to present an opportunity to those folks. The state, Indiana State Department of Health oversees the [accreditation] training, but the testing portion is outsourced to the [Ivy Tech] testing lab. If I'm going to have a problem with communication or anything, getting testing dates, getting all that, it's really with Ivy Tech, not with the state. The ladies over at the state are awesome. I'll tell you something that is a barrier, that I haven't had the money to spend on, I didn't quite understand why because I'm a single member LLC, but my buddy was telling me I need one. I don't have an operating agreement, for the business. He was like, 'We need to hire an attorney, get an operating agreement.' I'm like, here's another fee." [#23]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "Northwest Indiana, where we're from, you have to license in every city that you do work for. There's – within a half a mile, there's another town where we live and so on. So, you have to license over there. So, that was the hardest thing, trying to get the license" [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "From a building permitting standpoint, the state and local entities are moving a little bit slower, but it's the era of COVID. Everything's moving slower. So, everybody's doing the best they can with that. You just have to tell your clients to be patient. You can still – excuse me – expedite at the state level for a construction design release. So, that can still move through quickly when you have a hurried project. But I don't know about an accelerated review process at the local level. I don't know what Marion County, Fishers, Carmel, Bloomington. I haven't filed those. Typically, the contractor ends up filing for a local. I don't know what the turnaround times are on those, if we've seen increased times. I would assume that we have." [#66]
- The Black American male owner of an MBE-certified construction firm stated, "All the other waiting periods that a person has to get state contracts, even state funding, it's ridiculous, because when you've been through the process you've got your MC number, you've got your DOT number, and then you've got some more paperwork that I can't think of off the top of my head, all that takes about 30 days. And then the process alone, when you're saving up for it, you're saving your money to do all these different things that jobs is out there to make the money. It's phenomenal. It's cool. But then again, when you've got to wait another

six or seven months after you get your certification, six months to a year driving experience, ownership, or whatever the case may be, before you get a state or a federal funding, you know what I'm saying, it's ridiculous because you've already been through – it's just like you want to jump into something, but you've still got to do your time, you've got to wait your time out. I mean I have plenty of degrees: telecommunications, liberal arts degree, auto body degree, estimate-writing degree, insurance license, all these different degrees, and I never had to wait six months after I got my insurance license to go ahead and do the job. That's like another whammy, like you're going to wave money in front of my face and my family is starving right now, to go ahead and proceed. But we've got to wait six months to a year, and in six months to a year I've got to make sure I maintain not to get a tractor violation as far as above being out on one of my trucks, one of my work trucks, so I won't get fined or make sure I don't have an incident or an accident, and that's going to harm me because of the fact that they look at your motor vehicle record. Man, just making sure everything is up to par to do a job, which I could've been doing in the beginning. But all I need is a chance to get my foot in the door to show these people that, hey, I can be productive, I can do what everybody else is doing. You know what I'm saying? I don't need a waiting period. I think I trained myself good enough, because I drove RVs for 3.5 years all over the world – all over the United States here. And I feel like it's a chance of a lifetime to make money, but then again, you're holding me back, like you're pulling my coattail and just saying, 'Hey, you've got to wait. We've got to wait and see what you're about. We've got to wait.' There's no more trial and error right now; I have everything that I need. My certification should be done within the next three to five business days. All the other certifications are done. All I'm still now is waiting on a waiting period, you know what I'm saying? It's crazy, but it is what it is." [#69]

11. Learning about work or marketing. Thirty-five business owners and managers discussed how learning about work is a challenge, especially for smaller firms. [#3, #4, #6, #11, #12, #13, #16, #17, #18, #19, #21, #22, #23, #25, #26, #27, #30, #39, #41, #42, #46, #48, #59, #75, #76, #AV, #PT1, #PT3]. For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I think the state's doing a great job with that." [#3]
- The non-Hispanic white male owner of a construction firm stated, "Yeah, sometimes there's barriers there because it seems like everybody wants money to market your firm. Whether it be like Angie's list, that's a big misconception because it's always free to be on Angie's list. Well, it's free to get on that list, but it's not free to advertise on that list. And by advertising I mean, if I was on that list in [my city] for the plumber, if I paid them like two or \$3000 a year when someone typed in plumber in [my city] my name would come up in the rotation of the first five people, which I think is unfair because they always said we don't advertise, you don't pay to be on Angie's list, but once you're on there you pay and that's how people get more calls. And then all these [websites] and all these other places, I was a member of, I forget what it was, for a whole year and I paid for a whole year of it and didn't get one call back on it because it was just basically people fishing for prices. I've been in the plumbing business for over 30 years now and I think that that's the best advertisement is word of mouth, I mean your work speaks for you and you get a couple, you build that customer base,

and it doesn't really... And then it becomes, you know, it doesn't really matter who's there or what, they're always going to call you and use you." [#4]

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Yeah, I receive emails all the time about different opportunities out there. The problem is most of the opportunities out there, are in editor though, Fort Wayne, South Dan, at Lafayette, they're all one of those places, way away from where we are. Or most of it is like roadwork and bridges and that's not our scope of work. So, I receive emails continually about opportunities or it's something in the mechanical side of that may be nearby, but it's an entire project that I know if I say, Hey, we would only really get a small piece of that because that's going to go to a mechanical contractor out there that has 20 guys, 20 plumbers, pipe fitters HVHC guys to man that because it's that size job. We generally stay away from that size job. So, what we do is a little bit more unique." [#6]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "The most powerful thing is social media and the newer kinds of stuff. That would be helpful. And, actually, another part that would be helpful is, and I hate to ask the government to help in this area, because I'm not sure that they would be helpful, but I'll give you a good example. So, in my fireworks business, we do Facebook. We've done Facebook, and for the longest time, Facebook would not let me boost posts, because they said me advertising my fireworks store was against their guidelines, because it violated their advertising policy. It said that I was advertising guns or ammunition. I'm like, I am not advertising. I'm advertising fireworks, which is legally celebrating our country's birthday. This is not guns or ammunition. But they're so whack job ridiculous that they don't even know their own advertising policies, and they automatically stop you. It took me three years. Three years. And finally, what I had to do was post what they said in my own post to show them, to get around their own stupidity. So that's one area. Social media. There needs to be some kind of way to sue them or something, I guess. That would be helpful." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "They have a system that we log into, but we don't ever see anything there that we can bid on. I'm trying to remember what the name of the company is, because I keep track of who it is every year and I'm and then try to bid on that. But what they do is they're bidding all of the state print work with the company that can go around and deliver the mail to them, like to their public offices and stuff. They're in Indianapolis. So basically you [have to] set up a whole new business up there. In Indianapolis, just to do this delivery stuff, to get the print stuff. And that doesn't make sense to me" [#13]
- The Black American male owner of an MBE-certified construction company stated, "I'm not really able to. I've had the same problems in Indianapolis, they offer minority jobs and stuff up there. I've been through the Chamber of Commerce, I forget what that is...it's the government building, downtown on Illinois, I think. I've met some people there and I've signed up for work, hoping that someone will call me and give me an opportunity to get some work up there. I've never received a final bid." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I'm on some people's mailing list for some things and some of it's the most random stuff. I'm

like, okay, nope, nope, nope. But it keeps me thinking about, 'Well, there's something like that there. Maybe there's something like that here, going on here.'" [#17]

- The non-Hispanic white male representative of a majority-owned goods and services company stated, "It can be. Sometimes our company, it seems like we're not on every list to get a proposal from. And that's something that we try to figure out all the time. Yeah, if there was something that was central to figuring out, 'Hey, this bid's happening,' that would be very helpful." [#18]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "I don't do much marketing. I almost never did. But basically, and the reason is that because what we do and what I have, the nature of the work, it's so highly specialized, literally you would have to approach specific clients directly and work with them in terms of educating them on the need to do work. This is very much in the nature of energy efficiency, energy planning, for major industry specialists. It is that caliber of industrial facilities that I have worked with, I would say since the early 90s. Well, I think it is basically the outreach but that is pretty much a reflection of the efforts that I extend myself. So, I think that is a barrier Sometimes, but basically I noticed that we are not usually included on requests for proposals and what have you. What is interesting is that I get much more requests for proposals from outside the States and outside the United States than I do from Indiana." [#21]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "I know there's a lot of stuff that we need to work on. It's just that we don't have that much budget. Locally owned and we tried on our first year, tried doing marketing and actually talk to doctors about it. It's just that there was few doctors referring to us, but not that much. There's a lot of marketing tools that I came up with to differentiate us from the competition. I don't have the budget to find the market. It's just that where the businesses are at right now, one to where, again, it's more on the budget thing cause I'm doing everything. I'm doing part of the billing. I'm doing the administration, administrative tasks. I am the full-time clinician." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "We beat the streets and try to connect, tell our story. I just told you my story, try to tell our story, try to get it out there, understanding that hopefully friends of friends will think about us. I don't have some big, huge sales team I hate that a little bit. That totally burned on a guy, I can't do that whole paying folks to go fish for me. I'm not big enough yet. As far as, the biggest thing as a black owned businessman, it's all about I have this [network] about the relationships to new business. I mean, this is nobody's fault, but I don't have a bunch of friends that are business owners, and when I have had, I've got some guys I know now that are business owners, for whatever reason, one real business owner that has a business of substantialness that 1,500 people are trying to get an opportunity off of them. I get that, but it's connecting. It's just tough, man, it's just trying to get the work It's just tough, because it's hard to get trust. It's hard to get people to trust you, with their business. It's all about trust. It's all about building trust, and I understand that. I'm just trying to meet the right people to try to build that trust, to try to get some work." [#23]
- The Black American male representative of a construction trade organization stated, "We did a focus group with XBEs ourselves on particularly how, from an XBE perspective, what

could owners and GCs do to increase XBE spend on a project. So then one of the key challenges, one of the key discussions that came up in that focus group was that as an XBE you have to be really proactive with your networking and business development. So, you've got to join every association, you've got to go to everything. You've got to basically get to the point where your name and your face are something that people regularly see, that isn't the solution necessarily but all that is being done so you get invited to the table. And to even know what tables are out there that you might get invited to." [#25]

- The Black American male owner of an MBE-certified goods and services company stated, "So it's e-mail, referral, or something along those lines. That's how we find out about the job. We don't pay companies to go out and find all these bids, you know, and all this stuff. To me it's just another way to exploit money from small businesses. Yeah, I suppose if you had some decent-sized office staff you could afford it, then maybe beneficial 'cause they could find all the stuff and hand it to you. But those stuff seems to be costly from what I've seen over the years when they do that. It's not cheap. I would say the only barrier is my own personal time restraint, [more] than learning what other ways out there to market. Just because I'm not really sold on digital media, digital everything. Because everything is just so digital and I just know how I look at e-mails, if I don't recognize your name I just swipe and keep going. So, you're not going to be any different, you know, you know, when it comes to that type of marketing. So, I'm sure it works, but if you've got the right type of resources to teach you to do it, it probably really pays off." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "I mean that's always a challenge, yeah. We just do the best we can, but yeah. We'd like to learn about more opportunities that would be a good fit for us. But that's public and private." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes, yes, the cost of making shows, doing tradeshows, paid advertising. We had primarily focused on the consumer market. That turned out to be not such a smart thing for us to do. And that's when we turned primarily to the larger companies and also opportunities with the public sector." [#30]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "It was a little harder because it's not every day that I'm on the websites looking at requests for bids from the city and state because, like I said, I'm not a large company so I can't pay somebody to sit there and just get online and see the requests for bids coming through the city and state so we would always be on top of that." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "So, one of the things that I know that we need, especially in 2020, is a website. We don't have one. I do attend some networking events throughout the year if time allows me to do that. But we don't market. We don't have a lot of overhead and leadership and management, which we would like to, and we certainly need, and that would free us to pursue more business. But when you're small, like we are, rather than run around trying to get new clients, we want to run around to make sure we're keeping the clients that we have. Most of them are ten-plus years clients that we have. Many of them that we have were referred from other clients." [#41]

- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I don't think we've ever taken advantage of any programming here in the state. Those sort of resources were freely available to us online. We leveraged those quite a bit, and, also, through our accelerator programs, we were able to gain access to that information." [#42]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "That was pretty much me figuring out on my own and having friends who have their two cents in. So, for example, I have a friend of mine that works at Wayne TV and he's been a lifeline. He does advertising for Wayne TV, but he knows I can't afford to advertise on major channels. That would be awesome if I could, but airtime is just too expensive for somebody of my size. But he likes me, and he has stuck with me, and even though I've never bought an ad for him, he always comes in with an idea on how to market me. He is just so awesome, and it would be nice if you had more people like that, that would step up and say, 'I want to see you succeed. Why don't you try this?'" [#46]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "The other thing is to find the work. I know they have a lot of websites. Again, I haven't kept up. So, I'm not going to speak to that until I do my education. I still haven't seen a central place to find what work is available." [#59]
- The Hispanic American male owner of a uncertified MBE and VBE goods and services firm stated, "Marketing is all word of mouth right now, and when it comes to the entertainment areas and promotions, we do pretty well with them. Unfortunately, marketing right now wouldn't make any difference, 'cause no one's able to pull permits or have events. Y'know, it's tough sometimes to learn about the opportunities. From what I can tell, a lot of the companies that get the work are always the same companies that get the work, and they're connected with people who tell them about those opportunities before they're available. And by the time you hear about it, the building's already going up. So, y'know, a way to find out about more opportunities would be great, and in early stages." [#75]
- The Subcontinent Asian American representative of a business development organization stated, "It also depends on who you know, and some of the Asians are not very good at networking. They do not understand dynamics of ... they're not even keeping even a good track of which bills are going to be proposed, so proactively going after legislatures [who] understand what's in the next ... in 2021, '22, '23. Some of them, they don't really understand our political process. Somehow, they're really not that well-informed and well-educated about this process, and being part of that ecosystem I would call it." [#76]
- A comment from an Asian Pacific American owned MBE professional services firm stated, "Many Indiana companies do not know what they need when it comes to marketing services." [#AV]
- A comment from a Hispanic American owned MBE professional services firm stated, "Obtaining work is the hardest thing to do right now. I for look for corp to corp contracts. However, I only get W2 contracts." [#AV]
- A comment from a majority-owned goods and services firm stated, "The availability to market, and really get marketing out there, the pandemic has not been helpful." [#AV]

- A comment from a Hispanic American owned MBE and WBE professional services firm stated, "I wish there were more avenues to get our names out there." [#AV]
- The female owner of a DBE- and WBE-certified company stated, "One of my struggles is that I get a lot of e-mails from all those different agencies that says, 'hey, we might have a match for you.' I get phone calls sometimes, I get emails from individual primes saying we might have a match for you, and the sad truth is every single time I go to look to see if it is a match, it is not what we do. So, I -- my suggestion would be -- first off, if those entities don't need what I do, I probably should stop spending time recertifying, right? I should just back out and just hang onto the great customers that I have. But how do we get -- one, is the work there that matches what I do? If it is, great, let's figure out how to match up that need where services are, or if not, maybe we should just bow out of these certifications... One suggestion would be to take a serious look at the job classification or classifications to see if they are a true match for what it is that we do." [#PT1]
- The male owner of a professional services company stated, "Not all the time but sometimes unfortunately the IDOA list, there are -- it goes from A to Z. For people who take care of pets to engineering, everything, so the unfortunate part is- is that sometimes companies have just lists and I have seen it a number of times, they literally just push a button and they have it down to they just push a button and they will send everybody and anybody a request for a proposal or a quote. We want a quote on X, Y, and Z. And it becomes unfortunately just a waste of your time. And it would be nice if there were some types of breakdowns. For example, you do construction management, she does something else, I do consulting, if you could go directly to those areas as an index kind of like to breakdown the areas so we know that this is a match as you are talking about versus just them pushing a button because I get stuff, too. I have just -- I don't do this and it is -- but you go and look at it, you go through and start looking at the actual project scope or something and if you get four or five of those a week, it is just kind of a waste of time. It would be good if it was more site specific in regards to, for example, the things that I do, the things that others here in this room do to give us the ability to really bring value to what would be the end result, i.e., being able to have a discussion, dialogue, engagement within the project so it could make sense for us." [#PT1]
- The female owner of a professional services company stated, "I don't remember all the acronyms, but I know for instance INDOT uses codes, IDOA uses USPC codes, I forget what the rest is. It is a big category I don't know how these different certifying bodies can influence the classifications. I know we have got some reclassification that was done about two years ago, so I don't know who is in charge of that, but if they can influence it, that would be good. From my standpoint because I represent a variety of clients who sometimes can't come to meetings like this, I like seeing a lot of different things because I can say, oh, by the way, this came up and I know you are interested in it because consulting is kind of a real catch-all for everything. But for those in industries that want something very specific, if there was a way to review those codes by these different certifying bodies and for them to have influence on them being more specific, it would be a good approach." [#PT1]
- A respondent from a public meeting held in La Porte stated, "I think there is a whole subgroup of businesses and organizations that have been left out of the communication loop. For example, particularly here in Northwest Indiana, we get a lot of businesses from

the Chicagoland area, to the point that the Chicago Minority Supplier Development Council has a Northwest Indiana arm that does certification for their minority businesses that exist in their database that may not be in others. And I am thinking of organizations like the Lakeshore Chamber of Commerce, the Hammond Chamber of Commerce, the Gary Chamber of Commerce, they don't do business with the state, but their resources to make sure that minority-owned and women-owned and veteran-owned businesses would be a part of the conversation. So, to the degree that we can expand your outreach to make sure that the availability truly represents the existence of minority and women owned businesses in this region, I would strongly recommend that." [#PT1]

- The male owner of a goods and services company stated, "The dissemination of information, some of the local organizations when you receive information it would be helpful, like the program here today and things like that, if you are not in a certain circle, clan, group, or whatever, that information isn't shared or disbursed adequately where it could benefit the program or the program could reach its goals because there is not enough people in the seats and it doesn't reach the people well enough." [#PT3]
- The male owner of a DBE-certified construction firm stated, "How is IDOA, how is the, how is the Chamber of Commerce, how is the Small Business Development Center, and whoever else because I made my rounds, instead of just meeting with me to say that you have done your check box job requirements for the day, where is the follow-up? Where is the urgency that these businesses would look into not just survive, we want to thrive. We want to do well." [#PT3]

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. Ten interviewees commented on personal experiences with barriers related to bidding on public sector and private sector contracts [#1, #6, #13, #26, #27, #63, #66, #69, #71, #AV]. Their comments included:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Always. There's always a problem, but not because of the minority. It's just because of the contractor and subcontractor relationship." [#1]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "It's not anything, it's about two and a half, three inches thick of just pages. So, yeah, but you're not going to get away from that. They've got you. The spec is all the fine print. So, you're taking a big risk when you bid shit up that you're not familiar with." [#6]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "The biggest thing is like HITRUST in the top two certification and the stringent things that they put, because even though you're HITRUST certified it's every piece of software is an absolutely updated and patched to the latest and greatest and recent most thing, you get penalize for that and they want to know when you're going to get it done." [#13]
- The Black American male owner of an MBE-certified goods and services company stated, "I guess it's one of those things, you know, when the state does some of those bids if they put some contingencies on there saying you must have this type of coverage if awarded the

contract, versus having it prior to, 'cause that knocks a lot of people out. Prior to going to is like got to have a \$5 million umbrella. Well, that's pretty costly for \$2 million. If you get you need five when you don't really need five, you're wasting money that you don't have. I find that to be some of the frustrating things especially about these state contracts. Yes, unnecessarily restrictive, I would say that would be your insurance requirement or number of employees requirement. Because given the time, any company could probably get a certain number of people they could bring up to speed to do a job, but if they make the criteria you must have it currently even to bid, that would be a barrier. I think statewide, on a state level or a federal government level it's hard for me to know if that's a structural defect or a discrimination mechanism. In the private sector, when I know individuals have the final say it leads me to think as to a discrimination mechanism, knowing that this is the way to keep the smaller people out of our game. Like I said, you must have \$20 million in revenue. Well, they know who the big companies are, so they change the goalposts, move the goalpost a little farther down the road." [#26]

- The non-Hispanic white male owner of a professional services firm stated, "I've heard of that. I heard – I was talking to a principal of another agency and she actually won a bid for the State. This was years ago. Then they ended up I think discontinuing the RFP and submitted another RFP for the same work and created new restrictions on it that excluded her from being able to get it. It went to – like she sourced the preferred vendor. So, I haven't run into that myself, but that happened for her. But it was not in – certainly not in this administration and I think it was quite a long time ago." [#27]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Some of these RFP responses are pretty loosey-goosey these days. They don't really address the real issues. You know, I guess – I know attorneys need to be involved in contracts, but they shouldn't be as involved in the RFPs, I don't think. I think it – it's difficult to know what a client really wants in an RFP if it's written specifically or predominantly by a legal staff. I don't know if that makes sense to you or not. Well, the only problems I have with contracts and procedures is quite often, you know, the contracts are, for what we do, are written so that we take accountability, which is fine, for, you know, quality of the work. We're supposed to review all of that, review performance and all that. But what we find quite often is that the owner kind of overrules us, and there's – and then the other issue is a lot of the RFPs, for design, are intended to be perhaps constructed using a construction manager or some other third-party entity. And that's usually not represented in the contract, or the RFP. We don't know that. And, frankly, that other entity effects a lot of what we do. But they tend not to have any liability. They have authority, but no responsibility. So, that makes it kind of difficult in some of the public contracts. We don't see it as much in private. But in public contracts, there are situations where that becomes problematic. It's usually things that we don't know about. When we sign a contract, we don't know that there's a construction manager. Or when we give our proposal with fees, you know, that effects our fees. So, sometimes we don't find that out until afterwards. That's problematic." [#63]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Not necessarily restrictive, but hard to meet. The state has a way of dealing with this if you fill out – I can't remember what the form is called, but their effort form. Some public works projects. The minority, disadvantages, and women-owned business participation goals for

that, those can be hard just because of – just the volume of work that goes on and the relative imbalance in the – and the size of those businesses or the number of them to provide those services to the industry. It doesn't seem like it's proportional. If, say, we have a 20 percent goal of everything Department of Administration spends, is there 20 – does industry have – does industry of those type of firms have that capacity from a dollar volume? So, all the projects struggle to get the participation from those companies and they – sometimes it can be a challenge to get those numbers on a project. But then, Department of Administration has – I don't remember the form title but you fill it out and you can list what your effort is and who you contacted and what the result was. Good faith effort.” [#66]

- The Black American male owner of an MBE-certified construction firm stated, “It's just silly how people think. I mean I've got this brand-new van out here, but you want for me to sign on with you guys and you want me to wrap my whole van in your logo, but you're only going to pay me \$1.60 a mile and then you want me to go up under your insurance. It was all kind of crazy stuff and I was like no, I can't do that, because I'm an independent; I'm going to do my thing. So, it wipes out my name. You just want a person with a sprinter van. Well, if you do that and you come for us, we're only going to pay you \$0.83 a mile. I was like, 'Well, if that's the case then, I'm cool with that for right now, until I get a state, government, or whatever contract that I'm working on. But until then I can run with multiple different companies, but if I go ahead and sign with you and you wrap my van, I can only sign with you guys. My van is actually yours, and I don't think that's fair, because I'm paying for it.' You know what I'm saying?” [#69]
- The Black American male owner of an MBE-certified professional services firm stated, “In my case there are often times I have clients who will want to have me as to indemnify and hold them harmless for errors or omissions on the part of myself and my design team. 'Cause as an architect, generally all the engineers and other services like surveying, et cetera, et cetera, will come underneath us and do our contract. And oftentimes there are clients who say, 'Okay, you need to indemnify and hold us harmless for anything you or your team may do.' Which is somewhat unreasonable, so my counter-response then is immediately, 'Okay, if I do that, then you need to do that.' And then the response is, 'Well, what do you mean?' 'Say if you expect me to hold you harmless for anything by myself or my team, then similarly you need to hold me harmless for anything that you as the owner or developer in your team may cause, et cetera, et cetera.' And so, I've noticed that's a very easy way for me to weed out the reasonableness of a client, meaning that they will either immediately agree and allow me the same 'hold harmless' from them as they wanted from me; or they won't. And if they don't, I just don't do the work for them. I honestly don't think I've had a recent scenario where I've had a client say no. I've had a few take issues with me saying that initially, but they agreed to it.” [#71]
- A comment from the availability survey stated, “Most of the contract are not very flexible nor cost wise.” [#AV]

13. Bid processes and criteria. Twenty interviewees shared comments about the bidding process for agency work; business owners or managers highlighted its challenges. [#1, #3, #7, #13, #16, #17, #18, #19, #21, #23 #26, #40, #41, #48, #62, #67, #75, #AV, #PT1] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "That's all of our customers. No bids below. No bids below, it means that nobody got into the estimate. It's a secret estimate and the state doesn't publish. If you don't get under the estimate within 5%, they rebid it the next month. So, then they don't tell you what the estimate is. You got to get below it to get the job." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "The only thing I would enhance in the bidding process is that there would be a second Q&A versus just one Q&A, because sometimes answers will cause additional questions." [#3]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "It'd be nice to hear yes or no rather than be left hanging. You're not interested, just tell [me] no and why, and I'll see what I can do better in the future." [#7]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Many times whenever you're bidding something, they're asking for one thing, but they really want something else. It's like said that the offset press versus the digital press is two different things. And that is still not known by everyone who bids. And so, they're going through these processes that take forever and you keep trying to get to those bidding people to get them, to help them write those specs properly. And we do more ... We're finding that to be true a lot. And that becomes so frustrating to us whenever we could take a project and just because we're going to finish it a little differently, they don't deem it the same thing, because they're using an offset printer versus a digital press. when we do a bid, we try to contact them and try to go through it with them the way we bid it to see if they have any questions. And a lot of times in during that question process they're open to really taking bids, but some of them don't bid like that. They just say you present your bid, and it is what it is. We didn't have an opportunity to talk to them. So that is, to me is a very big problem with the way people bid. And what they're trying to do is make sure that the people don't get personally involved with the people, but at the same time people want to work with people. They don't want to just work with machines and things like that" [#13]
- The Black American male owner of an MBE-certified construction company stated, "I don't know how to play the game. There's a certain way they all work to be able to get in a certain category so they can be sure they lock in a job. I've pulled so many projects for them, and I've seen the names of the companies and the contracts and whatever, and I see different other painters going to work, but it doesn't seem like its viable to me." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "The first appearance is that they seem overwhelming, but maybe they're not. Maybe I'm perceiving it because there's so much jargon in it. There's tons of jargon that I'm just blown away with. I worked in GM, which has a lot of jargon too, so I feel comfortable trying to muddle through that stuff, but it's on a different level than even a corporate jargon. You know what I mean? It really is." [#17]
- The non-Hispanic white male representative of a majority-owned goods and services company stated, "I wouldn't say a barrier. There are times when some of our customers need a certain amount of bids and I would say the only barrier that exists is on our customer and partner side where they might get three bids and one might be

astronomically high and then the other one might be astronomically low. And then they are trying to figure out why there's such a big difference between these three bids. And on their end, there's a lot of confusion. Usually, you have to read all the contract to understand, 'Okay, well this company didn't even put in money for painting the elevator doors every year. They didn't include that in their bid.' And that's what our customers have to go through, and they have to really look at the specifications from these other companies to say, 'Oh, this company isn't even giving me everything I wanted.'" [#18]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Probably it's getting serious consideration for government jobs or for bigger jobs. I have been making positive progress for that, I think the website is one step. I think that having a five-million-dollar job on my resume is a good step and I'm just trying to work toward that. I can handle a lot more than what I do and a lot more challenging project. It's just getting, where do I find those clients? How can I get my foot in the door to make a presentation and seal the deal?" [#19]
- The Subcontinent Asian American owner of an uncertified MBE professional services firm stated, "Certainly yes, certainly. There are different hurdles at different stages of the bidding process and at the qualification stage and so forth. Yes." [#21]
- The Black American male owner of an MBE-certified professional services firm stated, "No, I don't understand it. I was saying, I haven't gone into the bidding, I haven't seen the work. That's what you were saying, like the staffing, I think the staffing company would be the company that I could get certified, take to the state, and bid on a contract." [#23]
- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, the main thing is the complication of the paperwork will be the number one thing. And if you get past that barrier you may read into – it says – the next thing you'll see is insurance – or bond size, and then very seldom the last leg would be if they say, 'Must have a minimum of xyz employees to bid on exercises.' But normally the paperwork and insurance, we don't get to that third leg of the fork, of the process of elimination." [#26]
- The non-Hispanic white male representative of a construction company stated, "It's just with the Indiana Department of Transportation. They are quite specific and quite extensive on their requirements and everything else, so you really have to pay attention to everything they're requiring. And then once you submit that, then you have to make sure that what they send you back is, again, matches what you had originally intended." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Oftentimes, when you get the email about this request for proposal or this bidding opportunity, you have a very limited window that you have to be able to – sometimes you already missed the walk-through. You have to be able to respond and you have to be able to respond quickly. When you're a small business and from a president/CEO, that sounds good. But I do all the bidding. There's certain aspects of the business that only I handle. So, I just find that I'm spread too thin to be able to respond in a week, in a week and a half, maybe two, to the proposals when they come. Again, you have a very short window to be able to respond to these requests for proposals. I was asked questions like – again, this might not be applicable at all, but I was asked questions – I was asked to bid on the paper goods – toilet paper, paper towels, soap, those types of things,

trash bags. But without any prior knowledge of what the history of use was for those items for this facility over the past year, how do you bid that? I'm sure that there are softwares and processes and technologies that will allow you or assist you with quoting on that. But if you've not done that before, you don't have a seat at the table. There are barriers. There are barriers in the procedures. Time, just understanding, again, how to navigate those systems, how to find the information that you need, lacking the softwares and the different tools that will make your job easier. It's almost like Fred Flintstone. He had to put his feet down to move his car. He couldn't just push a button. He didn't have the software packages and programs that do some of this calculation. Complex. Small company. Limited personnel. I recently met and have been having conversation with another minority-owned business, who's doing very well. They probably have a couple billion in revenue. One of the things that he says to me often, and rather condescendingly, is, 'You need a leadership team. You need your core team at the top.' I'm thinking, 'I know that. I know that, full well.' I know that as the CEO, I don't need to be in the field delivering equipment and supplies and having to do all of the things that I do. But if you don't have the revenue jobs to pay the people to do that, then you have to do it. Until you land those types of contracts that will generate revenue in your business that you can appropriately distribute in staffing your business with people to handle these varying functions, then you do it. So, you're overloaded. It just kind of keeps you stuck and stagnant in this place. It's like being between a rock and a hard place. You know some of the things that you need to do to break out of this cycle, but unless you land the contracts to generate the revenue, you can't do that. Well, unless you pull away from doing that to pursue the work to land the contract, you're just stuck." [#41]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "We don't exactly bid because we're a professional service. We respond sometimes to an RFQ or an RFP, or referrals. That's the dubious nature of our business. There's no even playing field. It's you select your architect the way you would your attorney or your accountant." [#62]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "We do the RFQs over the years that we've gotten are sometimes – when people put these things together, we choose to bid or not to bid, depending – there's a lot of work that goes into bidding and preparing a quote. And a lot of times the RFQs are just – sometimes – I think a lot of times people put people in place that don't know how to put a request for quote together very well. But for our industry we would do our best. Like I said, ours was more private sector, but if we did have – like we did work for some public sector and they would kind of blanket RFQ out to all the agencies or whatever, and they were just doing it just to cover their tails, I think. But I think sometimes the people that put these requests for quotes together don't even know what they're asking for. Like you need to provide three pieces of artwork, you need to do this, and they were asking for ridiculous things. And I think they didn't realize what goes into putting those things together, when they're really not going to do business with you anyway. Do you know what I'm saying? They're sending these quotes out, so we would just say, 'We're not interested,' because we would read through some of these quotes and say, 'This is just – somebody just threw this together' and they were just not worth our time, because you knew people that put some of these quotes together don't understand what they're asking for. So I think that was always kind of a pain, when they're requesting – they're asking for work upfront. I think to make my answer, this

long-winded answer short, sometimes we would just say, 'Thanks, but no thanks' because we were not going to provide marketing and art to a company that was probably not even going to use us anyway; they were asking for freebies, and so we would just say 'No thanks.' I don't know if that answers your question. But some of those quotes are just they go on and on and on and they take days to respond to. But some of them were just asking you to actually do the work without even giving you a contract. They were just asking for everything and then I think they would sit around, 'Oh, we like this' or 'We don't like that.' So, I think some of the requests for quotes we've had over the years, when we'd read them, we're like, 'No, we're not even doing this,' 'cause they were asking you to show your work. And sometimes they would even ask, 'How would you take us to market?' Well, you don't know that unless you sit down with a company or public sector or private sector; you can't give answers on that. Say, 'This is how we would market you. This is the artwork we would provide. This is what your logo would look like' and that was crazy because they weren't paying for that. And we've had people over the years that when we were young, we'd say, 'Okay, this is what we're looking at' and they actually took some work we did and went to a printer to have it printed. And that was based on an RFQ. So, we learned a lesson at a very young time of our professional lives. We don't do those anymore." [#67]

- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "We've done a couple RFPs for some bigger clients and companies, and sometimes the RFP is a bit complicated and hard to fill out. But I'm not sure it's a barrier more or less than just independent requirements for each contract." [#75]
- A comment from a WBE professional services firm stated, "I have a comment about the whole contractor process for minority businesses. There is way too much red tape which makes it very difficult on a small business to bid on work. When there's a company of my size of 6 people, there is way too much paperwork." [#AV]
- A comment from a majority-owned goods and services firm stated, "Tough bidding process." [#AV]
- A respondent from a public meeting held in Greenfield stated, "As a small business owner trying to be a prime, I don't have the bandwidth to create the proposals and then not get them." [#PT1]

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. Twenty-two business owners and managers described their experiences with bid shopping and bid manipulation in the Indiana marketplace [#1, #2, #3, #4, #5, #6, #7, #9, #11, #17, #18, #26, #27, #29, #31, #34, #41, #44, #48, #63, #67, #PT5]. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Bid shopping, oh yeah, big problem. Dishonest people. I get a phone call early this morning from a guy I'm familiar with for a big contractor. He wants to know will I bid, will quote him, message board rental, just message boards, 35 message boards from six months, okay? Yeah, I can do that. My first question is, who you using for your traffic control? And he

said, 'I got a call from [Firm A], [Firm B] and [Firm C], the three big players in Indianapolis.' I said, 'Okay,' because I know what he's doing. He wants a better price and he's going to take that out of their bid. So that's bid shopping. He's not taking, he's trying to cut their price. But generally, my question would be what kind of price do I need to be at? I had another guy call me this morning and said, 'I need to rent two crash attenuator trucks for six months, 16 hours a day with a driver, and you got to beat \$1,600.' Well, you know what he's doing? That's bid shopping. That, you're asked to do that sometimes for people and we try not to. I mean, that's just... I mean, sometimes the state likes to call unbalancing your bid. I had a contract last year where it had a 500,000 feet of center line. Those 500,000 feet. Well, the job's only 2,000 feet long. There's no way that number's right. So, what would you do, because they pay you by the unit? You bid it for a penny, which would make it be what? 5,000 bucks? And then you put the money that you really want it to be in the lump sum item, that's been manipulation. So, you're moving numbers around so that you still get paid the same way, the same amount. But because the engineering company that did the design work messed up, you have to manipulate things so that you still get the same number. That, in my mind, that's bid manipulation." [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "What I've run into is primes that come to me and say, 'We've done half a million dollars' worth of business with you and this is what you've charged us to do this business, to support us in this effort. Now we want to do a \$2 million deal with you, can you give us a better break?' Fair question, and I made some adjustments to accommodate that, to make me more competitive, but I am a little put off by that tactic. When you give me a \$20,000 deal and I've got to go through the same ordering process, invoicing process, receiving process, billing process, and I made a small amount of money, when I get a chance to do it on a larger scale all of a sudden you want to cut the margin. As a small potato I can't fight that much. My only defense is if we've got five clients bidding on that job, I want to be on the team of all five of them, so whoever gets it I'm on the team. That's my defense against that approach. I never go back and say, 'Johnny said they will do it for X%, so now you guys got to.'" [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "The only thing that I would say to bid manipulation is this idea ... When we submit a bid, we submit what we think we can do it for. And what I've learned is that sometimes there is an idea, I think ... I may have this wrong, but this is what I've picked up on. That you bid based on anticipated change requests. So, you bid as low as possible, knowing you're going to change request the rest of it to get you where you need to be, versus really bidding what it's going to take to get it. So, if somebody like me bids on, this is what I really think it's going to take to get you what you're looking for. And somebody else is like, we're going to do a lower bid and then change order it the rest of the way to where we need to be, then we're going to come up ... it's not going to be apples to apples." [#3]
- The non-Hispanic white male owner of a construction firm stated, "Yeah, that happens a lot. a lot of people do that, bid shopping is a big, it's a big problem. I mean it's not a problem, it's just how it is in the business, in the industry. That everybody's just going to shop and a lot of the times they're not even shopping, a lot of the times they're just looking, you know, the person they've been using for 20 years is taking advantage of them. When you do the tract homes and the plumbing part of the tract home, yeah you can lose a bid for a cent over \$50,

and that could be quite a big pain because they typically do them in sections, like section of a neighborhood, you'll be awarded the plumbing big for that section of the neighborhood. So, you'll do all the houses in that section and then the next section will come for bid and somebody could beat you out for \$50. I went into it before with insurance companies. The insurance industry, it can be rough with the bid manipulation" [#4]

- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Once in a while. I've had a price from so and so over here, they can do this same item, I've given them a price maybe, it's a small item or something maybe \$2, but they said they can let us have them for \$1.89. If it's pretty close, I might try to match it. If it's too much, I say well you probably ought to go with them. I don't blame you if you do. If you can save some money, that's fine. I'm not going to starve to death." [#5]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "You submit the price, and they ask you for a drawing. They ask it for... And that happens on small work a lot. Let's say somebody calls me, they're asking me for a price to reconfigure some piping and install a couple pumps or something like that. So, they ask you for what your plan is. You give them a drawing and you give them an estimate and then they take your drawing and then they go had it to somebody else and say 'Hey, give me a price on doing this.' After you've sunk, you went out there, you looked at it, you sunk a day into figuring it out and then somebody else can look at it and say in two minutes, 'Yeah, sure. We can do that. Here's your price for that.' That's [bid] shopping right there." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Bid shopping is irritating. I know it's a necessary evil, but I really find it frustrating when someone calls just to have me bid on a project because they got to meet their quota of three bids. And they had no intention whatsoever of changing from their original vendor, they just wanted someone to provide the bid for them so that they met their quota. That's rude. Where you give them a bid for a certain set of specs, then they come in and they add an extra four pages. Or they expect you to, you tell them, 'Okay we'll do corrections. But then we won't charge you for the artwork because you're buying the printing for us so we will not charge you for the artwork.' Then they end up spending 30 hours' worth of correction on it because they want to change it around 10 different times to see what it looks like. Then they go back to the very first one that you had. So that of course has used more of your time and resources than you originally allowed in your bid." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "Everybody shops their bids. Everybody does. I don't shop my bids. I go for three quotes, and I take the lowest quote... so everybody knows it going in at full force, any quotes." [#9]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I know it happens. I hear it from my contracts that I work for, it happens all the time." [#11]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Yeah, we've done that because, like the building we're getting ready to build, the guy got a bid from a company for this thing and then his real estate agent who is friends of ours, and we did some work for him to sell his house that he bought the same house, but that's a long story. I don't need to tell you all that. He did say, 'Hey, they said they did it for this. What do

you guys think?' We went down and gave him a bid using that number as the baseline, came off that a little bit and we added more options to it. It just put us more in a competitive place. Yeah. We've had a company one time say, 'Hey, we want...' This with some concrete work and they wanted us to leave some concrete work. And we said, 'Man, we got this crazy bid from this guy.' Like, 'Okay, well...' Honestly, between you and I, it's like, okay, if they think that's a crazy bid and my mentality, because my Dave Ramsey background again is, 'Holy crap, that's a lot of money they're asking for.' And then I'll step back and go, 'Wait a minute. This is a big company. They're used to paying bigger money. They have more risk. They have more resources. They expect more, honestly, than some individual would out of a company, of us.' We came back with a bid. It was a lot less, but it was more than I might have bid if it was just a little shop down the road, just because I'm like, 'They've got the resource. They're going to hold us at a higher standard. There's higher risk for us,' because it's a commercial lot instead of just some guy's shop. It was a real eye opener for me in terms of how to bid a job based on risk. Incorporating that risk with the price." [#17]

- The non-Hispanic white male representative of a majority-owned goods and services company stated, "The only thing I can think of is there was one that comes to mind where a lot of the companies, especially for some of the bigger jobs, you need multiple technicians in order to support that bid. So, one of the jobs I can recall, we were really, we thought, really competitive. I mean we had barely a margin on the project. And we were double the cost of one of our competitors and we're like, 'How? What are they doing where the union rate is what the union rate...?' You can go on today online and look up what the technicians make, right? I'm like, 'How are they underneath what the technician makes in this bid?' We never know. Maybe they just needed business to fill holes or whatever. So that's the only thing I can think of off the top of my head. I assume that they're paying the technicians the right amount of money. Otherwise, everybody would be hearing about it. How are they underneath that rate? What's the bid? So sometimes you get that, and you just scratch your head and you're like, 'How do you compete with that?'" [#18]
- The Black American male owner of an MBE-certified goods and services company stated, "We were going to work with a WMBE company and they're one of the largest ones in the city for years, 30 years' experience, where they looked to exploit smaller companies as well as far as pricing. And this particular thing reminded me that they wanted – and it rubbed us wrong; we didn't do the deal – but we knew what the bid price was and then they wanted to, you know, basically skim a dollar off the top for administration costs, which we thought that was crazy. And, you know, the bid was already close to margin as it was for a whole dollar. So, we found that to be insulting from a WMBE trying to extort an MBE a dollar an hour, after cost. Yeah, I'm pretty sure. Just because, like I said, sometimes the time that you went to some of these events and you signed the attendance sheet that attended some of these bigger companies, you put down your e-mail, you never hear from them. So you can only ask to wonder why, because, you know, they look at the list. I mean they want you to list – they put down like MB, WB, blah blah blah, whatever. Then you never hear from them. So, it's almost – I understand why you put it down, but then when you don't hear from them, okay, that may be a hindrance. They skim right through the ones because they could see who's who." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "I heard somebody from another agency tell me once that they hired a lot of interns to work in the

public on their public clients because the government is required to pay for every hour that somebody works. So, if you have a bunch of kind of interns working, you can bill for all those hours. So, we don't do it that way. I haven't had a lot of that, but I think that might happen with this new contract because they are – or the new RFP. They are required to get three bids on every job. I could see – but they're not required to take the lowest bid. So, I could see scenarios where a State agency has somebody, they just want to work with, but they're required to get three bids. So, if we find that we're just getting bid for no particular reason, we'll obviously stop responding.” [#27]

- The Black American male owner of an MBE-certified goods and services company stated, "They'll order bid, and then that company'll halfway into the year have a reason why they can't supply that product at this time. And then they end up paying all these other surcharges that never get put back into that bid award. It should go back in to say, 'No, this company's real number last year was this.' And what they should do at that point in time is go back out for bid and say, 'This company we awarded this to cannot meet the number they gave.' But then don't when it's their friends. They don't do it. They keep it with them as another gain because they have the ability – flexibility to go outside of that agreement. Again, one easy way is to say, 'If you don't sell it at this price –' they should have to make it public. If somebody does something different than what's on that bid, that should go out immediately to all the other bidders and say, 'Can you take this over still at that price?' And whatever time those folks had it, they had four months, that should get added onto it. And I should be able to say, 'Yeah. I can still meet it.' It's not – shouldn't be underneath the table. Because that's really what it is. That's a under the table deal. That would cut that out. That would cut that out right there. Yeah. That they have to make all the other bidders aware of whatever's done that is different than that award. That's only fair. Let me give you an – let me give you another example of what happens on bids. Let's say I'll take caustic again, so we bring it in in barges up the Mississippi River, up the Ohio River, keep it in our tanks over there. So, somebody that bids caustic will typically not give a year firmness. They will bid, and then they adjust it quarterly, or they adjust it monthly. And so, if you award a bid to somebody because of their January start price and then they got 11 more months, that's a fake bid. People getting the second look on a bid. Tell us that the bid is closed and that because we hit send and we hit it at the right time, but it didn't go through. A minute later it goes through and said, 'Your bid is out because you were late, and you cannot get this business,' what we had for 20 years. But the next day, the next week, the next month, they're calling the ones who make the product that we were bidding and said, 'Do you want to sell this to us?'" [#29]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "We've experienced that in the past, but I think it's probably better – it's so dependent on the quantity of work so, when there's enough work for everyone to bid on, that's not as much of a problem. Yes, we know that we've been in situations where we know that our price was the lowest and then they self-performed the work because we all quote the same people. It's a pretty small pond." [#31]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Well, that's the one-on-one basis is very little bidding, even though, occasionally, we'll give them a number. We'll say \$10,000.00. They'll use that number to go get a lesser number

from somebody else. That happens. That's just business. It's got nothing to do with me being Hispanic or anything." [#34]

- The Black American male owner of an MBE- and DBE-certified construction firm stated, "We say exactly what we say we're going to do for the amount that we're going to do it for. And what we think is that some of these older guys were having us do all the work on the scope and then partner out to their other guys and say, 'Hey, I got this scope from Bob. He's at 150. Can you beat that?' So, there were a couple of guys that we thought that that was really happening to and so we just stopped bidding with them." [#44]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Oh, I've run into it a lot. I do everything I can to minimize or eliminate it by writing specifications, accordingly, that limit how much time a contractor has to provide his bid, and by stipulating who all the primary subcontractors are within his bid, so that they can't go out afterwards and shop it. Now, they do that. They still try. They'll say, 'Oh, well, we found out this firm can't perform in the schedule, so we had to go to another firm.' You know? And we can't go around calling these guys and say, 'Did you say that you couldn't do this now?' You know? So, that's problematic. And owners, frankly, don't want to address it. They don't want to get crosswise with legal issues. So. But, yeah, bid shopping is still prevalent unless there's an active avoidance strategy between the owner and the designers." [#63]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Oh yeah. I mean most of the time – I think we're so seasoned now we know when people are just shopping, and we know when they're just throwing a proposal out to you – or an RFQ out to you just to get a number. So thankfully we reached a point in our profession, in our company that we're able to kind of figure out what was happening, and we just would say, 'Thank you, but we're not interested.' But sometimes people just need you to throw a number out because they just need numbers, and so we're very aware when people are bid shopping, so we just say, 'Thanks, but no thanks.'" [#67]
- The female owner of an uncertified WBE construction company stated, "One of my biggest concerns this year, what we have seen happen is we get awarded as a sub with primes to work on INDOT, maybe a half a million-dollar job, looks great. And as a smaller company typically I hire out and have people work for me and I can still count it towards my goal. But this year some of those other companies realized they just won't work with me because then they can go around my numbers. Instead of working with my numbers and get their own with a prime, even though they are not a DBE or WBE or whatever they are, and then those primes send me a DBE change order. So originally I was awarded a half million dollar job and then because I only have 20 trucks and I needed 60 every day, those 40 didn't work with me, they refused, and then prime needed them so then they call them and negotiate their own price, still work for INDOT and work for the company, and then I get a change order halfway through the job that says even though you were awarded half a million, now you are going to get maybe 200,000 or \$100,000 because you couldn't fulfill your requirements. And I think -- you know, I talked to a couple of the primes this year who said we are opening a door that's frustrating and scary for me that now you have shown these guys that they don't have to work with me, they don't have to help me out, and they can just come get their own job because you are so desperate and then you force me to sign these

changeover goals, why is anybody going to work for me anymore when they can just go around me and get their own price, get a better price than I can get because they are part of the company and, you know, then just send me a form that says we no longer have to meet that goal because you weren't able to hit it and so it is being put back on me that I wasn't able to hit my goal so I am no longer awarded? They are all INDOT. So, I am just a little nervous about that and concerned how INDOT is going to go forward with that if that just continues that they just can go around me constantly. There will be no need for me very soon.” [#PT5]

15. Treatment by prime or customers. Six business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#1, #3, #11, #44, #48, #71]. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, “Always. You get treated like the redheaded stepchild. It's just everybody, but they'll call you. Sometimes I think my customers are jealous of me because they think I get a preferential treatment because I'm a minority. So, some of them treat me right. For instance, one thing they do continually, and this is just such a burr in my saddle, if there's a problem on the job... Okay, let's say that a sign got knocked down by a vehicle, okay? Or let's say they know they need to change the message on a message sign because there's a holiday coming up and they know this on Tuesday, they will wait until four o'clock on Friday to call you, when you're telling your people they can call. That's dirty. I don't like it. And that's the way they mess with you. Not everybody does it, but you get a lot of people, you get a lot of state engineers that do you that way. And then they'll say if you don't get out here in the next two hours and fix this, there'll be a \$20 a day penalty. That's dirty. Now, I can't prove that they do that on purpose, but it happens a lot. So, is that about being a minority? Yep, it sure is because I think it's jealousy.” [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “I think it's related to being a subcontractor. I don't know that it would matter if I'm a woman, a minority, a veteran or a white male. I think for those that don't want to carve out the work and only use a subcontractor because it's part of their win strategy, it's not like, okay, I'm going to give this to the guys, but not the woman. I don't think so.” [#3]
- The non-Hispanic white male owner of a majority-owned construction company stated, “No, actually I get complaints that I'm getting it too good. Because the landscaper will follow behind me a lot of times so if they think I'm getting it too good then they just think that they're spending too much money on it. So, I get the opposite complaint, don't get it too good, we don't want to be doing the landscaper's work.” [#11]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, “If I'm going to put a green roof on a roof for you, it's going to cost you \$100,000.00 worth of green roof materials, you have to give me 50 percent of that money upfront. Now most contractors never give any money upfront. They believe that if you're going to do the business with them that you should be able to put the bid together without it. And we always say but we're dealing with customized plants and trees and shrubs that are going to go on that roof. And if something backs out, there's no place I can take them. if I'm laying dry roof and I'm supposed to put a, you know, 2002-foot roof on the building and something

backs up, I can take that material and put it on my next project. There is no next project when you're talking about green roof, so most contractors agree upfront and they pay the down payment. But when it comes to the second payment, sometimes it's been – that's been the hardest thing for me is to say okay, this is what we agreed to. You signed it. We had it notarized, and now I need another \$50,000.00. And I've actually had more than one general contractor say to me 'Where am I supposed to get \$50,000.00?' Sir, we agreed to this this four months ago, you know, and they will kind of weasel out. And what that tells me it has nothing to do with their intellect. What it tells me is that they're over budget and they don't have the cash. And so that's when I say thank you very much. It's been nice working with you, and I move on because I am not going to be the person who starts – one, I can't afford it. But also, that was the agreement that we had, so if you're going to walk out of an ironclad agreement, what's going to happen down the road. So, yes, there are a few times – going back to your original question – there are a few times that we run into these issues that we think are because we are, one, a company that's been doing it for a long time and, two, we're a black company that's been doing it for a long time and we're asking them to think out the norm. We're asking them to do something, quite candidly, out of the norm of what they do. They would never ask concrete – a concrete contractor would never say, 'Hey, I need \$300,000.00 upfront to lay the concrete.' If you're going to do the job, you go get your loan, you go get your business. But this is a little different business, so we do run into that from time to time." [#44]

16. Approval of the work by the prime contractor or customer. Nine business owners and managers described their experiences getting approvals of the work by the prime contractor or the customer [#1, #9, #13, #14, #25, #30, #48, #49, #68]. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "It depends. Yeah, we get that. Yeah, and I don't know why that happens, but it does. I mean, for instance, the standards by which we're held very extremely by job and by engineer. For instance, the state spec says if you paint a line, it can't vary more than a half inch in 50 foot. Some people, they don't pay attention to that, but they could because it's in there. I had one engineer one time, he didn't like me, and I think it had something to do with the minority issue. And he wanted me to provide an invoice for the material that I was, epoxy material, I was putting in the [epoxy]. I said, 'You can't do that.' He said, 'Yes, I can. It's in the spec book.' I looked it up. He was right. It is in there. I've been doing this for 35 years. Nobody ever asked me for that before. Why did he ask me? Because he had a... didn't like me. So, some things they can make you do that they're within their rights, but the idea is to build a good job that's safe. And the idea is also to let the contractor make money, so he'll live to fight another day. There's some engineers that if they see the contractor with a smile on his face, they take that he's taken advantage of them." [#1]
- The Native American male owner of an MBE-certified construction firm stated, "So, when there's a modification to a contract requirement, they're very slow to respond. I'm waiting on one now for South Carolina it's been almost six months, eight months. " [#9]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Most of it was treated nicely. And honestly, when it comes to, if we have people that are just intolerable, we have fired customers before. And it's something that's very difficult for

us to do now because we don't have enough business, but there have been times where if they don't pay properly and they want to just give us a hard time and take up our whole day and just chaos and silliness then we have to get away from them. Because we can't make money on them." [#13]

- The Black American male owner of an MBE- and DBE-certified construction company stated, "We're affected by the weather sometimes, sometimes we're lucky enough to be inside, but the biggest challenge is just customer relationships and finding people, and including figuring out how to grow, access to capital, and bonding, that stuff really is important. Early on at least, somewhat of a limiting factor, but we've gotten to the point now where it's not as limiting, bonding funding. When you need it, you can't get it; and when you can get it, you don't need it." [#14]
- The Black American male representative of a construction trade organization stated, "[I] think one of the challenges that we heard from our [company's] owners was that some [project] owners are great to work with and work for and some are not. So then sometimes our owners found that they didn't always get a lot of applications or a lot of competition for some of their projects." [#25]
- The Black American male owner of an uncertified MBE goods and services firm stated, "That was an issue and it's not necessarily the prime. That was mostly by the customer who had very, very, very I think overly specific delivery processes and delivery instructions and stuff that was really, really strange and unique. We had to learn how to prep and package for this particular customer. Once we learned that, then it obviously just became part of our routine, but it did add additional cost. If you're used to sending out something in – and everybody else takes it in one wrap of a shrink wrap but they require four wraps of shrink wrap, well, that's different and unique." [#30]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "We don't have any problems. We don't. We send folks in to do a commissioning of the work and if there's a difference of opinion we'll make sure their opinions are taken care of." [#49]
- The non-Hispanic white male owner of a majority-owned construction company stated, "[A ceiling needed repairs to the point] where I would have had to go in and repair it and paint it. And no matter how good it was, there was always, 'Oh, no, no. You should have done better than that.'" [#68]

17. Delayed payment, lack of payment, or other payment issues. Thirty-nine business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#1, #2, #3, #4, #7, #9, #10, #11, #16, #17, #22, #25, #26, #30, #31, #32, #34, #39, #41, #42, #44, #45, #46, #48, #61, #62, #66, #67, #68, #70, #71, #73, #76, #AV, #FG2, #PT5, #PT6]. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I've got a phone call after we're done with a guy out of St. Louis. He owes us \$5,300, and he's complaining about paying it. Said, 'We've already paid you \$50,000, let's just call it even.' No, we did the work. We want to get paid. That's our profit on this job. I can tell you stories where they owed us a lot of money and claimed they couldn't get the paperwork

done. And finally, I had to call their area manager, and it got paid. But it took a year. You can't live like that. Everybody's slow in construction. I mean, we have a bank, okay? And our bank lets us borrow a line of credit, based on how our receivables down the road. Anything over 90 days, they discount it. If a company, any one company, 25% of what they owe us is over 90 days, then we can't use that company at all in our calculation. And the other problem is there's a 10-day prompt payment law. They all ignore it. All of them, not pointing fingers at anyone, but they ignore it. I mean, Reith-Riley, they're really... I can't complain too much because if they owe you and they've been paid, they do pay you. They are slow. And I think part of the problem is there's so much work out there right now and the experienced people that are needed to make all of that payment thing happened, there's just not enough of them. So, they don't do it intentionally. I think it's just the nature of industry. We don't always have time to chase it, to figure out who owes you what. We have great records. We are very accurate, and we just send them, here's what you owe us and then here's the updated. If you've got a problem with that, call me. If you don't, send me a check. But the guys who are paying you, they'll have... They might have 20 subs they're dealing with and they might have 50 jobs they're dealing with, and so to make sure that everybody gets paid in a timely manner is difficult. We won't sign the DB. Do you know what a DB three is? That's the final document that says you've been paid everything they committed to. And sometimes they ask you to sign that without being paid." [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Whenever we've had an issue with payment we will [contact] the state and in one or two cases they've told the client that, 'You don't pay them, we ain't paying you,' and we got paid. We fortunately have not had a real issue with getting paid. We did some work for the state of Illinois and we had a problem getting paid. When we ship product, you got 10 days to pay for that product. In most cases our turn to pay our manufacturer is net 30. If you pay in 10 days, I may get that money on day 11, 12, 14, whatever, and we immediately pay our prime. We are suppliers, so we ... We say net 30, but we're probably paying net 20, where we don't want to be over 30 days that we get into a bad situation. Illinois was like 120 days, 150 days, so we just said ... We can't cashflow it." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Every business has their own set of standards and corporate culture and ways through the payment. So mostly it's been easy. Mostly it's easy. one has a practice where you have to maybe... Let's say that you can submit an invoice for the prior month, and you'd get paid 45 days later or something. But to do that you have to submit it no later than 5:00 on the 30th or the 31st, otherwise you have to wait another 30 days. Well, the only way that you're able to do that is to scramble to get everyone's time by the end of that workday when the invoice is due, which is almost impossible. So instead of having that 45 day terms, you really have 75 day terms. You're adding 30 days because they won't process if you don't get it in by 5:00 that day. I also appreciate that we're big enough to bear those terms. But the state... Knowledge Services is the vendor manager for the state. And so, it's supposed to kind of level the playing field for small businesses and they have a lot of small businesses on their contracts and they have... I think they are like, it's essentially 75 days to getting paid. However... which is tough if you're just a really small business so we can do that, you know? And so I appreciate the stage that we're in as a business that we have more flexibility, but

for a small business, like when we were getting started that was like, 'Wow, so we're going to hire this person, we're not going to get paid for 75 days. And what if it doesn't come in?' Like it's just, 'Maybe we shouldn't hire so fast, whatever.' But what they do offer, which is why I'm just like, this is terrible, but they offer factoring. And so, at a high interest rate factoring is when you don't have a banking relationship in case you need to leverage a line of credit to pay people before you get paid. So, a factoring company will give you like kind of a loan shark, a high interest rate to carry that, to give you cash against that receivable. And so Knowledge Services will pay you in 75 days, but if you need your cash sooner, they'll give it to you sooner at an interest rate. And I think that the state should say this, remind prime contractors, maybe even the bigger contractors, 'This is the reason that we do this. This is the why. It's not to take something away from you that you could do, but it is an economic engine for our state to support the growth of these small businesses. And you're going to help us do that. This is good will. This is like community service almost, but better because you're getting value. And likewise, to support these small businesses, we don't expect you to ever have over net 45-day terms or net 30 terms,' or whatever. You know, something that's reasonable, but that somebody's... Those outliers that are going to push the envelope would understand why and have constraints that really support the mission of the whole program." [#3]

- The non-Hispanic white male owner of a construction firm stated, "I've ran into problem with that a little bit, but I feel like if you have communication with the people that you're doing work for, it speeds up that payment process." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "It's rare that that happens. Most of my customers do a 30 day." [#7]
- The Native American male owner of an MBE-certified construction firm stated, "We started out and it nearly cost me my business because that was obtaining payment. They held us out for 90, 120 days for payment and I can't float that long. when it comes down to the purchase order and they say paid when paid. I come from a business that we went through training, how to hang onto your subs money as long as you can. So I know that that's what large businesses do. That's part of how they use other people's money to build projects. And I'm smarter than that now. You know what I'm saying? It's not going to be my money they're going to make money on. I'm there to make money, not fund their projects. We use what's called a procurement payment system. We submit our invoice to the customer; we submit our invoice to the payment system. Sometimes it takes them 10, 15, 20 days to go approve our invoice. And, once it's approved, the payment is like clockwork. But, getting it approved is many times a gigantic challenge." [#9]
- The female representative of a WBE-certified construction firm stated, "They may forget stuff from time to time. Everybody runs short one month. They intended to make a payment, and they couldn't. And you just call and talk to them and work something out. And most of the time, you get a check in the mail in a week or so, and you're done." [#10]
- The non-Hispanic white male owner of a majority-owned construction company stated, " [I] have had that in the past. Not lately, but I worked for company probably six or seven years ago, I think they'd forget that they owed me money. It would be 90 or 100 days before they would pay." [#11]

- The Black American male owner of an MBE-certified construction company stated, "One customer took about six months to pay me, but they finally paid me about a week ago." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "My first experience with that was, it was a consulting job I did. I did a consulting job as a contractor for a company that has a contract with [a large firm] in Wentzville, Missouri. [That firm], and I don't know how other companies do it, they pay their invoices second day, second month. 60 plus. Right. It's almost 90 days out. Now, it wasn't a big job, but I was reimbursed from the subcontractor that had the contract in the [large firm] plant. They paid me and reimbursed me right away for my travel and expenses. That was no money out of my pocket, but my time, my lost time for doing the job took them 90 days to pay me. It took an extra two weeks because once they got their money, then they went through their process and paid me. I'd say that's a problem. I haven't had a federal job yet, so I don't know. Now, I have heard that those are hard to, I have heard that the payment process there is difficult to get started and set up and figured out, but once it's done and you learn how to do it, you've got it. And I've been warned against that. And then I heard also that there is a delay in that." [#17]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "There's some that, especially those patients that receive our services secondary to motor vehicle accidents the insurance doesn't pay because of that. When we ask for that patient to pay us since we already rendered our services to them. It seems like they just ignored it. In that case, you're not dealing with the health insurance. You're dealing with travelers or the auto insurance people and they're probably having lawyers go over stuff. And then they pay, there are some that pay but negotiated amount. It's not even close to 50% of the services that we rendered. They take advantage because we're new in the business and they can really tell how small we are. I think both [our size and being minority owned]." [#22]
- The Black American male representative of a construction trade organization stated, "I hear that a lot that some owners just don't pay fast enough and then so sometimes one of the things that it makes certain general contractors easier to work for is they've got the capital to have their own accelerated payment processes, even if they have to wait on the owner to pay, while some of our smaller GCs, they actually have to wait to get paid by the owner before they can push money down the track. So, depending on who you're working with and what project you're working on, you could be a sub and you could perform the work and you could get paid in as fast as two weeks which is shocking if someone can pay you in two weeks, right? In other cases, you could be waiting 90 days for the same work. So then just the reality of having to cover 90 days of risk before you get paid versus having to cover two weeks is a game changer." [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "The ones you do get you have to fight to make sure you get your payments on time. And then like I said, we're still like 150,000 dollars from [being fully paid by a prime]. So, we still like to have the state, to battle that, get that money. I've seen good and bad. I've seen some of the contractees, you know, with not really very timely. But I've had a couple over the years that have made sure they got their payments in. so I can tell you right now it's about

50/50. As it is, so far. I would say yes and no. More so I think it's a mechanism as well if they don't pay in a timely manner, you know, and they mention you won't bid the job unless they consider working for us, we've got to pull out this contract, and then they can funnel in whoever they want to have the position to work by saying, 'Hey, we used these people for a while. We couldn't agree on the time payment frame,' so we had to bring in another vendor to do this work who may have been larger, but not an MBE, and they have the cash flow and the revenue to wait 60 to 90 days. So, I think that's a mechanism of eliminating MBEs on some of these jobs as well." [#26]

- The Black American male owner of an uncertified MBE goods and services firm stated, "We did run into some capital issues when we initially started the contract with [Firm A] because there was a delay in payment by the State of Indiana for around 126 days. That's a big X right there. If there is one process that I'm gonna put a big X on, it is that. The way the process works is that the State of Indiana pays the prime. So, if the State of Indiana takes 45 days to pay the prime and then that prime takes another 15 to 2 days to pay you, you're in a 65 to 90-day cycle. That is a very interesting way to run a business." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Most generally, we don't have trouble with that. INDOT is supposed to do a pay estimate every two weeks and as long as the engineer doesn't get behind on that, then it flows pretty well. Occasionally, we had a couple of jobs this year where the people had a leave of absence or something and so it kind of slowed the payments down. But most generally, they're not too bad about it. In the past it has, yes. But like I said, they've gotten – INDOT has cracked down on that a lot as far as generating estimates more often and then making sure that the subs get paid in a timely manner. I actually just got audited on an INDOT job of my payment of subcontractors and so, they are – they do regularly take a look at it." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "Well, in the first place, you're not gonna get all your money until long after the job is complete, 'cause they have a thing called – They hold back, what do you call that? The word don't come to my mind about what I'm trying to say. But retainage, that's what it's called, retainage. Okay. And that's usually ten percent, okay? And that is usually the percentage of profit that a small contractor make if he do everything right. So that I used to draw a picture on the paper, like that – draw a big fish, and then I'd draw a little fish right up under it, like that. Then I'd say, and I'd tell the guys, 'You know how that big fish got to be big as he is?' I said, 'Because he ate up a lot of little fish.' And I had, what that big fish is, that's the big company, the GC that the subcontractor work for. That's the little fish, the subcontractor. So that's the kinda thing that I ran into. I saw that very clear, y'know? So, what I'm trying to say is there's not a way for the certification to put some teeth in that package that says to this person that we're working for, be it state or whoever, that you gotta pay this man, because he can't stand the wait. 'Cause remember, he ain't nothing but a glorified worker anyway. Then he's got workers working for him, and all of 'em need to be paid yesterday. So, it's really all about making some money available to get this guy up and running. And certainly, have somebody to monitor 'em, y'know, so you can make sure he's not doing wrong things. Because nobody can start off knowing everything about nothing." [#32]

- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "State work, we've got to wait to do State work. It's just too long of a process. What happens is, in the past – I know this from having been a city engineer and they tried it at the municipality where I worked at. The bigger companies will bill a lot of time upfront and rob Peter to pay Paul to run their business. They don't necessarily perform around work upfront. They just keep billing upfront. Then the project starts– the money starts to wind down on the project. Now they don't want to get it done, but they do one way or another. I think it diminishes the quality of their work, maybe not the intellectual product, but line styles and things like that gets diminished. But they have a way of billing. I mean it used to aggravate me when they'd try to do it at the municipality I worked at. I had to fire a couple consulting firms because – you know, you've got to be honest with your client. Working with the State was difficult. I mean it was – they couldn't approve anything in a timely fashion and it just drags and drags. Yeah, so we don't do any State work." [#34]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Well, when you're dealing with, where you've got the government or something like that, they normally have a net-30, net-60 and it's non-negotiable. You get the work, that's it. You have to send a PO, you've got to wait your 30 days or 60, and sometimes it could be hard for a small business like mine because our vendors need to get paid, and we're not carrying a \$20 - \$30 million company to where we've got to pay these guys. Just across the board, yeah. If you're a small business, they just take forever to pay you. They don't see you as mandatory, and you're a small company anyway, so I mean what are you going to do?" [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "What's important for me, as a small business, is being paid in a timely manner. That 30 -, 45-day turnaround will sink a small business. That's another one of the reasons why you really have to look long and hard at those government bids, those government opportunities because they slow pay. So, I'm really slow-moving on even construction contractors. [Firm A], they paid me. They paid me ten days. I would work for them at the drop of a hat. My landlord, [Firm B], he called me last year and said, "Hey, I'm on a job. I'm doing the drywall. They need somebody to do the final clean." As I was negotiating with that company, I found out the pay was – "We'll pay 30 days after we get paid." I told him, I said, "I can't do that." There's no way I can hang out 60 days waiting on my \$6,000.00. I don't have it like that." So, what he – he said, "You know what? I'll just put you under me. I'll bring you in under me so that I can pay you." So, if he had not done that, we would not have done that work." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Yeah, we had some issues with that just in the start of it, and I think it was just mostly because the businesses we were pursuing were small businesses and nonprofits who didn't have reliable cashflow." [#42]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "Again, we have been very fortunate. We don't have – if there is a problem, it's usually something that I believe is out of the contractor's hand. We deal with – but also, we've been at it long enough to know that if you start messing with our payment, we will put a lien on the project so that has ... you would be surprised how fast a contractor who might have

either misunderstood or is playing games, how fast they will change their tune when they know that you put a lien on the property and they can't get their money until that lien is off. So, we have no problems putting a lien on a – even if it means that we can't work with that contractor anymore. I don't care. So, if you do it to me the first time, there won't be a second time.” [#44]

- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "Yes. I've had to chase a couple of nursing homes, especially during COVID-19. And there was no excuse for that, because they were open, and they had customers. They had residents. So, for them to send their employees to me – some of the nursing homes have employee reimbursement, if you will. So, they send their employees over with a sheet of paper and they tell them that they can buy up to \$200.00 worth of scrubs. I fill out the piece of paper and then they do a payroll deduct out of four paychecks. That's a risk for me, 'cause basically I'm giving them free scrubs and I've got to wait my turn to get paid in small increments. And when you don't see any of those payments it's irritating, because they didn't have a cash flow problem. They're never going to have a cash flow problem. So, there was no excuse for them not to pay. So there was a couple of them that I called and I said, 'Look, we're going to end this program and you can go to [competitor firms], but we're not doing it here.' And all of a sudden, the checks appeared. And I got phone calls from human resources apologizing for them taking so long. So, I still do the payroll deduction because I thought it was nice that they called and apologized for the lack of payment. I usually lately, of late I'm getting paid on the 30-day mark. I think they knew what a mess this is, I'm not playing around. [A competitor] says he's carrying about \$60,000.00 worth of debt from nursing homes. That's outrageous. I shit my drawers when I have \$2,500.00. \$60,000.00. And I said to [the competitor], 'Stop giving them credit. Are you stupid?' Who does that? But he doesn't want to lose their business. You already lost their business. You – and also lost revenue. So, me and him look at how we run our business a little bit different. I run a tighter ship. I could never. Never, never, never, never.” [#46]
- The non-Hispanic white male owner of a majority-owned construction company stated, "He had an emergency job that was right on the Calumet River, and they were making hydrated lime, and they had a kiln about 500 feet long, big pipe, brick line that rotated, and it rotates, and it had a crack in it. So, they call us out on a Sunday, and it was my inexperience, though, you know? It was an emergency job. They wanted welders out and equipment out and everything else. I did that for them. And they guaranteed me the work before I had any contracts, you know, because it was the weekend, and the guy says, well, you know, if you want the job, you've got to get started right now. I said, 'well, we haven't signed anything.' 'Well, we'll take care of that next week.' 'Well,' he says, 'I need you to give me a ballpark estimate.' Well, my ballpark estimate was what I knew at the time, we like \$25,000.00 for the repair work. Well, once we got into it, we found the entire pipe was cracked, and we had to do – the job came out to be about \$60,000.00, and they refused to pay the rest of it. So, then you're getting lawyers and everything else to try to get your money back. But that was about the only incident I ever had, though. Normally, you get with purchasing, and if – most of the time, they're pretty fair with you.” [#61]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Now what I'll tell you that we have seen is a lengthening of terms out to 120, 180 days by contract. Firms that have that in place, they're up front about it. It's just adds to the cost of

everything. So, we have to look at it and say, 'Do we want to cashflow this ourselves? Do we want to take a line of credit? What does this look like?' A lot of times, we can do – because we're professional services, we can get their purchasing departments to come off of that 120, 180 with a little bit of discussion. But sometimes we can't and it's just – that's the nature of the game and you tell them, 'Well, I've got to put interest on this.' They're like, 'Those are our terms.' 'Okay, you're paying more.' But that's just how it goes." [#66]

- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Sometimes as a small company getting paid, sometimes if you're just working with a client, sometimes it takes, you know, how we bill – we're a small company, sometimes when you get caught up in some of those bigger things you don't get paid quickly, and that hurts a little company sometimes, 'cause we're laying out all that money ahead. But it's sometimes collecting money from some people have been – that's been kind of a tough thing for us, too." [#67]
- The non-Hispanic white male owner of a majority-owned construction company stated, "There's been maybe only once that I had a little bit of time getting paid on it but then, I started to get the money paid up. But most of the time, I don't have no problem with taking the bid and getting the job and getting my money." [#68]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "We do face that. I mean, according to our terms, it should be like 30 to 40 days, I mean 45 days, but we receive payments at 90 days. Some are 100 days, y'know. Like it's been a hassle. I mean, 90 percent of our clients are like on time. But a few delays in some people. Probably it's because of the technology or something, because we deal with multimillion-dollar health systems, like hospitals. So, I mean, I don't think money is an issue with them; it's just the processes, technology." [#70]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I usually use a Fast-Track company to process my payment. They will charge me maybe two percent. I get a pay the next day or two business day. But if it's not approved by the Fast-Track company, some brokers, they will take up to a month or some of them, 50 days, and some of them – they don't pay you. I've had some losses on some of our loads." [#73]
- The Subcontinent Asian American representative of a business development organization stated, "Access to capital, I think the payment terms are also very challenging, like 60 to 90 days. Yeah. Those things are also there that some of the small business owners, they do not have that long." [#76]
- A comment from a WBE professional services firm stated, "Pay when paid policy creates too much of a lag time between doing work and being paid for the work. It can tank a small business like mine." [#AV]
- A comment from a WBE goods and services firm stated, "Client would like to expand their business, but it's difficult to wait 60-- 90 days to get paid by the state of Indiana. When trying to include minority businesses with a large contract, it is difficult and makes no sense to require a certain percentage." [#AV]
- A comment from a WBE goods and services firm stated, "Too long for payments to process." [#AV]

- The Black male owner of an MBE-certified goods and services firm stated, "I haven't had any issues with the state. But just being out here, doing this work, you can have a company, and you'll have somebody working 40 hours a week. And it might be \$1,000 for that week. Well, they may not pay you for it 60 days later. So that's almost \$10,000 that you have to front. And as a smaller business, \$20,000, it's just a lot, especially if that's just one customer. I have 42 customers right now. So if all of them made me wait more than 30 days to pay me, I'd be in trouble. Because my employees want to get paid every two weeks. And so, I need some kind of money. I mean, I'm just blessed enough to have a line of credit, and those sort of things. But most Black businesses, just to be honest, don't have enough collateral or enough relationships with banks to have a line of credit. I don't think that's the reason [discrimination]. I wouldn't say that would be the reason for not getting paid. I just think, especially with dealing with the government, I mean, they just paid late, and most smaller businesses can't function like that. And that's the reason why the big business always gets the contract. Because they have access to capital, and they can do a line of credit, but smaller businesses, we can't." [#FG2]
- The male owner of a professional services firm stated, "Slow payments, that's almost always across the board." [#PT5]
- A respondent from a public meeting held in Greenfield stated, "A barrier can be payment from the standpoint of timing of that payment. An example -- well, obviously if you have to wait three, four, six -- three months if you are waiting for payment, four, six, however in terms of months of payment and you are not a prime -- and I actually had an instance years ago with INDOT where the prime received payment, didn't make us payment, actually called my attorney -- I called INDOT and made them aware of it and they were like we can't do anything. I just called my attorney and said get them. And as soon as the attorney got engaged, then I got paid. Payment got drawn out for three, four, five months and I was like seriously? There is not even that much left on this contract, why are you drawing out the payment? It even got to the point we stopped taking calls. I actually stalked them. Purdue had something that was called Road Show. I literally -- we presented, and I found out the head of the individual firm was there presenting and I said I am going to go. I went and sat in the front row and just messed up his whole presentation for the first 15 minutes. And then I called my attorney, I was like, you know what? They only owe me \$15,000 and I said I don't care how you get the rest, you can take the rest of it just to make their life hell. They called them and got payment within two weeks. That was the thing, prior to that, three months into it I called INDOT and was like, hey, I know they have received payment, we actually -- you can go online and check and find out, we haven't received anything. Oh, yeah, we can't do anything about that? Seriously?" [#PT6]

18. Size of contracts. Twelve interviewees described the size of available contracts as challenging. [#3, #6, #10, #19, #25, #26, #30, #46, #61, #75, #AV, #PT3] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Well that, but when we're subcontracting, we're subcontracting on some deals that are tens of millions, or even hundreds of millions of dollars. So, our contracts are pretty big, even as a subcontractor. And so, for sure, I mean, the programs, and they're not all huge in the public sector space, but the programs in the public sector can be much, much larger

than anything we're doing in the private sector, especially we're going after mid-market.” [#3]

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, “Yeah. We pass on it. We don't bite off more than we think we can chew.” [#6]
- The female representative of a WBE-certified construction firm stated, “Like I said, the ones that are too big are the new, like if someone is building an entirely new community, new construction. We don't have the manpower to accommodate that.” [#10]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I like to be more 20 to \$30,000 jobs. I still need the small little jobs to fill in and to keep my name out there and to be good at that. I still want some of those, but I like the \$30,000 fee job.” [#19]
- The Black American male representative of a construction trade organization stated, “So that made them [the project managers] really think about, well what's the best delivery system for our projects? Your standard design-bid-build was not always the best way to approach a project. We've seen more of our public entities move towards a CMC model. So, means that they design for... Oh what's the in between. So, design-bid-build, so the design-build model. Where then they could hire a CM or a designer to work almost on the front end together to sort of work the program, work the package as opposed to your design-bid-build because there was... So, it could make projects move a little bit more efficiently. Particularly for our public institutions, the projects that seem to be going forward seem to be what I might call the mega projects. I don't know if this is an official definition. Either way that most recent, the 2020 Construction User Roundtable Conference they were talking about mega projects as being one of the key things you see going forward. They define those as a project of \$500 million or larger. So, they were predicting even pre-COVID era that those types of projects are becoming more and more common in North America in general. So, then I would say to some degree that those types of projects are some of the projects that are going to be able to proceed even in a COVID era because a lot of times, those projects are one, funded by big public entities, and then two they're considered to be of significant strategic value that they're part of either a ten to twenty year plan, as opposed to, oh hey we need to build this thing right now to deal with some immediate need. Because the project alone is going to take sometimes two to five years to complete and then it's really thinking about once it's completed it's going to have a 20-year shelf life. So, these mega projects are the projects that are inevitably going to be going forward even in a COVID era because you can build it now and it'll be functional and ready after we're past the crisis. The challenge then is that particularly for public entities, they have pretty strict, I would say, XBE or diverse supplier spend goals. So, the challenge of a mega project, \$500 million, \$1.6 billion project. If you're sticking to, particularly like the City of Indianapolis or the state, they look for 27% XBE spend. So, in a normal world it's hard to have diverse suppliers that can take 26%, 27% of a billion-dollar project. Basically, asking the diverse suppliers to cover \$270 million of a billion-dollar project. A lot of diverse firms can't just operate to the capacity to then take on that much work, even if you're spreading it across however many companies. So, I'd say that that potentially impacts owners because one, they want to support supplier diversity but... So, do you want your project to be extended by six months

or do you want costs to go 10% higher or do you sacrifice your diverse spend goals to just save costs and production time? If every project you've got work on is a mega project then that's putting them at a lot of risk, depending on the service delivery model. Then I would say for a sub-contractor, same issue, right? It's a lot of work to do but every time you're working on a project, that project is a large amount of work. So, I think in one sense the good thing is things like IU Health projects, if you're a construction company in Indiana, it's kind of your fault if you don't get some of that money, there is \$1.6 billion out there, you should be able to find some way to get some part of that project. The challenge might be that there's a criminal justice center being built, IU health strategic build out, there's a big project at Purdue, there's a big project at IU that then either somehow you're going to get stretched too thin or you're going to miss out on some of those opportunities because you can't bid them all or you can't do them all." [#25]

- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, 'cause some of the contracts and jobs we see are enormous, and unless you have the staffing, or somebody can get a way to break that down or stay break them down into smaller packages. Yeah, I'd say it's a nightmare for an individual company to figure out on their own." [#26]
- The Black American male owner of an uncertified MBE goods and services firm stated, "The problem is that the ability of some minorities' and women's or veterans' groups to bid on these projects is limited by what is decided how a project is bundled. If the bundled project is too large, it's going to by its very nature exclude small businesses. A \$10 million contract is not necessarily gonna be opportunities for some small businesses to bid on that but packaging it smaller than that might not be positive for the organization that's making the offer. I understand that. That's just the way it is." [#30]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "I've had a couple that made me sweat, that I wasn't sure if I was going to be able to fulfill it, because I didn't have a credit line being enough to buy it. But I made it work. And I've only had another one where I literally had to tell them, 'There's no way I could fill that order.' I just could not do it; it was just too big. And I did give that contract to James Medical; I steered them that way. Because he's got a bigger credit line than I do, and it was just the right thing to do. That's what small businesspeople do; they help each other. So, I did that." [#46]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Well, typically, a mechanical contractor, we have many in the Northwest Indiana area, they concentrate on basically the steel mills and stuff like that. Our growth really was hampered because we weren't – I couldn't get large enough, okay? In other words, if – let's say I drop a turbine rotor worth, oh, let's say a typical rotor, let's see, on a 300-megawatt machine, you would have maybe 20 stages on it, you're talking to replace a spindle probably the neighborhood of \$20 to \$30 million. So, if GE drops it, they can get reimbursed for it with no problem. If I drop it, I file bankruptcy. So, they would prefer to go to the bigger guys. But that's the main reason why we didn't really take off. They just outbid me." [#61]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "Obviously, we'd all love huge contracts, but you take what you get, y'know? And we'd love a huge contract, and if we ever got into a contract where it was large enough to

where we possibly had to put money into it before we would get money back, we may have to go financing something, but we haven't gotten to that point." [#75]

- A comment from a majority-owned professional services firm stated, "more difficult for small firm to land a contract." [#AV]
- The male owner of a DBE-certified construction firm stated, "A lot of RFPs, Qs, Is, Os, Ts, whatever comes out is on such a large scale, it is very difficult to get a piece of that pie the way it is worded, it is written. You can kind of get through the process, but it is often not worth it for a small business to even entertain a lot of the solicitations that come through because they are not written for us. I just feel that they are part of the protocol, they are for the larger companies that can and have been shown to get the job done. And, again, it tends to push out the small business in getting your opportunity. You can sign in on the sheets when you come to some of the sessions that they will say here is an information session, maybe network with some of the companies, there may be existing relationships of who they want to do business with. If they reach out to you, I was contacted, and it is the bigger prime company may want to control more of the opportunity and how you are utilized, meaning we just need a name only. We need to show that we have a DBE or MBE or WBE, really don't worry about how much you need to do, we need to be able to submit this paperwork and this paperwork requires that we have some names on here or we don't get all the points to guarantee us this opportunity, speaking from the prime contractor." [#PT3]

19. Other comments about marketplace barriers and discrimination. Twelve interviewees described other challenges in the marketplace, and offered additional insights. [#3, #6, #13, #23, #25, #39, #41, #42, #68, #AV, #PT5] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "There are opportunities where I believe, I am 100% confident, that we could serve the State very, very well. And it goes to large prime contractors that they have to pay far more money to. And so, I guess I wish that that playing field was leveled a bit more. I think we could save the State a lot of money. They're either sole sourcing, because they already have a big contract with that prime, and it's easier to do a change request with them than to put something to RFP. I think procurement is just a lot of heavy lifting. And so, it's like, if you can just do one and done, and then do change requests, or do something to keep it simple. And I suppose, I don't know if you can fight against that, but I think it could save the State an awful lot of money." [#3]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "The only barrier would be if you're someone new on the scene trying to get started because you don't have an established reputation or business." [#6]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Make people realize they need to buy local. They need to buy in their state. They need to give their state of chance or their local area chance before they go running all over the United States. It's so easy just to Google somebody from California. And it's funny because the other states do the same thing. So we might be doing business, like I said in Minnesota

and we don't have all the business in Indiana. And so were [freighting] stuff back and forth and that's typical America. They think they can always have better somewhere else." [#13]

- The Black American male owner of an MBE-certified professional services firm stated, "It's really, really hard to get enough work to be sustainable. I feel like I'm a paycheck-to-paycheck business owner. I don't know how common or uncommon that is." [#23]
- The Black American male representative of a construction trade organization stated, "One is the question for them is well, who are we going to bring in to work on this project? Who's going to be the CEM or the GC? And the first question you might ask is how resilient are they going to be? Meaning to what degree can they have the financial sustainability that then they can protect us? Right? That's question number one, which inherently favors the bigger companies." [#25]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Some of the changes, again, how they're doing business, especially with small companies. I've noticed a lot of them now are changing how much insurance small businesses should have when they're coming in. We notice that has grown major, and in my type of business, making sure guys are uniformed, and, when they're coming in, being accountable, drug testing, stuff like that. Before, when I first started, it wasn't that big of a deal. Companies, they didn't know who was coming in their buildings. I guess the way things are going now, they want to know who is doing the work and everything, so we have to make sure our guys are drug tested, we've got to make sure all our guys are uniformed. We do that anyway because we want to make sure we give the top-quality business to our customers, so we make sure we let them know who is coming in, who is doing their work, and the type of work they're going to get." [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I was a member of the ISSA – I can't even tell you what that stands for. It's an organization that – oh my goodness – provides all sorts of tools for businesses and contractors in the cleaning industry and probably other industries. But the membership fee – so they reduced it one year, last year – year before last - \$150.00. So, I joined. I was able to access some tools and software that I had not had before. Even the Chamber, the Indianapolis Chamber, oh my goodness. What is it? \$1,500.00? Or even the Better Business Bureau. You have to pay to be a member to keep your DUNs number, DUNs information. All of that is money. When you're a small business – so, discriminatory. That's where we – that's the question. Is it discriminatory? Well, if you don't have the resources, I don't know what you call that. It's a barrier. Do you call it discriminatory? I don't know. I mean you naturally assume that other ethnicities have the money, and some don't. Well, I don't necessarily assume that. But I know that those things are barriers to business, and they've been barriers in mine." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I think the biggest barriers that we faced, again, just relates back to our age. Many of the communities that we interacted with here, especially things like the – sorry, give me just a second. I'm blanking. The Chamber of Commerce, and similarly related, especially the minority variations on the chamber, we found it to be very exclusive. Nobody was willing to sort of engage with us in a professional way just simply because of our age.

Regardless of our record of performance, our success, we were never really able to take advantage of those types of communities to the fullest extent that we wanted to.” [#42]

- The non-Hispanic white male owner of a majority-owned construction company stated, “ [I] had four or five employees at one time but, you know, the payroll and – I don't know what they call it – pay somebody to do the taxes and everything and there's just too much. The taxes I make are more now than what – back when I had the employees.” [#68]
- A comment from a Native American owned MBE professional service firm stated, "We need to address classification risk for consultants. It makes it hard to be a consultant." [#AV]
- A comment from a majority-owned goods and services firm stated, “I am thinking about closing this business. The road was shut down for two years replacing a bridge. We were a dead end to nowhere.” [#AV]
- An owner of a construction company stated, "These are usually like Tier 1 spots. And so underneath that then is Tier 2, right? And that's usually like a sub and then when you get down to material provider, those are literal like Tier 3s and Tier 4s, right? And when you deal with minorities, typically we financially resource wise, they are usually falling under that Tier 3, Tier 4, sometimes Tier 2, and as you climb up this ladder, it is oftentimes we fall off. Why is that? Well, a lot of that has to do with lack of resources. So challenges like bonding capacity, which it is kind of a Catch 22 because in order to build bonding capacity you have to have a certain amount of jobs, right? In order to have certain amounts of jobs you have got to win certain amounts of jobs, right? And it is this domino effect of challenges, right? Then you have all of these insurance requirements. You get a job and the insurance is not only a million for general liability, but then it is 2 million for this, 5 million for that, so many layers within the insurance requirements. And then you have these certification requirements that we are talking about now, right? In order to get a certification, you have to have all your finances together, right? So when these small companies have to get their finances together, they are learning how to build the business. So many layers. It is just layers upon layers that they are having to go through. And then on top of that, relationships. So now you are trying to build relationships with all of these companies and guess what? It takes years to even do that, right? And so what I want to make sure is that we don't just look at this like it is just a one-off that's just payments, that's just this or that, it is a whole bunch of stuff, right? And we have to come to terms with the fact that we have so many layers in this process of getting a minority from one layer to the other, it is just sometimes really ridiculous, right? And so it is not until somebody connects with somebody from a mentor or protege perspective and that mentor has the ability and the willingness, if you will, to help them grow, carry them along, or else you are just kind of out on your own. You are just kind of trying to figure it out. It is a compacting question as to how minorities get over that hurdle. Somebody has got to sit down and come up with solutions that bring all this stuff together under one umbrella so that now we can talk through how do we come up with solutions to get us past those hurdles so we can grow so we can be competitive so we can be attracted to the marketplace, if you will. So now we are attractive and then now when you ask the question what is our capacity, we can answer with success. Why? Because we have the bonding capacity we need, we have got the insurance we need, we have got the relationship set up, et cetera, but it takes years to develop this type of stuff. And if you are not savvy, business savvy, if you don't have resources, if you don't have these types of

connections, you aren't even knowledgeable about this stuff and you are going to get kicked down and there is not going to be an opportunity there before you. So that's the thing that we have got to -- that I am hoping that this disparity study also highlights that is not just one, two, it is a thousand things that need to be sat down and we need to kind of come to terms." [#PT5]

I. Additional information Regarding Effects of Race, Gender, and Veteran Status

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority-, woman-, or veteran-owned firms.:

1. Price discrimination;
2. Denial of the opportunity to bid;
3. Stereotypical attitudes;
4. Unfair denials of contracts and unfair termination of a contract;
5. Double standards;
6. Discrimination in payments;
7. Predatory business practices;
8. Unfavorable work environment for minorities or women;
9. 'Good ol' boy network' or other closed networks;
10. Resistance to use of MBE/WBE/VBEs by government, prime or subcontractors;
11. MBE/WBE/SBE/VBE fronts or fraud;
12. False reporting of MBE/WBE/SBE/VBE participation; and
13. Other forms of discrimination against minorities or women.

1. Price discrimination. Five business owners and managers discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials and supplies. [#2, #15, #62, #71, #75] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Which is just the same thing as I told you before, [my competitor] says, 'We want to drown you. We want to price you out of business.' I go to [this business] a lot, who has product that I can buy from them for the government. This is a true statement, I can buy product in Kentucky, have it delivered from Kentucky 108 miles away to me right here cheaper than I can buy it from [a local business] Yes, \$1.57 a gallon cheaper. I went to [this local business] and said, 'I can get it cheaper,' they basically said, 'Get it. We don't want you in our space, we don't want you in Indiana.' They're a majority-owned company that's in the oil and lubricants, fuel business. I've gone to them more than once to say, when I want to buy certain products, if I want to buy a national brand product and you are the local distributor, when I come to you to buy the product instead of giving me the same price you give another company you inflate your prices to me. I can't do [that], so I go to another state

and say, 'Here's what I need. I've got a customer here that wants to buy this product.' That's my life. That is my life." [#2]

- The non-Hispanic white female owner of a WBE-certified construction company stated, "We're not a favorite over [a Virginia hospital]. That's another whole ugly story, but we did do half the gateway when it originally went up and they used [a competitor], and I think somebody's getting preferential pricing and it's not me." [#15]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "You know, how do I prove that? When you give somebody a quote, and they say, 'Well, we're just not going to pay you that', unless you know what they pay someone else to do it, you can't say that you – you can't, you know, confirm that you were discriminated against. And that's private information." [#62]
- The Black American male owner of an MBE-certified professional services firm stated, "I did feel as if I had some of that going on with a bank because there were some issues, and they were aware of it, when I was financing something. And then they took away my opportunity for recourse, which ultimately led me to finish it, and then this position, the development that we did – This was a personal development. And in talking with my attorney, they were like, 'Yeah, they took away your recourse. They said they were, but since you listened to what they told you not to do twice, instead of not listening and moving forward, and then them denying you that, you don't really have, from a case law standpoint, the ability to file.' It was like, 'What?' 'Yeah, I know they told you that. Yeah, I know you have documentation of that. Yeah, they took away your recourse.' That's just me. That was the only time I ever experienced that, but once was enough." [#71]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "I would say price discrimination from some of the bigger clients that we have. I don't know if it was discrimination because we're minority owned, or because we were a smaller company, but they were absolutely willing to pay bigger companies more money than they were willing to pay us." [#75]

2. Denial of the opportunity to bid. Fourteen business owners and managers expressed their experiences with any denials of the opportunity to bid on projects. [#2, #4, #5, #7, #19, #26, #39, #42, #49, #67, #71, #72, #PT2, #PT6] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "We are not selected, and our bid is not considered if they're not going to get 60% credit. [...] nobody wants you for 5%, nobody. It's if you're not on the list you can't play. If you're not on the list or 60% you still don't get invited to play, you're wasting your time." [#2]
- The non-Hispanic white male owner of a construction firm stated, "Because of the size of the company I guess you could say yes, because being one employee, obviously you can't do a huge job. But it was a point of fact that if you can get the job then you can retain other employees, but it seemed like a lot of employers, a lot of people that do big commercial jobs don't want to do that because they're afraid that you're not going to be able to handle the work. Well, there's a car dealership in Brazil going up right now, the old company that I used to work for and they're the building consultants on it and they were accepting bids for

the plumbing, and I asked them I would like to bid that job and they told me, no, I wouldn't be able to handle that work because my company was too small." [#4]

- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Oh, yeah. Every once in a while, but not government." [#5]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "The only thing I've ran into is not wanting to work with union shops or people that didn't feel that I was large enough to accommodate them." [#7]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The school board [doesn't] even ask me if I want to give them a price on stuff. They got some architects out in Indianapolis or Columbus or something that they've been working with for a long time and the projects that I see them doing are probably beyond me anyway. That hasn't been a problem, but the little projects that come up, I would still like to have the opportunity to compete on those and that's going to be something else I'm going to go after when I get my office going. I'm going to pay the school superintendent or the president of the board of education [a visit]." [#19]
- The Black American male owner of an MBE-certified goods and services company stated, "I would say indirectly, probably yes. They didn't come out and say it, but you just wonder. Because, you know, it's one of those things where if you know sometimes you may be cheaper and still don't understand why you didn't get the job, and especially in the private sector, you only can wonder as to why." [#26]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I don't know if the guy just got a bad feeling. Just being honest – when we met, he decided he didn't want to give us a chance. They didn't want to work [with us]." [#39]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I mean, there are several instances in which our age prevented us from being able to get the information that we necessarily needed in order to submit a bid." [#42]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "Yes. Probably thank them for it." [#49]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "It's not so much denied as that I will use tourism as the best example. Sometimes our tourism departments do not send RFQs to all these great agencies, and it's not just us. But when Lorelei from the Tourism Department went to California and spent thousands and thousands of dollars with an agency in California when she had wonderful ad agencies right at her doorstep in her own state in her own county, it's not so much denied, but let's just say overlooked. And it's not just my agency; we would all talk, because we're all friends. You know, everybody gets along in the marketing world. Sometimes we can't do something, we're all pretty laid-back people in the design world, but a lot of us have talked about how – and the one that sticks out is the tourism. So, I won't call it denied, but I will say that some people in powerful positions in the state that run public agencies just plain old don't look in their own backyard. And that's frustrating. And that's even on a community level too, with our Chamber of Commerce; they went to Indianapolis to get something done, because

somebody in Indy joined our Chamber. You know what I'm saying? It's political. It gets so political and so ridiculous that you're being overlooked when you're in your own community, and they're working with somebody out of Indy to do our Chamber newsletter. So it's stuff like that that makes you just kind of think, "Nah, I'm just not going to even mess with these people." It gives you a real – it makes you just not want to even try and approach. And all the dinners you go to, the donations you make, it's just I think sometimes the public sector really overlooks talent in their own backyard. And it's political. I guess that's my – it gets too political for me to waste the energy, I guess. Not to sound like a doomsayer on that, but sometimes it's easier to work with these wonderful companies that stay with us for a long time and there's none of that red tape." [#67]

- The Black American male owner of an MBE-certified professional services firm stated, "When the convention center came around, we had people asking us to team with them and work on that. When we talked to some of the politicians, they literally asked us not to go after the convention work, because they were like, 'We'd like to have the ability to spread it around to other XBEs.' So, we didn't go after it." [#71]
- The Black American male owner of an uncertified MBE construction company stated, "Of course. Even on getting jobs, even on jobs with companies, you know, you get that. I have gotten that. And not just – even with a business like I mean by me saying that, you know, I'm trying to be a – I got my own business, I'm trying to be an owner-operator so, you know, I'm trying to at least, one of my vehicles with the company so say they put me through the hula hoops, trying to get the situation and get the information I need for that, like, 'Oh, you just started your business,' and all that stuff. So, it's – like I told you, when you're just now starting a business and you [don't have] backing or [any] references out there so they kind of pass you up. They go on to the next person or the next business or the next company that's got more years of experience or [had been] in business longer than you." [#72]
- A respondent from a public meeting held in Vincennes stated, "I have been told, some contractor told me that when I did, my price was lower but they [aren't] going to give me the job, they are going to give it to their friends. Their friends get the work." [#PT2]
- The female owner of an MBE-certified and an uncertified WBE goods and services company stated, "One of our past clients passed on our information to a prime and we received a call from the prime. My husband is bi-racial. He was raised in the Caribbean. His last name is Chin, he is a black man, a black voice. Whoever called I guess was expecting an Asian and so once my husband answered the phone, I mean he answered the phone and introduced himself and stuff and this person is like, 'Oh, you are a black guy.' That's exactly what was said. And the other person wasn't able to control their tongue or hold themselves, and the conversation pretty much ended up being about him, where he was raised and stuff like this. Nothing about our ability to perform. Of course, at the time we did not know that one of our clients passed on the information. So, the client called back and said, 'Hey, did you get a call from ABC?' My husband was like yeah, but whatever it is, they talked about it. And then I guess the prime told the guy we weren't a good fit. That's what he said, we just weren't a good fit. Because he is like what went on in the conversation? We don't know because all they did was start to talk with my husband about where he was raised. My husband is an American, all the stuff, but we -- I mean we were not given the opportunity

and it started with his voice. We were not interviewed as to our ability or performance or anything. That's just one." [#PT6]

3. Stereotypical attitudes. Twenty-one interviewees reported stereotypes that negatively affected small, disadvantaged businesses. [#2, #10, #13, #17, #23, #26, #28, #34, #35, #36, #37, #42, #44, #59, #62, #67, #71, #72, #75, #76, #FG1] For example:

- The female representative of a WBE-certified construction firm stated, "We do run into some men, and I'm not going to generalize and say they're all that way, because I don't feel like they are, but you do run into men from time to time that would rather deal with a man, as opposed to a woman. And you just have to let them know. I'm a decision maker. So, you can make the decision with me." [#10]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I would go to the print shows up in Chicago when I first started and literally walk around and see these big skins of women in bikinis. And I was whenever I would try to talk to them about the equipment I was going to buy, I had to take my nephew and they would talk to him and he would point at me and say, 'She signed it. I'm just here to tell her what's okay or not.' It was crazy times. Well, we have men and women on our staff, sales staff. And if we start running into that, we just send a man in. That's honest truth. We call it suits - a suit or non-suit. Suits or skirts. And we need a suit on this one and we'll do that. And if we need a skirt on it, we'll do that." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I haven't, but here's the thing. I haven't done any heavy, hard commercial stuff yet where I'm going to run into that because the stuff, I've run into right now has been on projects that have maybe a wife and husband working. It's like my son and I go, and we almost tagged. We did this last time, tag-teaming with it. Seriously, it works really well because he works with the you know, and I ask those questions. Well, do you really want it that close to the house? Stand back here and look. Now have you looked at your colors? All these female-centric things that I would call it maybe, of the project. So, I've not been in a position where I've had to run into the hard business side of it yet. I bet I will though, because after working at [a major company] for 36 years, I just see how I was treated there and how I watched some of the contractors and some of the female project managers that were contracted there to do work for us, how some of my peers didn't work well with them. So, I can see that coming. I can. I defend this health lady all the time down there because people go, 'She's such a [expletive].] You guys don't understand her job. You don't understand what she's having to deal with. You don't. You know what I mean? So, I'm just like, 'She's trying to follow the rules and you guys are trying to slip things under her all the time.'" [#17]
- The Black American male owner of an MBE-certified professional services firm stated, "The water keeps getting muddied by Caucasian folks calling because they don't believe what I told them when they hear my Black voice on the phone. [...] It's not anybody spitting in my face, it's the trust that I can do what I say I can do. I'm just, that's the discrimination, I believe, that small African American businesses get in 2020. It's nobody [vandalizing] my business door or writing slander on it or nothing like that. It's the ability that you trust me to deliver." [#23]

- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I think that a lot of times we're stereotyped that we're not going to get far in life. You – that's the color of our skin right there a lot of times. And you can spill out your guts about how you – how effective your company is, and you can have letters of recommendations and all that. But it just the stereotype is still there. If we can get rid of that some kind of way or make it be known – like I – like earlier I was saying, even though these jobs or contracts are available, they [should] mandate that a certain percent automatically is geared toward minority." [#28]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "In the organization, you know, there's always that underlying – being a person of color, there's always that underlying racism. That dog whistle. Every now and then, they kind of forget that I'm a Hispanic and the [expletive] comes out. I'm a member of a country club, and you hear it. You hear talk about black people. You just walk away because I don't want to hear it. Maybe just – among a bunch of white people, they just feel better to talk about Hispanics and black people. It makes them kind of forget their shortcomings or whatever. If you hear it – and I always think – some of my white friends say, 'You're playing the racism card.' No, I'm not playing the racism card. You're just not listening to yourself tell me what you think. You may say you're not racist, but to a certain extent, we're all a little bigoted. But you try not to be. Yet, you'll say one thing to me, but you'll say another thing when I'm not there. It's always there. It's always there. They've got their little microaggressions that they throw at you. They think I'm too stupid to realize it. I just don't want to hear it. It's got no place in the business atmosphere. We got hired in [a city in Lake County] a number of years ago. We were working in a district. They gave districts, council-managed districts to engineering companies locally. Some people from Indianapolis ended up with a district. But we were working in a district right here where our office is. A councilman, they ended up giving us his district. We were working great. He loved us. We handled all the complaints on every project. It was working fantastic. All of a sudden, they have an election, and they get a Hispanic councilman in another district. He says, 'Well, we've decided to take you out of this district and we're going to put you in this other district. We're going to stick the Mexican engineer with the Mexican councilman.' I mean you didn't have to say that. All you had to say was, 'We're moving you to this different district because of the election.' I didn't know that Hispanic councilman from Adam. They introduced me to him. Yet they want to hook up a Hispanic with a Hispanic. Why? I don't know. He ended up liking us but, you know, I never used it to my advantage or never thought of it as an advantage. He was just a nice guy. We wanted to do good in his district, just like we did in the other district. But, them saying that kind of shows you – that was that micro – not a microaggression - but their feelings come to life. Oh, that's how you really think you get that – I don't know – on a daily basis, constantly. You try to ignore it. You get past it. for the most part, like I tell you, every day you run into it. Every day, inuendo, microaggressions, they're there. Every day. But let them slide off." [#34]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "I get a lot of calls from the cities. We're on those contractor lists. So, I've got people calling me, 'I want you to come out and do this job.' I wanted to let you know that I'm going to send this guy out. They expect calls to come out because we're an industrial contractor. They're like, 'Oh, well you're not a small contractor. You're a minority.' 'Well, it doesn't matter. We

specialize. We do high-voltage work.' That's kind of a – again, I'm like, 'Well, you called me.' [Surname] name on there, Hispanic name. We're – work with the cheapest guy around. We're a union shop. Yeah, that's the biggest guy around." [#35]

- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "I wouldn't say that it's always, I'll give you a case scenario. When I first took over [my company] there was an older gentleman, an older white guy in Kokomo, Indiana. When I met him, he said, 'Are you the owner?' I said, 'I am.' He said, 'Let's sit down and talk.' We sat down and talked for an hour, and he said, 'I don't care what color you are, what race you are. You're in business to provide for your family. If you ever need any help to just talk about what you need or how you're feeling about being in business,' because he's been in business for a while, he said, 'Give me a call.' That's been fairly consistent. It seems like there is a good fraternity of entrepreneurs, and they'll stick with you, or at least help you out. But, on the other side, when I walk into some other, smaller establishments, you can still see, 'What? You're the owner?' It is what it is." [#36]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "Oh, I would think that my accent doesn't help. Yeah, but I think that's kind of normal. If I sometimes am not able to explain well what I need to do, whatever, I think it's kind of normal that that can happen." [#37]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Yeah, we faced that a lot earlier on just, again, in terms of our age, having to sort of overcome, or work around expressing our age, using things like phone calls for the first several meetings and things like that to really get our foot in the door with both vendors and with potential clients, and showing our expertise before they were able to see our face." [#42]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "As much as I've been bragging about – and this has nothing to do with the state. There are some times you run into some contractors and then I think sometimes, yes, I think it might be racist sometimes against minorities. They look at a job and, see, also one of the quirky things that we do is we install [specialized roofing systems]. And the State of Indiana a lot of those guys have never – contractors have never dealt with very much of that. So I know more about it than they do, so when we put our bid in and we start explaining certain things, they come back and they're trying to say, 'Oh, you're trying to gouge us.' No, sir, this is how it's done, et cetera, et cetera. And if they choose not to follow the recommendation and they give it to somebody else, we're comfortable because we know what we've put in there will protect the owner's roof. And if you do something different and you choose not to do that, we don't want to be a part of that. So we do get some of that sometimes and some of it I do think is they don't know it. And sometimes I think it's also, you know, how in the world does this black man know about this and I don't?" [#44]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "It's a smaller company. We've done a lot of big contracts. They look at the company size and say you can't do that. Well, we've done it. We're very efficient in what we do. Some companies require eight employees to do what we can do with two employees. They look at that and say you can't do it. It's not possible. We're boots on the ground kind of

company. We're not a suit and tie company. Some people want the suit and tie guys to go in." [#59]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "One case, I was just sharing with a friend of my recently, me and one of my partners at the time, his name was [removed]. We went to the student, like, career day locally, and we got this, like, super warm welcome. Like, everybody was so glad to see us. So, we were both like, wow, okay. So, when we went to – when we first got there – when we went to get our badges, they gave us the badges for a radio personality because they just assumed that I was the DJ. And when I explained that, you know, this is great, but I'm not her. You know, I'm the architect on the list; I'm down there. That was quite awkward. So, that was interesting. And then I've had a couple times when clients have actually come to the office and sat and everything and, you know, the staff would give them water or whatever, and I'd come out and start talking with them, and they'd ask, well, where – when can I talk to the owner or the architect? And I tell them I am, and you get this deer in the headlights look. I mean, I served as [a high level government position], and one time I met with a group of developers. I went to the meeting – I was there when they came. They sat and talked for almost 30 minutes and finally asked where was the [position]. And when I told them that I'm the [position], they almost fell out of their seats, because I heard their whole business scheme and everything they wanted to say about the [city in Indiana] and everything else. So, you know, it was just an assumption that I was the assistant or the administrator, you know, the secretary. The only thing I can say, and this is just in general, but, I mean, it applies, you know, across the board. Most people, their perception, idea, thought of an architect is not a woman, is not someone young, and it's not a minority. When you say the word architect, that's not what comes in people's mind. And, unfortunately for me, having gone into this profession, I didn't know this was the case when I went into it. Having to deal with so many preconceived notions of what an architect should be our profession is built on trust. You know, we're doing capital improvements, hundreds sometimes millions of dollars. So, how do you get over the hurdle? I can't change who or what I am." [#62]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "Yes, there were a few times that I felt we weren't treated as well, as there were two women and two men, partners in our company, and sometimes we would be sitting – this was back in the day, you know, where it would be they looked at the women as that we worked for the men, where we were the partners as well." [#67]
- The Black American male owner of an MBE-certified professional services firm stated, "I'll just give you a visual. Yes, I have. One example had a client, a large national developer, and the individual who brought me was an associate. And they had two phases. First phase is they loved us. Started butting heads with one of the guys, and I started wondering, okay, not 'Is he racist?' but he was just from Louisville. Well, he's from Kentucky. Just started wondering, 'Okay, does he just not like the fact that I own this firm, and that I'm managing an older white gentleman, who was my project manager?' And then came to find out from his associate that, 'Yeah, he likes you; he just wants to work around people like him.' So I just stepped out of the way, and then let my project manager do the interactions, unless it was contract related. If it was specifically contract administration related, I stepped back in. And then, on the second phase, they loved us, and we got it done, and then I was told by my

same friend, he was like, 'Okay, just beware once you get the design done and get approvals. He's going to want to replace you and have somebody else do it, do the construction administration.' And that's what happened. But he was just like, 'He respects you, but he just wants somebody that looks like him.' 'Okay.' So that – it wasn't as much of a shock, because I had a friend with whom I was working who was, he was coaching me as we were going through it. It was disappointing, but it didn't feel bad, because it was in East Chicago, where my mother was from, and so it was kind of a family legacy thing. And the ability for me to help impact the place of family heritage meant more than dealing with this guy's issues. So I think that was probably the most blatant. But what I was going to say initially before I thought of that specifically was that I'm a [tall, big] black guy. So I'm very kind, but people don't really talk freely, much, around me. They may say it behind my back, or even – In all my business, I only had one client who got aggressive, and that was just her style, belligerent. And I literally got to the point that I was like -they owed us money. My office manager was there, my project manager, and I got to the point that I was like, 'You know what? I'm going to remove myself from the situation. I have very competent and trustworthy staff, and I'm fully confident that my associates will get through this issue with you all. So I'm going to extricate myself.' And I said, 'I'm going to do so because if I remain here, this is not going to turn out well for either one of you.' And I left. And 15 minutes later, my associate comes back to me and he's like, 'Are you okay?' I'm like, 'Yeah, I'm good.' And he's like, 'But we got it all figured out.' And that was it." [#71]

- The Black American male owner of an uncertified MBE construction company stated, "People look at you as a minority, you know what I'm saying, and kind of like – and kind of got a – it's an effect on you as well because – you know what I'm saying? It makes people not really want to take chances due to certain things going on, like the racial wars or whatever due to with the police and stuff like that, like how the Breonna Taylor thing is going on. So, you know, it separates a lot of people and a lot of things that people can do to come together because of the chaos that's going on in the world right now." [#72]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "We had a large contract at [a bank] for a long time, and their attitude towards my technicians, who were minority as well, or a lot of them, were different towards my white technicians than they were towards my Hispanic and black technicians. They would request the white guys more than they would request the Latinos and black employees I had. They often viewed them as lower-valued technicians then the others, when they were actually better technicians. And it was consistent, all the time, at that specific location. And as a matter of fact, when that contract ended, they ended up paying a bigger company twice the amount than they were paying me, and that bigger company hired my white employees out from underneath me. And they were completely fine with it." [#75]
- The Subcontinent Asian American representative of a business development organization stated, "Yeah. Absolutely. Unconscious bias is always there, and obviously, there and ... but it's very hard for me to make any general statements, because sometimes these kinds of things are very specific, and one experience may not be equal to the other. I would say it's more in public sector than the private sector. big corporations, they have already implemented a lot of those practices. It is their internal culture, it is their best practices and all, versus some of the government agencies. But they do have a supply diversity quota, which is good. But they sometimes keep on awarding businesses to the same people. Very

complex, because it's just that the people who are in control, they really ... again, it's according to me diversity and inclusion is more of putting up the face often, and just trying to I would say put the show and that's it. It's a token representation. They say, 'Okay, I have two blacks on my cabinet, and I have one Latina, and I have three women.' Then you're diverse. We do not often get into that ... I don't know if it's a mindset. Trust me, it's a control. It is so deep and it's so inherent that people have to really accept it, and just have that mindset. I mean mindset is huge." [#76]

- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "When I first started in architecture school and I can say I'm actually really interested in construction, older men would say to me, 'Well, girls don't do construction.' I don't think you hear that comment as commonly these days as you most definitely did when I was starting out. I think there is much more of a widespread sense of there are no barriers. Anyone can do the work they want to do." [#FG1]

4. Unfair denials of contracts and unfair termination of a contract. Nine business owners and managers were asked if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract. [#13, #26, #39, #41, #48, #62, #68, #AV, #PT2] For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We used to have [a University contract] And then we have a competitor [...] and they come in and just basically we bid the contract because we want it. Then they got their attorneys involved and said something about somebody didn't do something right with the bid, and all of a sudden, we didn't have it anymore. So, they've had it ever since. So wasn't anything we did, somebody over there did something. They kind of called them out on it or whatever. I don't know what happened." [#13]
- The Black American male owner of an MBE-certified goods and services company stated, "Yes. Especially with the unfair termination of contracts and, you know, I think when it comes to a government entity the prime should have to have an affiliate from that particular office that they deal directly with, to say, 'This is the issue we're having' and when they have to move in a different direction, a lot of times the state doesn't even know what happened until the prime calls or the sub calls and says, 'Hey, they're discriminating or doing this to us.' By that time, it's too late because they've already – by the time we find out who to get a hold of and move, it's 30 days down the road and then you can't back it up and go the other direction. Which ultimately, I think the state can, because if they're getting paid by the state agency they can always go back to that primes and say, 'No, we need to make more of an effort or put this back in tack, because that's how you got this state contract.' I've seen it; that's why I think a lot of people don't even want to be bothered with the process anymore." [#26]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I mean, a lot of small businesses will sit there and think that there is some discriminating because a lot of the major corporations keep winning a lot of the bids, especially when you hear that companies are looking to do work with small businesses, minority companies or whatever. But, every time you look up, these guys are the ones who are winning the bids all the time, and we don't hear the reason why they picked them, or the

reason why they were awarded the contract. All you hear is that they were awarded the contract.” [#39]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "When they come, it's almost that they're surprised that we're African-American. You can see it. You can see it on their faces. There have been a couple of clients that we've gone out to in Greenwood. They were shocked. When the lady opened the door, she sort of blinked a couple of times. Of course, we didn't get the job. I'm sure the other cleaner on this company's list got the job. You could guess, 'Well, maybe her bid was lower.' Maybe. But I could see the shock on her face when she opened the door and saw that I was African American. So, those things do exist. I am aware of them. I think some people are more affected by those things than other people. But I've seen it and I think I've experienced it. One contract, from last year, year before last, we did the work. The following year, we knew a board member. The board member said, 'Hey, get your bid in for this year.' We did. That board member let me know, 'You know, we talked about you guys and we agreed that you did a good job, and we would have you back.' Well, a couple of weeks before the work was to begin, I reached out and said, not to the board member, but to the people that I needed to, and said, 'Hey, this event will start in a couple of weeks. We've not received any information.' One of the ladies in the office called me back and said, 'I am so sorry. No one called you?' I said, 'No.' She said, 'Well, the treasurer gave it to somebody else.' Well, the board member – when I called the board member and said, 'Hey, I thought you said they said they were going to give it to us,' and she was livid. She said, 'We did. We talked about it. We agreed that they would give it to you guys.' Well, the people that they gave it to certainly weren't African American. So, I don't know what the basis was for that treasurer side-stepping their board policy for distributing a contract. Their policy was they would discuss it, they would vote on it, and they would decide. Well, they had the conversation. No issues were raised. It was assumed that we had it. This treasurer did something else.” [#41]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, “ [I have been] denied the opportunity to do work because I'm a woman or a female – or a minority. Not necessarily so much as denied, just not given. And not receive a call. When different projects are done, they'll do what they call short list certain firms. But it's never, you know, it's not a public thing. It's private. So, all you hear about is the project being done, or the organization saying we've shortlisted these firms that we're considering for this. And it's like wow, how do you get on the short list in the private sector? In my opinion, yes. The one I mentioned in particular – was with, yeah, that was with a public entity. I even – the firm that we had teamed up with after I realized that they simply were not going to honor the agreement for the school's sake, I proposed another teammate to help us finish the work. But they said no, this is the team that you were awarded the contract with, and we're letting go of your team. We're letting go of your team. We're going to go with another team. The team that they went with was not a local company, it was not a minority-owned or disadvantaged or woman-owned business. So, and like I said, the exact contract amount was – that one was [over \$700,000]. For a small firm, that's a big deal.” [#62]
- The non-Hispanic white male owner of a majority-owned construction company stated, "His plaster ceiling got damage – water damaged – and the proposal was all filled out and basically, it was A & B – because there's A – that part of the ceiling would have to come out

and part of the wall, whatever water damage it was; and B would be taking the whole ceiling out. We took what was A at first – took part of the ceiling down – it just had one room to where – actually, that other room would have had to been – this part of the ceiling would have to be dropped, too, but we didn't get that far. The lady started, I don't know, she called me as a professional, but then, say that – my opinion – I told her, 'I'm not charging you – I'm not going to do it.' I told her, 'My opinion –there's nothing wrong with the rest of the ceiling. I think you should leave it. But that's my opinion. You own the house. Give me a direct answer. Do you want me to drop the whole ceiling?' And she went against me and then, she went outside to talk with my workers. I said, 'Well, this contract – this proposal's been between you and I.' So, things got really messed up. So, basically, she flushed out to pay and basically, 'Grab your tools and leave' I was told. I mean, I thought it was pretty crappy, you know? I don't know what the heck – what her problem was but, I just told her – I said, 'My workers are here.' I said, 'I gave you my opinion. I'm not telling you that I'm not going to do it. I'm just giving you my opinion that it should be left. I know it's your home. What do you want me to do?' And she wouldn't. She'd go outside. She was pissed off like, I don't know, like – then, she'd go out and talk to one or two of my workers. I said, 'I want a direct answer. The proposal's between you and I.' And I told her, 'I'll give you my opinion. I'm not telling you I'm not going to drop the ceiling.' I said, 'What do you want me to do? The workers are here.'" [#68]

- A majority owner of a professional services firm stated, "A client was award recommendation from the state of Indiana, but the RFP was rescinded without explanation and awarded to an out-of-state company. The client sent 2 letters to the governor and has not received a response." [#AV]
- A respondent from a public meeting held in Vincennes stated, "A contract, I had received it, it's been about a year ago. It was at [redacted]. So, once I went in to get my badge, because you have to get your badge taken at the airport before you can come into work. When the man saw who I was, he was like a director or something at the airport. As soon as he saw who I was, he said, 'Hey, you can't come in here and clean,' and he said you need to leave off of my property right now. So, I was asked to leave off his property. I just backed back and got in my car and left. He made it clear that I wasn't going to come in there and clean. And so, the guy that sent me out there, because we had did some paperwork and his name was [redacted]. [...] We were the subcontract company. [The prime] said he couldn't get in the mix of it, he had to keep it moving. So, he had to find someone else to go. He said I can't do nothing about that man not wanting you on his property cleaning. So, we lost out on a contract because of race, so we filed a complaint. We were told by the lady [...] no one really challenges this guy, whoever he was. I signed all the paperwork but the guy, he didn't sign his part. [The prime] didn't sign his part so that's why I couldn't push it no further because he didn't sign off on his part of it." [#PT2]

5. Double standards. Seventeen interviewees discussed whether there were double standards for small disadvantaged firms. [#1, #2, #7, #9, #11, #13, # 16, #25, #26, #27, #41, #62, #71, #72, #75, #76] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, " [I] got into a fight [with someone] about [whether] I paying the proper prevailing wage on a job in Lake County. I knew I was and I knew I was right. And he tried to hold up

my payment and I wrote a letter, did all the research, wrote the letter, and I won, and he had to back off and say, 'You're right.' Then another time he thought I shouldn't be doing epoxy markings. This is back when we did it, because he thought that I didn't own the machine. So, I said, 'Well, come down here and look at it.' So, he did, and then he backed off and said, 'You're okay.' And then another time, I don't remember, anyways, he had three or four different times when he would call us into question and nobody else is doing that. That was discrimination. Now, I didn't do anything because I don't want to spend all my time fighting some battle like that. I let it go. And I know that was what that was. He's probably one of the few people that really discriminated, but now he's promoted and he's in INDOT in the central office. The people that work for the primes. I don't think you'd ever hear that from the management because they know better. But sometimes the people in the field they're like, I got to be out there where you're doing your work because I know you're going to screw it up.' Kind of thing." [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I don't know the answer to that. I keep pointing to INDOT that drives that issue. If the standard they're applying to me for the 5% broker fee, or the 60% distributor, is it being applied unilaterally or across the entire spectrum of other distributors or is it just being applied to me? An example you mentioned for somebody else you said down south, if there was an individual case where they said that they didn't do whatever for their safety road construction barrier, then perhaps they may have been told that for that one opportunity that they don't meet the requirement. INDOT is trying to paint my whole organization, not for a single job opportunity, for all the things that go through my company I have a broker. I take issue with that. I don't think they're applying that same standard to the whole universe." [#2]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Like my paper vendor, he'll give me a little more preferential treatment than say the guy that owns the other little printing company that's man owned. He might give a little more because he's like, 'That guy's an [expletive] and you're a sweetheart.'" [#7]
- The Native American male owner of an MBE-certified construction firm stated, "Customers that won't take their contracts, minority small business because they've been burned by other minority small businesses that weren't qualified to do the project. And that reverberates through the entire industry all over the place. So, as a Native American company and as an Alaska Native, so there was a company in Alaska that failed several projects. Well, that started reverberating down into the lower 48 and there were several customers that steered away from Native American contracts because of the fires of one company." [#9]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I see the other companies getting away with subpar work all the time, but it's kind of commonplace, I think. No, [not toward me], not in my experience." [#11]
- The Black American male owner of an MBE-certified construction company stated, "I do have to do the work better because that's all they need is an excuse to not give me work." [#16]

- The Black American male representative of a construction trade organization stated, "The one thing I will say actually is what some of our minority or diverse subcontractors have said is that... So maybe the head, the owner of a diverse firm, they've done all the networking, they've done all the work to connect themselves to the higher echelons of a non-diverse firm, so they're part of the package, they're going to get part of the work. But then at the same time when they show up on the job site, particularly the project manager or the superintendent sometimes treat them like, 'Oh, you're the diverse supplier we've got to bring in to put up the drywall.' Or 'Oh yeah we've got our white guys putting up this stuff, but you're involved in putting that part in.' So there's a certain treatment they get as the diverse supplier when they show up on the job site. Obviously, I think that could be dealt with by EO training and unconscious bias training and stuff like that, but that would be the other thing. That's not a barrier to get business, it's a barrier to do business. So, it's getting different treatment on the job site or even how your work's being evaluated. So, one of our XBE focus groups, they did complain about this. They did say that one of the challenges they experience is that when you're a diverse owned firm that you have to prove you're competent. Then when you're the non-diverse, even if you're a minority working for the non-diverse firm, there's an assumption that you are competent until you prove otherwise, but it's the inverse for diverse owned firms" [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, that definitely happens, because I've seen it when it comes to professional uniform appearance. When we strive to do that and then you'll see our competitor at another job site that has less than appealing appearance, but they seem to get a pass. I think it's just a way of nitpicking or finding a way to keep one and eliminate another." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "I do think it is probably for minorities a challenge as well - I do think there is discrimination. I had some experiences with African American friends of mine in the South where people just don't have the same expectations of expertise as they might of somebody who wasn't African American. That becomes a struggle." [#27]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "What I will say is that sometimes, when you are a small business, you're not – oh, how do I say this? For lack of a better word, given the respect. There isn't the expectation that you have the skill, the knowledge, the ability to function as effectively as a larger, well-known company or a franchise. Again, well-known, that name like Stanley Steamer or something like that. Or EMS, for instance. If you don't have that name, you can't even get in the door. Maybe it's always been that way." [#41]
- The Black American male owner of an MBE-certified professional services firm stated, "We ended up selling – I ended up shutting the business, starting [company name], selling the church – under duress, but nonetheless. And I felt as if I had failed. And at that point in time, there was a lot of articles about said 'failure.' I met a past developer client. I just called him, and we sat down. Twice in his life he'd been very pointed with me. And we were eating lunch [...], and he was kind of like, 'You know, you'd think you'd get over it.' I looked at him like he had stabbed a dagger in my heart. And he looked at me and he's like, 'Let me clarify.' It's like, 'You're not unique.' And he's like, 'So many developers.' He didn't say 'white,' but he was like, 'So many developers [...] have been so close to going under and failing.' He was

like, 'But in the case of some of them,' he said, 'it actually was their creditors who actually saved them from going bankrupt. But you don't hear about that. But rest assured, it happens all the time.' So that was thing one. And you say 'barrier.' I'd say all that to say I think a barrier is as a person of color – I was just reading an article from John Thompson; he more or less said the same thing – I don't have the ability to 'fail' equally as a majority person. And to that point, my failings as an example seemed to be so pronounced for whatever reason was – political or what have you – where at the same time there are so many other businesses going out of business you never heard anything about. And I've always said, always been told, always felt that college – and that ties back to who we hired [...] – I have to be better than my competitor, better than my majority competitor, to get half the work. I can't be as good as you; I have to be better than you. I have to be a hell of a lot better than you. So that sounds arrogant; I know that sounds bad. But it's a real thing. At least I feel, myself and a lot of other people of color, do feel it's a real thing. And so, I think to some degree it's a barrier, or can be a barrier. That if you make a mistake on a project or make a mistake – and we all make mistakes – that that allowance to recover is not there." [#71]

- The Black American male owner of an uncertified MBE construction company stated, "Of course they're going to hold – they don't put it like that but of course they're going to hold you to more standards because they're going to make you work harder because they expect more out of you due to the – my being a minority they want me to really do what I got to do to prove myself. So of course, they're going to make me be at double standards. Just how hard I want it – just to see if I'm going to give up. Because it used to be certain minorities, especially men, us men, throwing in the towel because they expect us to go to other different solutions, of course." [#72]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "I do feel that way, but I can't prove that it was race based, or if it was, you know, the size of my company, or what have you. But there was definitely different treatment between me and other companies." [#75]
- The Subcontinent Asian American representative of a business development organization stated, "I would say yes, because many Asian-Americans ... I guess often people when they do diversity quota, in my mind, it's often just check the box. And that is often, 'I have so many women business owners. Or if I have so many black business owners. Okay. I'm done with it.' And then move on. Asians are still not widely accepted as U.S. citizens, which many, many Asians are. Because we are still considered as the last batch of immigrants, I would call it. It's very unfortunate in this country. There's no comparison for how deep the discrimination is in this country to start with. But at the same time, when it comes to even getting the consideration, or even the privileges, Asian-Americans are not given always the same or a lot of importance when it comes to diversity." [#76]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor were often mentioned by interviewees as barriers to success in both public and private sector work. Some firms attributed this to discrimination by race or gender, while others thought it was a factor of the size of the firm. [#1, #13, #26, #31, #32, #34, #36, #62, #71] Examples of such comments include the following:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Maybe, sometimes, people think that because we're a minority, we've got plenty of money cause we're getting all these jobs. And then, they're not real interested in paying us on time. We gave him a price going into the job and he'll pay the price. And, so, we went out and did it. Right after we sent the bill, he didn't like the price. You agreed to the price, and then he said, 'Well, it's too much.' I said, 'You should pay your people less.' He said, 'We're union. We can't do that.' So, he wanted us to give them a discount and we did. But we're not working for him right now." [#1]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I had one customer one time that owned me a bunch of money and thought they could kind of schmooze me over or whatever, but I just actually had a woman in his company that told me this was happening to me. And I called him up and said, 'I can't believe this is happening. And I hope this is not true.' And basically, she saw it happen a couple of times and she actually told my attorney that wrote a letter to him and said, 'You will pay her. You're not going to jump off here out of this \$400,000 bill that you owe her.' So that guy paid me in [installments]. Still, it was all paid off." [#13]
- The Black American male owner of an MBE-certified goods and services company stated, "That definitely happens. Minority companies always seem, in order to even get a chance, to have to sell themselves short. And why is that? Why do you have to be the inferior person proving the product? Slower payments and lower pay rate. That's the biggest obstacle there, is that you're small and you should do it at this foreseen rate out of their own imaginary thinking. Why is it that the minority or MB company always has to be the cheap one? And that isn't like – that, incentive is not like a chance. That's the only way you're even going to get a chance." [#26]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "No, really, they've actually held to a tighter payment schedule as a result of our being a DBE." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "Well, I had an occasion where I had a job as a subcontractor for a company that's on a pretty big job for the housing authority a few years ago. And they treated me pretty bad. What they do is, again, is back to relationships, now. They got people that they take care of, and they got others that they make toe the line, y'know. And then being a small contractor, they say – If I only got one job going on, and I'm dependent on those payments that said they would be 30 net, whatever, and that don't happen that way, now that's a tough situation for that small contractor that [doesn't] have the access to that – what do you call it, the word will come to me in a minute – that I could lean on until that payment that should've been 30 days, and it turns out to be 60 or 90, I can weather that storm. Now, this is something that the small contractor needs as bad as a dead man needs a box. Because that's going to happen. It's inevitable. So that big contractor, that big fish that I was telling you about up there a while ago? That got big because they ate up all the little ones. That's a pass for the gravel, there, how that happened. He can put a squeeze on the money, and just want to get you out of the mix, so you won't be coming talking about how you want to bid anymore. They can make your experience so bad that you said, 'Well, ah, forget this.' And that's a reality. It's

happening that way. I don't know what label you put on it – manipulation or whatever. But that's the reality of the construction world.” [#32]

- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Yeah, but that's anybody. I've got black guys that won't pay me right now, that are in government, because they just don't like me. I performed the work at their direction. They're okay with it. They say, 'But give me your invoices by December 6th of last year. We'll get you paid right away.' Here we are, April, nothing. They're just black guys. So, I don't know. Maybe they don't like the Hispanics. I don't know. But I just take it as I'm a big boy. They're going to hold my money till whenever. Hopefully, they'll pay me eventually. Yeah, there's discrimination among – I think – are they jealous that I've got a business? Are they jealous? I don't know. I just think there's some professional jealousy there. But payment, yeah, that's business. I think it's professional jealousy. Not bigotry there to hold back that payment. I don't think anybody does it because they owe you the money. They pay you. But sometimes you wonder why you don't get paid in time.” [#34]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Not that I know of, because of my race, no. Right now, a lot of it is because of this virus.” [#36]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "Yes, well, I've had the comment, you know, I've had the comments made because, they'll say, the size of your firm, we shouldn't have to pay you this. And our fees are based upon the per square footage cost of the project, or – there's two ways we invoice people, or we generate our fees – based on a per square footage cost for design, or a percentage of the construction value. It has nothing to do with if me, as one person, if I can design a space that's 50,000 square feet, I should be paid if four people worked on it. I'm still delivering what you want for the construction value of that project. But I've had different organizations say you're not a big firm. We're not paying you that. But we're doing the work.” [#62]
- The Black American male owner of an MBE-certified professional services firm stated, "I think the attempt by the one FTA, the transportation, I believe that one, yes.” [#71]

7. Predatory business practices. Four business owners and managers commented about their experiences with predatory business practices. [#1, #12, #19, #26] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "The state of Indiana wants, so they say, they want minorities to succeed. Because they rely on us to meet their goal to the federal highway so they can continue to get funding. If they don't meet their goal, they're going to have a problem with the federal highway. But they make it, sometimes, they make it unduly difficult.” [#1]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "For the longest time, I'm one of the only fireworks retailers to compete with a Chinese manufacturer in the US. So, there is a company that is based out of China. [...] But the guy that owns it owns 35 businesses in China. He has a couple patents in China, and he has a business that he opened here in [Virginia], because my Chamber of Commerce went to China on a recruiting trip, that he opened up a business here and bought an old car

dealership, and said he's going to manufacture here. Which of course he didn't, because it's too expensive to manufacture here. Labor in China's a lot cheaper. He sells and imports to that, and then sells to people like me all over the US, but then also will sell one sparkler to people in town. So, that's my main competition. This is the best part. So, when he moved into town, I heard they were going to move into town. Then he changes his [business] name to my [business] name. I could probably sue them, but they've got a whole bunch more money than I do. Now, I've talked to a copyright lawyer, and they said it'd cost me tens, if not hundreds of thousands of dollars to sue. And I beat him, you know, otherwise, so it doesn't really matter. But it's an annoying thing." [#12]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've had a problem with a short black dress issue that I can't compete with. You go in to do a presentation and then the people coming in behind you is two girls in short black dresses. I didn't get the job. That happens, that really does happen." [#19]
- The Black American male owner of an MBE-certified goods and services company stated, "I would say that's the main thing, that exploiting your price, and exploiting the pressures of timetable of respondents to bud big. Very seldom you get one more than three days out, four days out. And like I said, some of these bids are so complicated they've probably been working on them for two months or something. So I don't know if they're just busy, or last minute worked out well. What's the status you'll even find, and you say, 'We didn't find anybody.' Well, you probably didn't find anybody because by the time they checked their e-mails and responded the window is tomorrow and, 'Screw that. I [don't have] time to do it.'" [#26]

8. Unfavorable work environment for minorities or women. Nine business owners and managers commented about their experiences working in unfavorable environments. [#1, #3, #7, #26, #41, #42, #44, #48, #62] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Then they denied us for, I don't remember what the issue was, but they denied us and so we had to resubmit. So, during the time when our prequalification ran out, I had to deal with the guy who doesn't like me because he had to monitor our amount of work on hand. So, every day I would talk to him and he would want to know how much work I've got on hand and how much of it we worked off and all this stuff. And he was just unduly harsh about it. And, finally, we got the pre-qual done and he hasn't called me since. But, during that time he was unduly harsh." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I'm sure that I've heard of, or experienced offensive comments or behavior. I mean, there was a guy once that we were going into orals, but he's just stupid. He said something that was very provocative about winning it based on, it was me and another woman who came to be part of orals, and it was oral presentations. And so, I mean, there's just stupid people out there that say stupid things. Mostly that's not the case." [#3]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "Honestly, the biggest thing I've run into, and this has been true throughout my

career is generally there's more sexual harassment of the woman-owned. That seems to be about the only real obstacle is they tend to get a little more lewd with the woman." [#7]

- The Black American male owner of an MBE-certified goods and services company stated, "I've seen that before in the private sector before. And it was really – as a prime contractor for one of our northern stores we had before, we had a vendor, was a grocery store that we had a security guard there and the exact words was – and he's a security guard in a grocery store, he looked too threatening and intimidating, he didn't smile enough. I said, 'Do you want a door greeter or a security guard?' And so, we had to – that was one we pulled out of that market, because we told that particular customer – happened to be Kroger at the time – that we can't be setting ourselves up for lawsuits trying to appeal to you, because what do we tell this guard, why he's getting pulled from that store. Too threatening and intimidating? You're security. You want a greeter, get an 80-year-old person to be a greeter." [#26]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "One of the clients on – one of the sorority houses that we provide service for, the house director resigned in the middle of – not at the end of the semester but two or three weeks in, she resigned. So, that company began to bring in all these different alum to help keep the house going because you only have a month or two before the end of the school year. You don't hire someone else. You just try to make it to the end, so that's what they did. So, they brought down this house director from [a University], once a week, to sort of make sure the house was running fine. She was the most condescending, arrogant, unprofessional woman that I have come across in a long time. I've heard a lot about people like her, but I don't think I'd ever encountered any. She told my workers – so I met with this lady and she said, 'These are the things we want to do. We want the dining room mopped every day.' That is a job that we never did. That wasn't our role. Wasn't in our scope of work. She wanted all these different things. All of these different things meant more time, or I would have to add more staff. So, we began trying to figure out how we could accommodate all of these changes. One of the things I told her was that 'Well, we can accommodate four days a week but we cannot – we can only do that by bringing someone from another site but we cannot do this on Wednesday. We just don't have the staff.' So, she goes through a conversation about her housekeepers [at another University] and how most of them don't speak English. One of the things that she told them when she first got there that she wanted all of these certain things. The lady began to say that she couldn't do it. I told her – that she didn't have the staff to do all of these things. She told her, 'Well, you need to call your mother, your friends, or whoever you can because this is what I want.' She just cried. I looked at her. I said, 'Well, I'm not going to cry.' 'Well, I wouldn't think you would.' The following – I did report that, mind you. Don't bully me. It's unprofessional. It's tacky. So, then the following week, she had told us she wanted us to go buy another vacuum because she didn't think the one that we were using was strong enough. Mind you, we provide equipment in some houses and some, we don't, and in some houses where they want something more, they purchase it. Again, you have six weeks until the school year's over. That house is closing for the year because it's going to be under construction. We don't even know anything about our coming back. So, when she came back the following week, she looked at the vacuum that my staff was using, which was the same one, and she made a statement to my staff, 'Huh, if she can't do what I say, then [laughs].' I thought, 'Who does

she think we are? I don't have to do what you say. We're not maids. We're professional. This is a conversation and it's a professional dialogue.' For her to very condescendingly make those statements to my staff was arrogant and it was racist, in my opinion. That wasn't the only thing that she said. There were several things, comments that she made. 'Well, she better do what I say because I'll have a say in who comes back.' She would not have said those things, I don't think, if she was talking to other Caucasians. She was talking to the 'black maids' or housekeepers. It was very unprofessional. She should have called me and said, 'You know, I thought that I expressed I needed you to jump through this hoop,' or whatever and I would have certainly told her that I wasn't going to, but – or that it was just impractical for me to do that. As it turned out, a week later, COVID-19 shut down the campus. Yeah, I've had – she was by far the worst. I didn't know – I hear a lot more about the discriminatory remarks being made and people being called certain things and treated certain ways. I hear far more of that than I experience. But this was one time that – and my staff called me right away, 'You wouldn't believe what she said to us.' Yeah. They were offended and I was offended for them." [#41]

- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Yeah, we've experienced that I think just through the lens of sexuality, which I'm not sure if it's a focus or not of this study, just when potential clients or vendors sort of discover that my husband and I, we're queer, and that we own this business together, it could become a point of concern for individuals who are engaged with us." [#42]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "We had two lesbian electricians on our crew a couple years ago and they took some [expletive]. But they were smart enough and poised enough to give it right back, and this wasn't against a contractor. These were just knuckleheads working on the job who decided they had to say something. They wanted to be heard and the two ladies put them back where they belong real quick, but that's not against the industry. That's just against knucklehead men working in the industry." [#44]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "I had a scenario once where when the contractor found out that I was the owner of this firm – he was working as the project manager – he removed himself from the project and delegated it to someone in a lower position in his firm. I'll never forget that. I'm oftentimes, when I'm the architect, the first time that the clients meet, they're waiting for the architect to come. No racial slurs. Different things not said. And as far as sexual harassment not by a client. Now, I've had a couple people say we were looking for someone who could enforce this. We really need someone that can enforce this. And I've learned that enforce this means they want a man, you know? In construction, because my undergrad is in building technology, I worked as a project manager for [a construction company] That was a minority firm based in [a city in Indiana]. Of course, sexual harassment early in my career. I was told by [my prior boss], he told me don't date the workers, period, and I held to that. But, being out on the job site, I actually developed a kidney stone because my superintendent would not provide a port-a-potty for women. So, I was going from Northwest Indiana to the north side of Chicago, leaving my home at 4:30 in the morning and I can tell you where every clean bathroom on the northwest side of Chicago is. And when I went to the hospital, I spent four days in the hospital. I was given some flowers, and when I

got back on the job site, there was a second port-a-potty there. But I was the first woman out in the field with that superintendent. I might have been one of the first women period to be a project manager, now that I think about it." [#62]

9. '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. Thirty-five firms shared their thoughts. [#1, #3, #4, #7, #11, #12, #13, #16, #17, #23, #25, #26, #28, #31, #32, #35, #37, #41, #42, #44, #46, #48, #59, #61, #62, #65, #67, #71, #AV, #FG1, #FG2, #PT3] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "So it would be, for instance, everyone, all the guys get invited to a golf outing to discuss something, and they don't think to invite me, or the other women. That has happened, or out for beers, or whatever to talk about it, or some guy's thing. And it's like, yeah, but it's not only the guys on your team, you know?" [#3]
- The non-Hispanic white male owner of a construction firm stated, "That hasn't been a barrier for me, but I've seen it before. It goes back to where you've used the same sub for 20 years and I'm not opposed to getting other bids for other jobs and stuff like that if it's required but, like again, it all goes back to the quality of work. The good old boy thing is going to be, if the guy does the quality of work, why not use him on all your jobs." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "There's so many stories about good old boys but there is a good old boy environment that exists in this world. Yes, there is." [#7]
- The non-Hispanic white male owner of a majority-owned construction company stated, "That's kind of common in this line of work. There's certainly that element for sure but not that I've had any major problems with it, no." [#11]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "I've heard of people that won't hire IU grads and then won't hire Purdue grads. Like, are you kidding me? Really? Didn't realize that was a thing." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Well, the biggest thing is in the print industry, it's a mail business. And in the mail, the M-A-I-L industry it is a male business. Well, it wasn't our local chamber here. They had the good old boy network, and they would literally put me on the board to take a seat of, they wanted to have some women and minority. So, I would play that role. And one time I got on our CEO round table here locally. And whenever I got on the CEO round table, I was the only woman in the group. The rest of them were men. And I literally had a man say to me that day that he didn't want to talk in front of me. And I was like, 'You don't want to talk in front of me. Why not? What's the problem here?' He said, 'Well, you're a woman.' And I said, 'You got to be kidding me. What year is this?' I was just pointing out what year it was. And I said, 'You're trying to tell me you don't feel comfortable talking to the CEO round table because I'm in here and I'm a woman?' And so when I left the meeting, I had a friend of mine who defended me. And when I left the meeting, I told the chamber, not only do I want to be on that one, but I want to be the facilitator for that. And then the next meeting the guy came back and literally apologized. He went home and I guess laughingly told his wife about it. He thought they would hit off. He came back and apologized. And that was the worst." [#13]

- The Black American male owner of an MBE-certified construction company stated, "Anything you do right, it's not going to be easy because people have been established and have their own cousins and nephews and stuff like that, sons and daughters, and it's tight knit. And as far as getting business, it's the same way with that. You've got a company that's been in business 40 or 50 years, they've pretty much established that they don't need any work really, they're already established." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I see it. I see it really heavy in the septic business in Lawrence County in a church from a couple of my real estate friends. There are certain installers, and it's odd because the person down there in charge of that department is a female. But me being the only female installer and new to the list, so I've not proven myself well with her yet and that kind of thing. But I do see that there's a bias towards, not a bias, but a preference towards certain installers versus others. I don't know if that's from my experience or if it's just from some personal issue or bias. I don't know." [#17]
- The Black American male owner of an MBE-certified professional services firm stated, "They don't even know I'm Black. I don't talk to them; I stay out of the way. [A white employee] told them that he owns the company, they don't know [expletive]. I just keep letting them think it, too." [#23]
- The Black American male representative of a construction trade organization stated, "Yeah so in one sense most of your owners and your general contractors and developers and your CMs, they can do a lot of outreach sessions but then for whatever reason they don't necessarily have what I might expect to be the best databases on who to reach out to, so they've got their list of usual suspects. So the challenge of either finding out the tables exist is you've got to get the various big companies to put you on their list of usual suspects they even notify. Then I'd say the other thing that I have at least been told is if you were kind of seen in their own careers or their histories of their companies. I guess there's two tables. There's a meeting or a discussion that you get invited to or informed of before any of that outreach is done and that's when you get to really secure the big piece of the pie. When you get the flyer or the newsletter or the, hey come to this outreach session, that's a much smaller opportunity because the really good friend, the core partners have already been invited to the other meeting." [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, that definitely goes on. You try to be more inclusive and try to be more of a free spirited free thinker, but at the end of the day it goes on and you try to roll with the punches, without having to bend over backwards and compromise yourself. And it still hinders you from getting out of work. It's sad to say, but some of our best days business-wise was when I went myself as an MBE, had mostly a Caucasian office staff in the front office. It was just amazing how much more volume of work you get acquired." [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "Our company was not viable as the white companies. We sought at that time to get information as to what we needed to do from other security guard companies, but they looked at us like we were crazy." [#28]

- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "I think that's kind of also moved away from, I think, just with all the requirements, we don't really see that so much anymore. Although, we were at a meeting recently where they were asking why the requirements are still listed, why the percentages? And the woman spoke well to it that was speaking from INDOT. She said, 'I'm the only woman in this field and until there is more representation, then I feel like the percentages should be required.' I think she did a good job of addressing that but we don't really run into that very much." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "That comes with the territory, see. Because if you drew a pyramid and stand it up, at the top, it's a point up there at the top. So [there's not] much space up there. Yeah. So when you've got the ones that are controlling the flow of the money in this one group that meets at the golf course, where the small contractor [doesn't have] time to go if he could go, you see, and it's – the reality again comes into play." [#32]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "So, it's mainly as a city. I don't see that at a state level. State level is pretty fair. I could establish different groups within the state. They have their favorite contractors. But again, it's mainly on the local level with that. One of the cities that we're working with now, again, if we were a contractor because, either they're doing favors on the side for them or – and you try to do work that has a permit, you have a sort of group of guys or a group of people within there that you wonder how they not give you the opportunity to – or you give them a bid and they still give it to the other guy. So, to me, that's unfair prices of doing a type of work. But it's really discouraging even coming in and sending bids anymore to that group because of that. In the good ol' boy network, they've got to separate those folks. They hire their cousins. They hire their department heads, when they hire their relatives to work for them or – I've seen it catering to one contractor. Make it fair. Make it fair to – if there's a board this time, if it goes in front of the board to get approval and have these things filled to get approved, and stuff like that. Because these guys, it becomes – that's at the city level all the way across the board that we see that. Some departments, you've got a board meeting. They open it up. That's great. We won some, we lose some." [#35]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "Well, I think that's kind of normal; also, I'm just talking about the private sector. I don't know the public, how that will work, but private is every general contractor has his own group, and they have their own electrician which they normally use, so you need to try to get into that, I'm an outsider. Yeah, I do see that often, yes, in that way." [#37]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Oftentimes, contracts – those contracts and those agreements and those arrangements are made on the golf course. They're made based on relationship and your ability to have connection to the people that make those decisions, those upper-level project managers or business managers or whoever it is that has that authority to grant that work. If you are not in that circle, there's no way you're going to get that job." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I mean, those networks exist I think at pretty much every level of business, and we found that it could just be very politicized in how you gain access to those

networks. I really don't have a solid strategy for how you would eliminate that type of behavior. But, it can be very detrimental to new businesses who are getting started, especially depending on what industries they're working in." [#42]

- The Black American male owner of an MBE- and DBE-certified construction firm stated, "That's always there. And I don't know if there's anything you can do to break that. What you have to do, what we've tried to do is just say we'll continue to work. We continue to deliver value. We continue to do something. If we lose somebody on a regular basis, then we just stop bidding with that contract, you know, because sometimes we had one contractor about three years ago. He called us and said, 'Hey, I sent you guys a couple bids and you never bid us out.' I said, 'You know what? We've been bidding with you for two years. We never won anything. It wasn't worth it anymore.' The reason there's a good ol' boy network is whoever has that job has been taking care of that customer for a very long time, and it's going to be hard to break that cycle. What we decided is it's not worth trying to break that cycle. We'll bid with them a couple times. If we think we're legitimate, fine. If we realize that they're just using our number to stage somebody else, then we stop bidding with that customer." [#44]
- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "Every day. Every day. It is a 'good ole boy' as far as the vendors go. You know, I'm the junior on the block, I'm the smallest on the block, I don't have the years of experience under myself. I don't have the large line of credit. And, you know, they don't look at me like they look at [my competitors], where they bend over backwards. And when I say bend over backwards, I'm talking about they give them free pictures and posters and pay for them to go to nationals. We have a Uniforms Association. They get all kinds of kudos and free stuff all the time, shirts and just all kinds of stuff. I get nothing. And when I ask for those things they're like, 'Yeah, you're not quite big enough' or 'Your sales, what you buy from us isn't quite big enough.' I couldn't even get a free hanger from them. I really have to beg to get anything from them, because I'm not as big as [my competitors]. You know, [my competitor] probably buys about \$1 million of scrubs a year. That's going to get somebody's attention. Where I'm buying \$50,000.00. I'm not even a blip on their radar. And I complain about this all the time to [my colleagues], it shouldn't matter how many stores I have or how much I buy, the fact that I'm packing and moving their [expletive] should be enough, that they're represented in my store. Because I could pick anybody. I have 1,000 vendors that I could choose from of who I want to – what lines I want to carry in my store. They should be honored that I'm carrying them; it shouldn't be the other way around. You get what I'm saying? They could come to me tomorrow and apologize to me, open up a line of credit and tell me I don't have to pay for the first 90 days and I would still tell them to [expletive] off." [#46]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "It is what it is. Sometimes we have to do contracts with other people. These are mainly in private, not in public. In public, it's pretty open which is nice. In private, they'll know someone. We'd have to work under them to get the work." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Well, that – yeah, that goes on quite a bit. But they don't tell you that's the reason, though." [#61]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "When I think about it, I've been a designer, I've wanted to be an architect since I was four years old. Even when I was in grade school, I had my composition book, my friends all knew and everything. And they're like, you've always wanted to do that. It's always what I wanted to do. It's what I am. I've designed clothes, other things, and I love building. I had no idea going into this field of how male-dominated it is, of how – and they say this all the time – of how white it is. You know, when we go to, like, the AIA conventions or NeoCon, which is the huge design event – they didn't have it this year because of COVID, which was really, it's really weird – that's talked about and it's a common fact. We only make up – it used to be less than one percent. Now, because of all the kids graduating and starting to get their license, minorities only make up less than two percent of the architecture profession. I don't think that's by accident." [#62]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Not because of ethnicity, but generally everyone's closed. They all have closed groups. But it's not ethnicity-based." [#65]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "In our local communities I just think – and it's not even a big thing, but I just think it depends on the community you're in. But I think it's just a natural process that when you have certain people that are in a community from the mayor or whatever, I just think they're going to have their own group of people. It's not something that even bothers me, because everybody has their group of people that they work with and where their comfort level is. But I think politics does – I'm just using it as an overall umbrella, but I think politics plays a big part. And I will say I had a political sign in my yard years and years ago and somebody said, 'You'll never get work from us if you have that sign in your yard.' And I thought, 'Really?' So yes, I think politics plays an important part, and I think we've been overlooked due to our political views sometimes as an agency." [#67]
- The Black American male owner of an MBE-certified professional services firm stated, "To be honest, I have to acknowledge that maybe I'm somewhat of the reverse, from the standpoint of, as I mentioned earlier, I have consultants I tend to use. But I try and shift and engage more. But yeah, I've run into that. And I somewhat get it, if you would. That's a harder one. I somewhat get it, because I tend to think we all like to go with what we are comfortable and familiar with, so we – I think the challenge for all of us just ends up being, okay, making sure we allow the opportunity for others to come in and provide. Does that make sense? Yeah. I think that's a harder one, to be honest. But I would say I believe in equity, but I do think that one could be a harder one depending on the funding stream. If there're public dollars in there, then it's like, 'Yeah, you old boys, I get it; you need to broaden it.' If it's all your own money, it's kind of hard for me to argue what you spend your own money on. I may prefer, I would like; but if it's your own money, it's harder. But there aren't as many cases, at least not in the public realm. There aren't as many cases where you're going to see it's all of the developer's own money." [#71]
- A comment from a Black American MBE professional services firm stated, "As a start-up there aren't many resources to help stabilize design firms in engineering and architectural design. It is a closed market. As a minority, unless you are affiliated with a large company or network that can feed you work or tell you about work." [#AV]

- A comment from a majority-owned construction firm stated, "I don't get to work in Indiana at all. I usually work in Louisville Ky. There are three big companies that dominate this area." [#AV]
- A comment from a majority-owned construction firm stated, "There are 2 competitors who are monopolizing the northern part of Indiana. Very difficult to get business in the northern part of Indiana." [#AV]
- A comment from a Black American owned MBE construction firm stated, "Locally a lot of the nonprofits don't get a fair shake. The bigger company's get the options first. We don't get to know about it. I want to have a chance to work also. It's all political. You can't use federal funds to exclude people." [#AV]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "I'll just hit on that uncomfortable lack of diversity that exists in our industry and our firm is a prime example. We have 180 people, like I mentioned, and we have no minority partners. We have no minority leaders of this firm, if you will, that are shareholders and all men. We've been focused on this for five years, if not, maybe seven or eight, and it's difficult to move the needle. It's going to take a long time. We are trying to take a harder look at ourselves, understand what biases we have and trying to find the unique voices we've got to add over time. So internally, our equity and our emotional intelligence is improving, but it doesn't even show yet. You can't see it. So that's actually a detriment to our success right now if we don't solve that." [#FG1]
- The Black American male owner of an MBE-certified goods and services firms stated, "Definitely in the business sector. When I first joined, when I first started my security company, I joined the Indy Chamber. That's the Indianapolis Chamber. I mean, it'd be 200 people, and there would be four black people. For us to try to cut into those conversations, people do business with people they know, or that looks like them. Trying to cut into those conversations or was very hard for me to do. I accomplished it, but the other people that were there did not. So the companies did not flourish like mine, but so, no, it's very hard to break into the business sector, if you don't look like everybody else that's making money." [#FG2]
- The male owner of a goods and services company stated, "A lot of times when the local municipality is at the driver's seat of anything beneficial, not only is the information not disseminated, sometimes it is kept under wraps so those that are undesirable won't be sitting in the seats. If you don't go to the right church, you are not kin to the right family, you are not the right religion, if you don't date the right person, often you are marginalized and you are set aside. It is ironic to me with us being all in one way or the other minorities, but we have subcultures among the minorities marginalizing each other and I find that to be ridiculous. But that aside, that's been my experience working here." [#PT3]

10. Resistance to use of MBE/WBE/VBEs by government, prime contractors, or subcontractors. Eighteen interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm. [#1, #2, #3, #9, #22, #23, #25, #28, #29, #35, #38, #39, #49, #62, #71, #72, #AV, #FG2] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Making it difficult to do business. You got to be able to do some things and other people can do. I think there has to be... I would like to see a change in the USDOT rules that says after you've been in business for five years and you're proven your worth to the industry, that we would lighten up on some of this craziness." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I want to be a part of I-69, I want to be a part of these roundabouts, I want to be a part of this infrastructure in the state. I probably, my biggest single contract was probably in Kentucky. Now, what I'm alluding to is that some of this is political. There are probably people that say ... One guy said to me, probably a couple years after I was out of the military, quote, 'You have not paid your dues.' What does that mean? What does that mean? 'We pick the winners and losers and you have not paid your dues.' There is some sentiment there to say, with a couple that says, 'You're an impediment. We're only using you because we're required.' Maybe not this level of the prime, but the project manager who is doing this project, and he's working 15 hours a day, his tolerance level is this low. He is, 'Why didn't this get delivered? Where is it at? Where is this?' Just stuff that we have problems with. We call him and say, 'We need this to order the product,' and they got issues with that. The government has no problems. This is not city, but the city honestly haven't done a good job, but the government in terms of state and fed, they push the programs." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I've had people say a couple of stupid things before, just about the disregard, the value that you're going to add. And probably I don't know if it's perception or prior experience where there are some certified businesses that show up with an entitlement attitude, and as though they diminish what you really ... the value that you can add. They just think you're just there, because you've got- the only reason you got it is because you're a minority." [#3]
- The Native American male owner of an MBE-certified construction firm stated, "Have I been told, 'We don't trust Native American companies just because they're Native American?' Absolutely. But it wasn't for money or loans or something of that nature, no. It was more on the grounds of, 'Hey, my project's more important than a set-aside requirement.'" [#9]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "I say 25% [of the time] I feel it that way." [#22]
- The Black American male owner of an MBE-certified professional services firm stated, "To be quite honest with you, when I talked to the folks about getting my minority, getting the MBE stuff together and letting them know that I was MBE, they told me don't even tell them that because they'll put me in the MBE box and then I'll be over there going through a whole bunch of programs and stuff, and not even get the work." [#23]
- The Black American male representative of a construction trade organization stated, "So once you get invited to the table then the question is do you get a legit piece of the pie? That we've heard stories where you might have an XBE who performs the exact same type of work and largely to the same scale as their non-diverse competitor but then instead of say, all right we're going to give XBE this portion of the work, non-XBE this portion of the work."

Instead, we're going to give the whole contract to the non-diverse supplier and then he might sub some of that work, or he might sub the labor to the XBE. Of course, the XBE's like, 'Wait a minute. We've got the same capacity.' Our recommendation is that owners and GCs but GCs in particular should use the XBEs to the capacity that they can perform. So, let's say if you have, and we do have some numbers earlier, but let's say you have a 15% goal for minority spend because they divide the 27 in different ways, right? But let's say it's 8% or 10% minority spend. So, someone will say, 'Oh okay we've got drywall to put up. Let's give 10% to the XBE firm.' That doesn't really solve the problem, right? Theoretically you want to see well, this is our trusted XBE supplier of drywall, how much of the drywall can he or she or whatever perform. They can perform 25%, great. So now if we can't find an XBE to perform this type of work in another aspect of the building or another aspect of the project, we can just go with a non-diverse firm because we've spent as high as we can on other aspects of the job. For some reason that just doesn't happen, it doesn't happen that way very consistently. So the challenge for XBEs is getting to be used at their capacity because instead the good old boy network is like, 'Oh well my buddy owns this company so I'm going to give it to him and I'll let him sub some of that out to the XBEs.' So, I'd say the mistake that GCs make a lot of times is they try to just hit the percentage goal as opposed to let me actually see the XBEs as true partners." [#25]

- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "Everybody now wants security. But the thing is, once they see our faces, things change. With these – even – now, Indianapolis has all of these giant, giant, giant warehouses. And every warehouse that we attempted to go to, there's nothing but – they all – from Sears, Walmart, all these big warehouses, white people are in those. And I've been trying to get one of those warehouses since I've been here. We can't find out who the contact is. They won't give it to us. We try and just go a different – through the back door trying to find out different information. It's just not – we're just not there." [#28]
- The Black American male owner of an MBE-certified goods and services company stated, "Because a lot of them felt the space we're in was already taken, and that's really unfortunate. That if a black walks in, a company like a pharmaceutical company, says, 'We already have one.' That was what was told to me. 'We already have one.' But that company I know has over 10,000 vendors. But when a black walked in, they said, 'We have one.' We got our token is what they meant." [#29]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "So, many times, like we haven't heard from you or we don't know your company. Again, it's because – I've seen it in – because, you know, my name, I'm the company name. Obviously, I don't get those opportunities." [#35]
- The Black American male owner of an MBE-certified professional services firm stated, "I've heard and spoke with different people about it. I haven't seen it physically. I can't speak to a specific instance where it's happened to me or anybody that I've known or worked with, but, honestly, I've talked to other minority business owners about it. I would say probably a couple of years ago. We were trying to get in on a big project for [local schools] and there was some discussion that there was a struggle to get the minority and women owned businesses – professional businesses percentages to a certain amount on the project. And it was just a discussion I had with another minority business owner, but I didn't really see

anything physical come out of it as far as people were being denied contracts or people were being denied the opportunity to work on the project. Oh, that was 2018. That was 2018. Because they had a \$100 million bond that they were doing quite a bit of work over there. And I was just having a discussion with a minority construction consulting firm, and he was talking about creating opportunities for minority and women owned businesses to be a part of the major projects and what it would take for that to happen.” [#38]

- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "Well, we had one situation here. We did a job for the airport. The company needed to use an MBE to do some of the scope of the work. Well, the guy didn't like that they had to use us, so they kind of set us up to fail. this type of product that they do, you have to be almost a contractor to put these cabinets up, and they told us, 'Look, just put them up.' When we went and did the work and put them up, they never showed us the right way or whatever, they set us up to fail so we were discriminated on that because he was like, 'See? If we didn't have to use these guys, then this work would have been fine.' Because they didn't really want to work with us anyway. I noticed that when you find some prime companies that really don't want to work but they feel they're forced to work with them, some of them will set you up to fail." [#39]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "The participation is something that we're all a part of. A lot of times I don't even know how you'd even know whether a company is woman owned or minority owned or whatever. You'd almost have to ask. We don't." [#49]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "We always team with firms that are much larger than ours. We're quote unquote the minority participation or the women participation. And a lot of institutions, you know, by law, they only have to give five percent of projects to a minority, or five percent or 10 percent to a woman-owned business. Five or 10 percent of anything is not the lion's share of that. If you're always getting five or 10 percent out of 100 percent, it's not a good thing in business. I don't think I'm telling you anything you don't already know." [#62]
- The Black American male owner of an MBE-certified professional services firm stated, "The issue that we would've had would have been the tendency for more times than not with the larger projects, XBE firms or smaller firms are teaming with a majority firm, and the tendency for said firms to want to minimize, one, your fee, or two, your interactions. I've had that. I mean, well, I actually had that recently. It wasn't a large firm; it was just a majority firm, and our level of interaction was pretty low, almost comical. But I positioned it in such a way that I was like, 'Well, if that's what you want, then okay.' No resistance. I've had scenarios where they said, 'Well, we're not aware, there are no qualified – 'And then I'll just run down a list to them. So, I don't – Maybe it is resistance. I don't know whether it's – I take the approach it's not resistance, that it's more so ignorance. Meaning lack of awareness." [#71]
- The Black American male owner of an uncertified MBE construction company stated, "I'm kind of finding it a little bit – not difficult but you just got to put a lot of footwork in and then, by me being a minority people are kind of a little bit judgmental, you know, as far as holding back information for you to grow as a small business because they look kind of down on like a little bit of small businesses coming straight off the ground because you

[don't have] backing. And then, you know, they're going to always try to have their – have their resources with bigger companies, you know, because of the names and titles that they hold as a bigger company. Me and this guy, we both graduated at the same time, we talked to the first company at the same time. I see him going over – and me and him talk about it because we have to be – we became great friends through the truck driver school we went through. So, I went up to the job to be the first one to fill out for the job of being the truck driver for this company and when I filled it out everything was smooth and stuff like that. He came up to me and they gave him – and fill out the application and they gave him the job before me. I called to check back on the job, and they said they already gave the job to somebody. And it was my buddy, and my buddy's a white guy. And he can't believe – he's like, 'Man, I feel bad taking the job because you did – we both got out of school at the same time and you made it to go fill out the application before me and they gave me the job before you?' And I don't understand it but it was a mom and pop little job. And they gave him the job before they gave me the job. They made an excuse. And I came before – but I just took it like how it was. I came to fill out the application before him and everything. And we both had the same amount of experience. So, it's not like he had more experience than me, it's because he was a different color than me. So yeah. And that made me kind of look funny at the trucking industry because once upon a time there wasn't a lot of minorities in this industry, just over the last few to maybe five, ten years minorities [have started] becoming like more like a lot into this, than how it used to be. But yeah, it made me want to kind of give up, but by me being a strong-minded individual, I didn't give up because I got goals. And taken for myself." [#72]

- The Black American female owner of a WBE- and MBE-certified professional services firm stated, "It's very hard being Black American to get into facilities to get contracts" [#AV]
- The Black American male owner of an MBE-certified goods and services firms stated, "I mean, sure. I mean, I've had, even in the construction field, I joined a construction association. It was \$1,600 for the year to be a part of it. So, I joined it so that we could do, we could build relationships with these construction companies, and do security while they build, doing on-site security at night and stuff like that. Well, when I joined, and I got maybe two contracts out of it, the board of this organization went out and found another security company, and brought them in, and told them they needed to be a part of this, because I was making money. And so, when they brought them on, people started working with them, instead of me. I mean, that was direct. They directly brought competition. Where nobody had ever even thought about doing security, they brought direct competition to me." [#FG2]

11. MBE/WBE/SBE/VBE fronts or fraud. Fifteen business owners and managers shared their experience with MBE/WBE/DBE/VBE/DOBEs fronts or frauds. For Example [#1, #2, #3, #4, #7, #13, #17, #26, #27, #30, #31, #34, #62, #71, #PT6] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "There was a company here in the state that did guard rail work. This is back in the 80s when I first started. And, they had a guy who was a Hispanic guy. [...] He was in a CPA. So, this majority guard rail contractor went to the C-P-A and said, 'We want to start a company and make you the president. And then, we want to run all our guard rail work through you.' So, they did it. And that went on for years. So, finally the state said, we're not

going to let that happen anymore. So, they de-certified that guy. Well, the owner of that guard rail company, I was new, had only been in the business for a year. He called me up and he said, 'I want to talk to you. Can I meet you down in Indianapolis?' So, we did. He offered to put me in charge of a sham company. He said, 'You're already certified. We'll use your company. We'll just run all our guard rail business through you. I'll guarantee you \$200,000 a year, put it in your pocket. I'll get you a truck, an office, a staff. All you have to do is let us run the stuff through your books.' And, you know, I'm a guy who was making less than \$20,000 for the state and just started a business. I was tempted. I went to my banker. I went to my CPA. I went to [a Chamber representative], and I told him about this, and you know what they said, 'So, you know you're going to be successful. You don't need to run a sham company.' But I'm telling you there is a mentality out there that will cheat." [#1]

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "When we went to look at buying [majority veteran owned] company they were 100% a pass through. 100% a pass through. I didn't make a mistake, 100% a pass through, didn't own ... Rented a space about like this, had two ladies in there, and all they did was change this, change that, process this, change this, change that, process this, change this ... No scrutiny was growing like boom, boom, boom, boom. All of a sudden, we look to go buy them, it's like, 'Okay, now you're an MBE, you're a veteran,' and the whole pool of folks that are MBEs started looking like the criteria that I meet has become a higher standard. I used to see it a lot. I think it's very prevalent still, where you've got a white female who all of a sudden is now a whatever, when in fact behind the scene is a big organization that's running the business through my wife, my niece, my cousin, some other family member that is not a woman ... Not is not a woman, but is in a woman set aside category, that you funnel business through her. You meet the goal because that's 8%. That's there." [#2]
- The non-Hispanic white male owner of a construction firm stated, "Well there's plumbing companies out there right now that operate underneath the husbands license, but the husband stays home, and the female runs the company. And the female says it's her plumbing company when it's operated underneath her husband's license. Well, it's a little upsetting because then they're getting jobs as a minority, saying they're a minority, when really, they're not. I mean, they take advantage of the system." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I've run into some companies that they say they're a woman owned business that you don't really see the woman present. I know for my company, I'm the one talking to you." [#7]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "One of our competitors here in Louisville was like that. The mom supposedly owned the company, but she didn't work there. The son and the husband took care of it. And then they would like scream and yell and threaten attorneys and all kinds of stuff." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I hear rumblings about that. I don't think I've seen it. I think the one rambling I've heard about one company; I won't name him. But once I started looking and seeing what was really happening, that female is really running the business. That female may not be out there with a shovel on the construction site. But she's running the project coordination. She's making the decisions about what they're doing. So just because I don't have the hard

hat on and walking out in the mud with the guys, doesn't mean I'm not the owner running the business. You know what I mean?" [#17]

- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, I've heard a lot of that went on, especially in the earlier days. People just used somebody else's name or whatever, how they did it. And a lot of that went on over the time, years ago. And I think now it should be a little harder to do that." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "I have heard of an organization that I won't mention their name but is not from the State of Indiana. But we had some problems with them. One of our staff told me that she thought that they were a front and had kind of a front and had all different arms of different businesses that would allow them to supply contracts. But it was kind of a little bit of a shell game. But I don't know if that's true. It was just something I heard." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Not necessarily fraud, not necessarily fraud but definitely fronts. Fronts, I guess, could be considered fraud." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "That's gotten better. There's still some sketchiness in that area but that's much improved. A little bit of companies that are suspect of whether they're actually performing the work and that type of thing. But not to the extent that that used to take place." [#31]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "But when we've had to perform as a minority, we did what we had to and I didn't hire a taller, wider, smarter guy to do all my paperwork for me. We performed it here in house. We were never a sham minority business like a good percentage of them out there. Can't you see that some of these companies are not real? I mean they're just shells. The guy's only doing the work, don't get me wrong. There are some women that get involved in the business and then they kind of take it over, and then their husbands are the technical workers or the field work. There are some like that. But there's some where the wife's just the figure head. Talking companies, the wife's just the figure head and they get to use the certification as a WBE. I just can't believe the certification doesn't see through all of that. That's what's disheartening. They've got to work harder to eliminate all the sham outfits out there. If they really tried to help a true minority, they would be helping me. But they don't. Just fill out your application and we'll look at it. Sometimes I'm embarrassed at the questions they ask or because, 'Can't you see I'm real?' I mean I own 100 percent. I'm the guy doing the work. I don't have some white guy sitting there doing my books for me or owning 49 percent of the business. They've just got to be more aware. So, you can see a scam I mean it's like, 'Can't you see? Can't you ask other questions or really dig into it?' But I know of scams that are going on out there. I'm not going to turn them in. But how does a certification agency not see that? I don't get it. I mean they even did an interview when I got certified, they did a personal interview. I mean I'm not doing this out of my spare bedroom at home. I've actually got a building I bought. Worked hard to pay it off and I got desks and chairs where everybody's got their own space. They're not crowded in. I mean, we're real. I know there's some that aren't." [#34]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "I know of several scenarios where the business is owned by the true owner's wife. She owns 51 percent of the business, so it's considered a woman-owned business. And so, a woman-owned business where there isn't a husband in the industry or working in the office is not at a disadvantage to those that are, yet they're both classified as women-owned businesses." [#62]
- The Black American male owner of an MBE-certified professional services firm stated, "Yes. I have been asked to be one of those on occasion, and my response was, 'Well, what would I be doing?' and they said, 'Oh, nothing. We would just pay you \$75,000.00.' And my response was, 'Unless you can find something meaningful for us to do, no.' I was like, 'If you can find something meaningful for us to do, absolutely.'" [#71]
- A respondent from a public meeting held in Greenfield stated, "I am very aware that there are women in the medical field who are owners of construction companies, but they are nurses, they don't operate -- they do not operate these businesses at all. [#PT6]

12. False reporting of MBE/WBE/SBE/VBE participation. Twenty-one business owners and managers shared their experiences with the "Good Faith" programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals. [#1, #2, #3, #7, #9, #16, #25, #26, #28, #30, #32, #62, #FG1, #FG2, #PT5, #PT6] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "But here's what I don't like, the Department of Administration has decided to have goals on professional service contracts. Well, that's a professional service contract. They don't monitor that very well. So they have these goals, but they have goals on professional service contracts, but they don't monitor that very well. I don't think. I mean, when a contract gets bid, for a construction contract, they monitor that pretty well. But there's professional service contracts like what you're doing, it's a professional service contract. They don't pay much attention to that after it's been bid. Did the engineering company or the provider, whoever he was, meet the minority goal?" [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "My relationship with IDOA, they've called me in the past and said, 'Such and such a person have you identified on this contract. Are you working with them?' I love it. I like that. Now, in no case did that, in my case, uncover fraud. It was in fact a legitimate inquiry. Whether they'd done, put me on a team on another contract, and I had no participation, no play, no business whatsoever ... I don't know. I do think there's some trigger that says, 'Verify this.'" [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "A year is gone and nothing. We haven't even heard from you guys. In the room they said, 'We're only going to use these subcontractors if it's good for us'. I'm like, 'Are you kidding me? You are contractually obligated to the state. You made a commitment, not just to us, but to this state. You won this. You took points from another vendor, potentially better.' The lack of integrity. That's one extreme to the other. Most are not like that. But,

there are some that like, 'Listen, that's a necessary evil. We're going to put it on. Then, if it works out, so be it.' If I have any feedback, not that you're asking for it, but maybe it was on the question, it is the pay audit system is a great idea. What it lacks is transparency on both sides. It's transparent to the state. If I knew what the primes were reporting and they knew what I was reporting, I think that would be super powerful, so that I might know that they reported X, and we're way over. They've used us to what they committed and then some. Maybe that speaks to how we've served them well, or whatever, or that they are reporting X and we haven't done any work at all, and we know they're never going to hit a commitment, so then we can be consultative. Or, that they aren't adhering. I mean, or that, here's another thing, that we think that it's their contract with the X, the scope has changed. It's not been communicated to us. It's a fraction of what it was, and we're still forecasting. I don't know what they're putting in, because I don't have visibility to that. I suspect they're not putting anything in other than the truth. I don't think it's falsifying good faith efforts. I don't think there was ever good faith in the beginning." [#3]

- The Native American male owner of an MBE-certified construction firm stated, "But, if I submit a bid and there's this minority set-aside requirement within the contract, they have to go that way or justify why they didn't, and I've never had anybody justify why they didn't. It was always based on price." [#9]
- The Black American male owner of an MBE-certified construction company stated, "A lot of people tell me to bid, I got so tired of bidding that, they use my name to tell the contractor, because they felt it will work out, that they had me on the roster or whatever. And when it came the time to paint, they had somebody else. At least they have me believing that they going to hire me to paint. And on the day I show up to paint, they gave me the run-around. I don't remember exactly what name it was, but it was a company out of Indianapolis. Well, they used another minority. Yeah, they told me how they do it. They ask you to bid, but you got one day to bid, you bid and then they don't let you do it. The federal government and everyone else knows that they have awarded these contractors these jobs, and they write down that they should go back to minority businesses, and it's not happening. That's what I have to say." [#16]
- The Black American male representative of a construction trade organization stated, "In general we've heard a lot from owners themselves and also from XBE firms is that when there are goals, the goals themselves aren't always met, they're kind of aspirational in almost every case but then without those goals the XBE spend doesn't happen at all. So, if you have a 27% goal you might end up at 25 or 24% then there's some sort of, there's this whole sort of game around good faith efforts. But then if there wasn't a goal at all, or let's say if the goal were 15%, then organizations can hit 15% without sweating. We'll bring in our joint venture guy, we call the usual suspects, we give everybody a small piece of the pie, they get 15%. So, then the reality is that the 27% then gets you above 15, it may not get you 27, but the 27% goal produces more XBE spend than the 15% goal. Even more so requiring the good faith efforts, then even if, I critiqued the sort of releases or the big opportunities or hey, you come to these outreach events. But since people have to do those outreach events to document their good faith efforts, then if those things aren't required then those things fall off the table. So, I would say yes the XBE spend goals, the requirement of having good faith, that those things need to be done and they do have an impact, even if the goals themselves haven't been met." [#25]

- The Black American male owner of an MBE-certified goods and services company stated, "We find we get a lot of bid requests and then you don't know if they won the bids. And without any substantial documentation I'd be willing to say there are some bids out there that we probably submitted paperwork that once the prime probably secured it, never reached back out and they got it. And like I said, I don't know who tracks this, if you put these people down, what happened. And I've heard the stories and I've only had one phone call one time when somebody reached out to us and said, 'Hey, you were down on this bid. Did you do any work with them?' It's like, 'I've never even heard of them.' So that led me to think this goes on a lot more often than any of us probably imagine. I think one of the main things I can say, a way to catch that is to always require the larger companies to send a list of whoever they e-mailed or however they did it, and have someone within the state that can generate a general letter that says, 'Did you receive an offer to get on this? Did you bid, yes or no?' And that way the state has something to go back and say, 'Hey, did you submit this person as a bidder on a job, or didn't bid? Here's their signature letter saying they bid on it.' That would limit people saying, 'We couldn't find anybody.'" [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "The other company – they won the bid. And they asked us to go along with them. So they submitted our name with the state, but they never called us. After a year went by, we – I had contact with this company. Going back and forth, and he was saying things like, 'Well, we got to wait till something – a position comes up.' And I said, 'Wait for a position to come up?' And he said, 'Or we had to wait where we can' as they lose guards, they would replace their guards with our guards. Which didn't ever happen. So I submitted a complaint. I called the state and said, 'This guy is not using us after a year – even after a year went by.' So we had a meeting. They did – on the telephone with one of the representatives with the state. And they – he gave his reasoning for not using us. He said that I was the one that was not complying with the contract because I couldn't provide the people to do it. And I told the state, 'That's not what he told me. He told me that once they – people would leave those positions –' because security is often – it's – guards come and go. And so it's like – it's never consistent. You can always use a guard. Because we were set at a – I think it was 15 percent of the contract. And so it seems to me that the state was listening to more of his than the MBE, than me. So I said, 'Well, I see where this is going. I'll tell you what. Just forget it. I withdraw my complaint, sir.' And to me they just believed them over me. So I didn't see the worthiness of trying to subcontract anymore with the state." [#28]
- The Black American male owner of an uncertified-MBE construction company stated, "I have a contract with the insurance company. I'm having a little tug of war with them now. They made an agreement with the city that they would utilize contractors in the city, and minority contractors in the city. But they insist on sending people from even across state lines in my back door to do work that I could be doing. So I'm in a little tug of war with that now. But this is an agreement that this insurance company could insure the homeowners of the city through a sanitary district. And they're not involved with the construction part, or the contract part of it; not like that. But what they requested of this company was, when they approached them, they said, 'Look, now we'll consider signing the agreement, but you've got to use some Gary contractors.' And as I just said earlier, they agreed to that, but now we look up, and my guys are sitting twiddling their thumbs, and they got guys down the street doing work from another area. So maybe that's something that you could put a

star beside, and see if they can get some teeth in it, so that like the city would be more responsible for seeing that this kind of thing doesn't happen." [#32]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "I had an experience where our firm was originally supposed to be the design firm, the lead firm. We were asked to submit a proposal; we did. We were then asked to add some people to our team; we did. The contract was on the agenda to be approved. It was pulled off twice. And then the project was awarded to a different firm. They gave us a call – I'm just giving you a scenario – and said, 'Well, we're going to give you some of the work.' So, instead of it being our project, now we're getting a percentage, the five or 10 percent. Then, after that contract was awarded, the lead firm arbitrarily decided to take a portion of the portion that we were given and give it to another firm without our knowledge or consent. And that's for a public project. So, and the firm that did that, I can't prove it, but I've never seen the wife in that firm. It's considered a women-owned business though. You know, it's registered and certified as such in the state of Indiana." [#62]
- The non-Hispanic white male partner of a majority-owned professional services firm stated, "Indianapolis just recently, in the last week and a half passed major changes to the public bid laws mandating a set of requirements for contractors who are going to bid public works in Marion County." [#FG1]
- The non-Hispanic white female partner of a WBE-certified professional services firm stated, "They have to go through a list of things, mentoring, XBEs, advertising in newspapers that would be read by XBEs, a whole list of things that need to be done on behalf of their ability to get a contract with the city. If they don't do that, they can be denied their contract. If they don't follow through on it, they can be penalized to the point where their contract is voided." [#FG1]
- The non-Hispanic white male partner of a majority-owned professional services firm stated, "So they are making a serious effort to get the XBEs established. Once they get rolling, they're as likely to fail as any non XBE in the construction industry. Like I said before, it has a very low profit margin and it's very competitive. Things are actually changing, I think, in a positive direction in Marion County, as far as creating the opportunity to establish more XBE firms." [#FG1]
- A respondent from a focus group of MBE-certified goods and services firms stated, "Definitely. That they have goals, so if they say 20%, I mean, just talking about Indianapolis, they'll give \$100 million to somebody to develop an apartment building. And they'll say, 'Well, you got to use 20% of minorities.' 'Okay.' They're supposed to keep track of it, but then at the end of the day, if they only used 5% on the minorities, everybody's, 'Oh, well, they tried.' And then, three months later, they're asking for \$100 million, they give it to them. There's no penalty, there's no teeth in anything. They don't have to use black businesses, or minority business, they don't have to, because there's no penalty if they don't. My whole goal is, if you say that they got to spend 20%, and they only spend five million, but 15 million needs to go back in the black community, to help these black businesses grow. Or you hold these people to the fire. If they don't spend the 20% on black businesses, they no longer get money from the city, and no longer get money from the state to do these projects. That will turn their ears around and say, 'Oh, okay, well now we got to

listen to them. We got to use 20%. Now we'll use 25, to make sure that we made that 20%.' I think that's the way you do it." [#FG2]

- A respondent from a public meeting held in Greenfield stated, "We usually go as a sub on a lot of these contracts, the primes know they have to have those three entities, the MBE, women business, and veterans. So they will come to us and say, 'Okay, we want you to be part of this contract as a sub.' We say, 'Great, it is in our field we have been working in for 24 years, we can handle that.' So they process the RFPs and then what happens after they award that RFP, that prime comes to us and says, 'Okay, we are beating everything,' and then what they tell us is, "Well, we bid it too low on that contract, we don't need you guys.' So they did that to get those three they are supposed to have and then they drop you because now they have been awarded a contract. So now we have to go downtown, which we met with IDOA and FSSA and all those people and even our state Senator and they tell you basically you signed a contract with this prime, you have to deal with them. Well, these big companies know a minority business can't afford lawyers so what they do, they just let it run through and eventually it will go away. That's happened on two big RFPs that we got that we could not get because of that situation where the prime will tell you they don't need you after they were awarded the contract. Just recently last year the same thing happened with a sub on a contract where they get put in those contracts, you have to read them and all that stuff, we have attorneys that have to read them. They say, 'Well, okay, in order for them to cancel that contract they have to give you a six-month notice.' Well, they give you that six months ahead of time to tell you they are not going to need you after that because they bring in another big company to take over what we were doing. So, all that, we have been through that a lot through the 24 years and there is absolutely no help when you go downtown to talk to IDOA or whatever because once they award that contract, they don't know you. They just want you to handle it. So that's been a big problem with us with trying to get the contracts and getting work and it just goes away because you just can't afford to sue these big companies because they will drain you and put you out of business. There is no accountability for anybody to help you after those contracts are awarded." [#PT5]
- A respondent from a public meeting held in Greenfield stated, "They have loopholes. There are a lot of loopholes with contractors to get out of using the minority contractors." [#PT5]
- An owner of a professional services firm stated, "We do work with low-income housing and IHCDA is the agency with the state of Indiana and they -- everything is very competitive and they have a point system where they grade, right? So they give you more points for using a minority or women owned architect to do your project. So the project that I was on was awarded, I was -- I had an affidavit signed from the client that said we are going to use you to do the architecture if we are awarded this project. They were awarded the project, they called me and said, 'We are not going to use you for the architecture.' So I called ISCDA and I said, 'Wait a minute, they used me, they used my points, they signed an affidavit, I am supposed to be the architect on this project, what's the problem?' They said, 'Oh, well, they don't have to use you. We can't force them to use you.' I said, 'Well, can't you pull their grant then?', and they said, 'No, we don't have any enforcement like that. They will be able to make it up on construction with WBEs in construction.' And I said, 'Well, that is probably not going to happen, there is less chance of women in construction than there is in professional services.' But they basically said, 'Sorry.'" [#PT6]

- An owner of a professional services firm stated, "I think there should be enforcement is my point. If you are going to sign and that is part of the process, that's why they are awarded, then they should have to go forward as they said they were going to go forward." [#PT6]
- A respondent from a public meeting held in Greenfield stated, "Someone would use you, they said they will use you but you never hear back from them. So we don't even know -- I mean I am not that good to know whether or not the bid or who the bid was awarded to because I think if you tell us that you will use us on your project, it will be honorable to use us. So we have filled out numerous paperwork and sent them in. We hardly receive responses or follow-ups or anything at all on any of those, whether or not they have been rewarded. I don't know. We have never gotten a call back." [#PT6]

13. Other forms of discrimination against minorities or women. Thirteen interviewees discussed various factors that affect entrance and advancement in the industry. [#6, #13, #14, #16, #23, #25, #27, #32, #44, #62, #AV, #FG1] For example:

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "For me personally, I'm not going to say that there is not any racial bias out there in the world because I believe there is. But I guess my issue with it, and I'm just going to get on my little horn for one minute, we're having a scoping... We have to do this, have this conversation. But do we ever stop to think about, truthfully, and this may come back to bite me, but it bothers me how the white guy feels sometimes? Because you do have companies out there that are white and male owned that maybe he's not a veteran or anything else, that's been a guy that's never had a problem with anybody. He judged you solely based on your character. But yet, he may be struggling because he's not a minority. Or the guy that you're telling him you have to use this company. And I know there are some companies out there where they may struggle and it's a little hard. I worked in construction before coming into business with Chris, and I dealt with some discrimination, but 90% of the time people were very accepting. As long as you showed up and you did your job and you did quality work, I had no problems. And I've seen the same thing since I've been owner of this company. I show up to meetings, I talk to people. I have some sense about what we're doing, and I've not had any problems, and that may only be based on how I carry myself. I came on the scene and I was the one going to meetings and I was the face that a lot of these companies are seeing. I can tell you personally as a black female head of the company I personally have not had any problems. That's not to say that somebody may have?" [#6]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "[When I] built this building in 1998, a woman was not even allowed to sign on a loan for a building that I've built. They wanted my husband's signature on it. And I just insisted that I owned the business from '86 to '98 and his name is not going to be on it. And then I had to give a personal guarantee on it." [#13]
- The Black American male owner of an MBE- and DBE-certified construction company stated, "That's the thing about it, the thing that you've got to understand about the MBE programs that's been out there, and how the market has kind of revolved around that, but it goes back to the Surface Transportation Act in 1964 or something like that. Darren Mitchell was the author of that where it was evolved around the gas tax, it went out to everybody, all

the gas tax that gets collected goes to Washington, then Washington redistributed it to the donor states, and the states who are ... they spread the money out that way. But anyway, that's what this Surface Transportation was around, and Darren Mitchell was lobbying to make sure that minority contractors at least had 10% opportunity to see that business, at least at a 10% goal. Finally, to get the bill through, they added one thing to the bill that made everybody sign off on it and pass it, and that was that it would include women also. So, with that said, there were a lot of wives and sisters and people like that became business owners to participate in that program, and most of the companies went about it that way. But really, as long as they were meeting the 10% goal, they were meeting the goal. Now, whether they were meeting it with all women, or all MBE, it doesn't matter, they were meeting it." [#14]

- The Black American male owner of an MBE-certified construction company stated, "You know, every once in a while, they'll throw out stuff and then they'll blackball you and won't want you to work for them." [#16]
- The Black American male owner of an MBE-certified professional services firm stated, "The issue is, trying to speed it up is here in Indiana we have a shortage of nurses' aides. We also have a shortage of folks that want to be... A shortage of nurses' aides and a shortage of folks that want to be nurses' aides. I believe that if they were able to make that test friendlier to folks who are English as a second language, it would increase that need here in the state tremendously. I believe that there are other states that have an effective testing method. I also believe, I've mentioned this to the state folks and they're like, the test has a lot of English and stuff, they're like, 'You've got to be able read in English, you've got to be able to do this, do that, do this, and this deal.' I think that's bull crap, because when you leave out of the Midwest and you go to the coast, you see people doing these jobs with conversation English." [#23]
- The Black American male representative of a construction trade organization stated, "Construction companies in general, whether they are diverse or not should be working on diversifying your workforces. So, employing, regardless of who the ownership is, they should be trying to employ more women, more minorities, more veterans, more disabled individuals. Even more so they should be trying to have diversity at all levels of their hierarchy within the organization. So, don't just hire, what happens a lot of times in construction companies, you have a lot of your minorities, they're swinging hammers at the job site. Then a lot of your women are working in marketing and accounting and HR, so a lot of your white-collar jobs as part of the construction company. But then of course the key decision makers, the owners, the president, the vice president and so on, a lot of those people are all white men. So, there's diversity in their organization but there isn't diversity up and down the hierarchy. The second thing is that construction companies in general should have a person directly responsible for workforce diversity and then they also need to have a plan for diversity and also engage in regular diversity training, whatever that might be. The last thing I'd throw out there is that each company, particularly at the GC level should have it's own diverse supplier spend plan. So, one of the things we've learned from some of our companies that tends to work well for them is they have an internal goal of what their diversity spend goal is. So, some of the general contractor firms, regardless of the goals set by the owner, they have their own goal that they shoot for on every project, no matter what. What that does is it creates this sort of muscle memory of this is how we

generate XBE spend on every project. One company's goal was 25%. So now then they might have some owners that only ask for 20%, they might have some owners that ask for 27, so then they're able to scale up or scale down because they've already got a template of how they generate XBE spend on every project. So, if you put those things together, we want diversified workforce, diversified leadership structure, regular diversity training and then you also want to have an XBE spend goal and an XBE spend goal plan as part of the company's normal operating procedure." [#25]

- The non-Hispanic white male owner of a professional services firm stated, "I do think, however, that – I think they should allow somebody who is a prime to also utilize their WBE, MBE status. Because right now, if they're a prime, they've also – and they're an MBE, they also have to hire an MBE to do the work. I think it would be better if it would encourage more of the certified businesses to become primes rather than just sub-primes because they can take advantage of that. You know, I would just say, in our industry, it tends to be very white just across the board. I'm not quite sure why that is. But we don't tend to have a lot of – when we have a position have a lot of minorities apply for the position. But that is true. It's not something that's great, but it's true." [#27]
- The Black American male owner of an uncertified-MBE construction company stated, "If you did a poll right now to see how many minority businesses have succeeded since all these things have been in place, the number is very low, percentage is very low. And it's all because – You can find a guy, they might be a carpenter, and he's doing pretty good at it, and he like the industry, and he said, 'Well, hey, I wanna go in business myself.' And then they get in the business arena, and they find all of these obstacles that I'm talking about." [#32]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "I don't believe any of our problems that we have come because we're a minority-owned company. When we have a misunderstanding, it's not about whether or not we're minority or not. It's about did we misunderstand what the scope of the work was? Did we completely understand the scope of the work or whatever it might be? So, we don't, like I said, I don't – I feel very comfortable that as a minority-owned business we have the opportunities to bid on work with the public sector. It's published. It's explained. And if you have any questions, you can sit down and meet with somebody so you can get clarification. So that whole process for us is a very smooth process. Now we understand that, so I don't think there's been any, you know, I don't know if you were heading that way, but I haven't seen any discrimination. I haven't seen anything that says you're less of a contractor because you're minority. We haven't seen any of that, trust me, and I'm 62 years old. I've been around a long time. I've seen a lot and I haven't seen anything that would ever give me the indication that because we're minorities, we're not getting the full opportunities." [#44]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "We only – as African Americans, we make up less than two percent of professional licensed architects People don't do things until they're made to, and even then, as a minority, there are certain minority groups that are more disadvantaged than others, and then there's always – the government tries their best. And then I could go on and on as far as minorities go, because there are people that come to this country who don't have to pay taxes for the first 10 years of being here, and they're considered a minority, and they

come from very wealthy families just to get to this country. And then there are other people that are minorities in this country who historically have had higher incomes and revenues than other minorities but, because they're not the majority, they're still considered minority, and disadvantaged minorities are competing with them as well." [#62]

- A comment from the availability survey stated, " [I'm] concerned about opportunities due to being a minority, regardless of having a good product." [#AV]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "Once they're established, no. But there does seem to be a problem of getting an XBE established. Once they get into the industry, the opportunities are pretty equal." [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm state, "I think it's just hard to establish a construction firm. I'm not certain that there are a lot of well-established construction firms in the area and they seem to dominate which means there's less room for those that want to enter the industry. But you can't grow an XBE firm unless you're going to establish an XBE firms." [#FG1]

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 in general;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;
5. Joint venture relationships;
6. Financing assistance;
7. Bonding assistance;
8. Assistance in obtaining business insurance;
9. Assistance in using emerging technology;
10. Other small business start-up assistance;
11. Information on public agency contracting procedures and bidding opportunities;
12. Registration with public agencies;
13. Directories of potential subcontractors;
14. Pre-bid conferences;
15. Plan holder and other lists
16. Other agency outreach;

17. Streamlining/simplification of bidding procedures;
18. Unbundling contracts;
19. Price or evaluation preferences for small businesses;
20. Small business set-asides;
21. Mandatory subcontracting minimums;
22. Small business subcontracting goals; and
23. Formal complaint/grievance procedures;

1. Awareness of programs in general. Twenty-three business owners discussed various programs and race- and gender-neutral programs they have experienced. [#1, #2, #3, #5, #10, #17, #23, #26, #27, #28, #31, #36, #39, #41, #49, #62, #76, #AV, #FG1, #FG2] Multiple business owners were unaware of any available programs for small business assistance. For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I didn't get a degree, but I went to a course. And IDOA paid for that. It was \$10,000. So, that's the kind of stuff that... there's a company out there called F-M-I. Fails Management Institute. They do most of the training and stuff for major contractors. Or AGC. Associated General Contractors. If you really want to do something for minority owned businesses, use those entities to provide training for your up and coming minority companies. That's the way. I learned more from that class." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I know there's a technical assistance center or somebody, used to be called P-TECH. I think they have good intentions. I certainly don't know that they do bookkeeping, estimating, and bidding. I've sent people to that P-TECH event, they've showed us how to get into databases and how to bid." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We've got, I think it's the Indiana Technology Innovation Association or something. It's kind of the new tech association. Tech Point does primarily workforce development now and helping to encourage new businesses. Then, you've got the association that serves more of the broader tech-enabled community. We're involved in Indiana IOT lab, the technology of things lab, up in Fishers, which is just doing amazing things. Just really kind of pushing the envelope with where technology and innovation is going." [#3]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "What they call the ASI, Ad Specialty Institute, and they list suppliers and how they conduct business and their years in business. And at the same time, ASI also lists us as distributors and how we do business, how we pay our bills and so on." [#5]
- The female representative of a WBE-certified construction firm stated, "Well, they already have the chamber, and that helps a lot. We like that. We like all the different things that they have set up. They do webinars and things like that. I think that's fantastic. We really like that a lot. Because then we don't have to actually leave the office to participate." [#10]

- The non-Hispanic white female owner of a WBE-certified construction company stated, "I did one time actually. You know, they have, I think what's it called, SCORE, where they have an advisor. But SCORE, I went up for an appointment for that one day. And honestly, that wasn't worth my time. I mean, I guess it would've been worth my time if I had not worked in a manufacturing operation and been a part of a strategic planning group anyway. You know, if I had no idea how to write business plans or how to write... or how to work a system. I know how to do that kind of stuff. So, the stuff I got from that wasn't very helpful. [Also] down at the Crane at the Navy base here, there's a division in there for small business development, small business development division. There is a fine line between, from what I understand, what this gentleman can actually help small businesses do and what he can't do, which isn't a problem with him personally. It's just in his role. So, I am wondering if there's any educational piece that the state or some organization could do that could take that responsibility away from him because he's part of a decision-making piece. So, it's kind of a conflict. So, if there's that whole knowledge base that he has about how to do business with Crane as a small business, what are some key factors? What are the things that you really need to do? He knows that, right? If there's ways to pull that out, away from his office in his role, put it in something else that could be packaged and available and it may be there already, but I just don't know it, but available to help, coach, mentor, speak one on one with people in a small group, focus groups or something like that, or reaching out to the small businesses in the surrounding counties or something. The whole model could be duplicated on all the different organizations maybe." [#17]
- The Black American male owner of an MBE-certified professional services firm stated, "I'm sure you've heard of it, have you heard of Federal 8(a) program? That's what I want. A friend of mine told me one of the best steps to do is start with the state, get certified with the state, go through you guys' process, your little culture for 8(a) certification because I qualify when I look at the 8(a) on the initial eligibility. I'm about to, I want to start getting after that." [#23]
- The Black American male owner of an MBE-certified goods and services company stated, "The IDEC or whatever, the Diverse Council, that's a group that has to get certified and they have meetings and so forth to try to keep people up to date. I haven't really – when I was really active, haven't really landed anything from it as far as contract-wise, but they were helpful for people trying to get certified. And it's a different certificate, I guess that has a different market reach. It's been over to Saint Louis and other places, which I haven't planned on doing work over there, so I don't really keep my certification up to speed." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "Well, the Small Business Administration." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "It was through business loans [not COVID related] that give you – it was through the Small Business Administration, SBA. And they sent us through loops and hoops and everything else. That didn't pan out because the money that we had to use it for, they were saying that it was – what were they saying? That our company wasn't big enough or it wasn't – had not progressed enough to obtain the loan yet. So it wasn't – a lot of it didn't make a lot of sense to me. You go there; you put in for these loans. And then you turn down

– get turned down. So, I never did go back again to try to seek out one of those type loans.” [#28]

- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "The state used to have some type of consulting firm that did management-type training. That was helpful. I don't know if that's still continued or not. It was through INDOT, but they hired consultants that kind of traveled around to the different areas and gave management – and also helped female or minority companies that weren't pre-qualified yet to get pre-qualified. But I don't know if that's still available.” [#31]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "I applied for an SBA loan [pre-COVID] and received it. It's still a lot of paperwork but there was no barrier.” [#36]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I don't know too many. Like I said, I just know the MBE, minority council. They're very helpful. They have events going on all over the city all the time, meet-and-greets and stuff like that, where they put you in front of the buyers so you can pass your card out, so at least they know about you. The same thing with the SBA. They have events sometimes. But, other than that, that's all I know.” [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I am getting a lot of information from the city at this point, from the Office of Minority Development. I am getting a lot of information, some information from SCORE and Small Business Administration. They have seminars and training all the time. I'm on their list. I think SCORE is incredibly helpful. I've gone to them many, many times. Well, you get to sit down and talk with someone one-on-one. I remember when our business, in our early years – and I don't know at what point or who told me about them, but I would go down to see them. Their office was downtown. It seemed like every question I asked, that counselor would say, 'Just a minute,' and open a file drawer and hand me something, hand me a piece of paper. They were just very, very helpful, particularly in those days, with giving me information and listening to me, listening to my questions, trying to understand exactly what I was asking and then telling me what they thought about it. I recently reached out to the Small Business Administration a week or so ago and connected with an incredible person, Daniel, and was able to just bounce my concerns off of him about financing and which way I should go. He has kept up with me and made sure that I was put on another list where I would receive emails as information is constantly evolving. So, whenever I have dealt with them, they have always been helpful and seemingly non-discriminatory. I just haven't had any sense of, 'Because you're this or not that that we're not going to talk to you.' I've never gotten that sense from them at all. Just very helpful, helpful people.” [#41]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "I don't know if there is some type of database or professional services, because there's a lot of concentration, even, like, with your questions, for helping suppliers and builders. That's, you know, there are a lot of programs, a lot of things out there. I get – we get stuff all the time in reference to that, but not for professional services.” [#62]
- The Subcontinent Asian American representative of a business development organization stated, "Yeah. I'm aware of SBA and all, and that's where I said when we had Ellen Bedel

come down, she did talk about SBA. She did talk about the benefits and all you know. I would say based on the loans available, I know during the COVID crisis, they were providing six months interest-free loans also. That information has been shared of course. “ [#76]

- A comment from a majority-owned professional services firm stated, "We work with the ISBDC closely." [#AV]
- A comment from a majority-owned professional services firm stated, "Other states that are very involved in SBIR and STTR programs. They provide significant incentives and visibility that would be beneficial for us in Indiana. Indiana compared to other states is not on the same level in terms of the assistance they provide." [#AV]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "National Organization of Minority Architects. As a firm, we're trying to recruit professionals in various disciplines from historically black colleges and universities is, at least where we're now reaching out. I wouldn't say we're having success there yet. But as a society, I can't really think of much other traction that we're seeing, although these groups that we do have are certainly doing great things. It's going to show up, the fruits of this work are going to prove out, but it's going to take a long time." [#FG1]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "The unions periodically put on classes for their members on how to be a successful union contractor. There's one going right now with the IBW. So, there's always an effort to encourage union members to establish their own businesses. If we could encourage more minorities and women to establish their businesses great, but I'm not certain that there's any particular push to get that established. There's a push to get just the availability to our membership. If you want to start your own business, this is what it takes. These are your binding requirements, et cetera, what makes a successful business and so on. We're always attempting to establish businesses from within." [#FG1]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "The AIA has rolled out an equity, diversity and inclusion initiative. But also couple that with justice. While the acronym is JEDI and it's easy to giggle over that, it's a good group that I think is really taking an honest approach at moving these barriers and making it more of an action statement than just an aspiration that of, 'Okay, we really aspire to be diverse. Now, we're taking initiatives to try to make that a reality.' Just in the little bit that this program has really been out amongst our members, we've had a significant reaction, some are very positive, some of it not so positive. It's, I think because we're starting to challenge long held norms that this is the way that we practice and opening some of our members' eyes to know there's a broader world out there. These are the issues that are facing our peers and we're trying to lift everyone up so that we're all stronger because of it." [#FG1]
- The Black American male owner of an MBE-certified goods and services firms stated, "There's something called [Start Text] in Indianapolis, they've been giving people a lot of money to people to innovate things, like battery rolls and things like that. The Indy Black Chamber... we have programmed what we do start to finish. We help you get your LLC. We help you get your EIN number. We help you get your business plan. We help you get a website designed. And then, once we do that, it's a 12-week course, we send you through, and we bring in a CPA, lawyers, just helping with that whole back office end. Once you get

done with this 12-week course, we did work out to give out \$5,000 loans. Well, some people didn't want the \$5,000 loan, because they were just starting. So, we were also working with lists to give people \$1,000 grants, so they can get started with their business. We put on workshops, it's a three-pillar thing. We help you with your back-office end, because every industry's different. We help with the license, insurance certifications, again, every industry is different. So, we got to figure out what's going on in your industry. Then we also, after we do that, our second pillar is, we advocate for black businesses. So, we go to the city, the state, the airport, and just the hospitals. And we say, 'Look, what do you have? We have these people.' And what we do is we try to get them contracts. Once we get them contracts, our third pillar is workforce development, when they get their contracts, we help them hire people as they grow. We also help them connect to banks, so that they can keep that cash flow going, and they don't go out of business, because they have this big contract. And so that's the things that we work on. What I've told the Mayor, and trying to tell the Governor is, 'If you invest in black businesses, black businesses hire black people.' And so, if you have black people working at a livable wage, they're not on the street at three o'clock in the morning, they got to be at work at eight o'clock. So now they got a livable wage, they're working, it cuts down on crime. When they got a little bit wage, now they can buy homes. They're no longer renting, they're buying homes. And again, like I said, you either own a business or you own a home. That's how wealth is developed. So, if they buy homes, and they invest in their community, when the black community grows up, then Indiana grows as a whole. And that's the whole point of the Black Chamber." [#FG2]

2. Technical assistance and support services. Twenty-five business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses. For example: [#1, #2, #3, #4, #5, #6, #7, #16, #17, #22, #27, #30, #32, #37, #38, #39, #40, #41, #42, #45, #48, #49, #59, #70, #75] Comments included:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I think on the technical support, I think yes, that helps. However, we're way beyond that. We could be teaching it. INDOT has a company on retainer that teaches classes." [#1]
- The non-Hispanic white male owner of a construction firm stated, "I guess, depends. In that part of the industry I think, the online services like QuickBooks or something like that, they're so cheap and so efficient on what they do that I don't know, unless the government were to come out with something that was a lot cheaper, that I don't know if it would benefit." [#4]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I would find them useful because that's the part I struggle in." [#7]
- The Black American male owner of an MBE-certified construction company stated, "My biggest pull-back is not having anyone to do my clerical work." [#16]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Being such a small business... I just went to my tax guy yet yesterday to get our things together for the '19 tax year and all. As we started out, I'm just paying these guys cash on the side in the first year. And you know, we're just doing small jobs here, left and right. I am insured. You know, my company is insured. We have liability insurance. We have

workman's comp. We have... all of the autos are insured under the company name and stuff. But how to grow and become a one person show and run a payroll and run a business. You know, it's just I talked to the accountant yesterday. I said, 'I've got to get an extension.' I said, 'I am just... From last year's data, I'm still just overwhelmed.' And I'm a pretty good data person. And it's like, I'm trying to keep up and we don't have enough business income yet." [#17]

- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "A little bit of struggle there because it's just me having it and some, my wife does it, cause we cannot, again, cannot afford to pay another person to do that for us." [#22]
- The Black American male owner of an uncertified MBE goods and services firm stated, "We've always had a professional accountant since Day 1 so it's a little bit different for us. But in terms of direct experience, yes, I've seen many, many startup not just minority businesses that fail to understand the responsibility that they have to themselves and to governmental agencies to maintain proper accounting and financial management discipline." [#30]
- The Black American male owner of an uncertified-MBE construction company stated, "Well, I actually was, as I said earlier, I became an 8(a) contractor back in the '90s, and I'd bid some sizeable jobs with the school city here in Gary. I won a couple sizeable contracts, and they almost put me out of business, those contracts did. Not the people; the contracts. And it was because of my ignorance. So, what am I saying now? Okay. And so, my experience, now. I went into this as a greenhorn, if you will, and there's things I didn't put in place with my business. I didn't have my business organization complete. My business plan, if you will. I believe that this process that we're talking about, if we're gonna be successful in helping to develop businesses, that we gotta go back to the plan room and put the things in place that it takes to call the person like myself at that time to go into this fully with the whole armor on. Do you understand what I'm trying to say? Including some agreement with a lending institution that would say, 'Because this company is certified now – he isn't just another company; he's certified – we got his back.' Where the state got his back. 'Let him have what he need to operate with.' And without going through all these hoops we have go to through to get enough money to buy lunch with." [#32]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "Yes, it will. I have two bids to send me yesterday and today, and I have many, many questions that I don't know even if I am able to know what are the requirements. I think I am ignorant of understanding all the requirements, so that would be so helpful to have someone I can ask, seminars, or something. Yes, that would be so helpful." [#37]
- The non-Hispanic white male representative of a construction company stated, "If it was more centralized, I guess that would be the best thing. Because sometimes like especially like within receiving payments and other questions that I've had about contracts or questions that they've had about a contract, you'll contact this person and they'll say, 'Well, you need to contact this person.' And then you'll contact that person and they'll say, 'Well, you need to contact this person.'" [#40]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Yeah, I mean that would be very helpful I think for a lot of people,

especially because not everybody works in technology and has that experience, but you do need to have technical experience in order to do everything from your annual filings with the state to invoicing and managing your finances. Bringing everybody up to a baseline would be really beneficial, I think, really successful.” [#42]

3. On-the-job training programs. Thirty-one business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries; firms who work in non-union construction firms or goods and services were most likely to support on-the-job training. For example: [#2, #3, #4, #5, #6, #10, #13, #17, #24, #26, #27, #28, #30, #31, #32, #36, #37, #38, #39, #41, #42, #44, #45, #48, #49, #59, #69, #70, #75, #AV, #FG1] For example:

- The non-Hispanic white male owner of a construction firm stated, "Yeah [I have heard of these programs], but none offered by the state. Some of the local plumbing supply places would offer certifications for different type of gap piping. You go there for half a day and get a free lunch and you get certified on different things. Although I did take a state course on back flow prevention that was offered by the state years ago." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Remember we're union, so the union actually trains our... Unions, they go to school. They're in school and they're working for you learning on the job for four or five years. That's part of the union." [#6]
- The female representative of a WBE-certified construction firm stated, "We have an apprenticeship program. And our plumber takes him with him, and it's a training for, let me see, three years. And then during that time, they're also going to school, and we help them with that, as well. It is in Indianapolis I think the big thing is supporting skilled trades, not just college educations. You know what I'm saying? Because everybody can go and get a college degree, but who's going to fix their toilet when they can't go to the bathroom? We need skilled trades, too. we need those electricians. We need plumbers. We need all of those things that keep our lives going. We need people to do them. And if we don't get younger people trained, we're going to have a problem." [#10]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We have a Purdue extension, a US[I] extension and Ivy Tech all within a five-mile radius of us. And so, we play big time to the high schools and those three colleges here. And for part time and summertime help. And then we hope, and we work with them while they go to school in hopes that they will join us after they've finished college. Now some of them don't finish college, they just start working and don't go back. And then some of them finished college. And then we have some degree that they come into the business as well. Most of our managers came from those schools as they finished their degrees." [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I have an expertise in some construction stuff because of my father and so it's tribal knowledge in our family, but if I needed to stop and learn how to do something... Maybe, oh, I don't know, say it's, I don't know, this might crazy, but say building something in a nontraditional way other than what we're used to building. Say there's a construction method that we don't know. How I would find out about that and how we would deal with

that. I would probably get ahold of just the construction instructors and maybe at Ivy Tech or something like that and try and figure out if they have the knowledge and then we might try and do something. But again, I don't know if I would stop what I'm doing to go and learn that. I guess if the project was lucrative enough that it would require us to know that to finish it or to do it, we would go do that." [#17]

- The female representative of a Native American-owned MBE- and WBE-certified professional services firm stated, "Well, we specialize in manufacturing in [a specific] brand. So, I know that there are courses that somebody could take maybe through the universities that might be manufacturing based. And you get to partner with us so that we can help promote apprenticeships with some of our clients. That would be great. Or even be able to work with speaking to maybe the classes or providing information to them so that when they are looking for those manufacturing jumps, that maybe we would be somebody that they would consider coming to So in Madison, that's one of my locations as well. We have an Ivy Tech that's very active with us there. They allow us to come onsite and speak to their groups. They allow us to put flyers up in their facility. We've done job fairs onsite with them. And the Ivy Tech in Columbus, Indiana. I know they've been willing to partner with us on a few things, but it's been a couple years since we've been able to partner with them on anything. I'm not positive about Bloomington, but I know we used to do some hiring with IU over there, but I don't think we do that right now." [#24]
- The Black American male owner of an MBE-certified goods and services company stated, "If it's a specific job that asks for something in particular outside of our normal scope, that would be beneficial. Otherwise our own internal on-the-job training would kind of more be beneficial, 'cause we know what we expect from our employees." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "I am aware that the State of Indiana has programs for helping people to train." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I think on-the-job training would be a factor, a good factor because if we can get in there or if we – if I had the opportunity to train myself from my experience through our company, to train the guards and have class – but that takes money. All that takes money. A lot of people that we get is not – is – they wanna do the work, which of course, doing security there's nothing – only thing you need is a high school diploma in some cases. But you can't put these guards out there on a site that can't read or can't write or can't understand. So, what we do, we can – we – when we get our guards, we go through the process of seeing what they can do. And a lot of times we just can't use 'em because we don't have the time, the patience to get what they need." [#28]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes, those would definitely be beneficial for I believe all businesses but particularly minority- and women-owned businesses that can get access to good training." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "With the unions, all of our employees go through an apprenticeship program." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "Get in touch with the board of education and insist that they put back into the schools in the

urban areas the shops and construction training that we used to have. 'Course it'll take a little time, because we gotta restart this engine now. But that would be the two things that could help the aggressive individual that wants to get into the construction industry to get a decent start that he could compete with the existing competition." [#32]

- The Hispanic American male owner of an uncertified-MBE construction company stated, "Well, in the electrical, there is so much to learn and to know, and many of the things that you learn is by experience, really, because [someone] can show you how should do but not really teach you how to do it. For example, working with three-phase, sometimes I have some questions, or fire suppressors, I would like to find a place where I could study about that, kitchen fire suppressors, different types of materials that are used that I am not familiar with. That could be something very useful. The other day, they were building a Hardees, I think, and they had a lot of different parts of conduits, yeah, different parts that I am not familiar all of them. I said, 'Oh wow, this is awesome. This is nice if I could know where to buy it or how it's called, or how to use it,' et cetera. Yeah, so how the parts available or how to use them, and some specific topics like, for example, again, the fire suppressor or resistance, three-phase, or seminars that are direct into whatever is in the field." [#37]
- The Black American male owner of an MBE-certified professional services firm stated, "I guess, again, my mindset is if you really don't have the credentials, you shouldn't really start the business. You gotta have a certain amount of – and it is just me. It's maybe the way I see the world. You gotta have enough built up knowledge about what you're doing. I'm not saying you can't learn as you're doing, but you gotta know a certain amount. So, I'm not gonna – I'm not gonna say that's not going to help, but from my vantage point you gotta have a certain amount of built up knowledge to start your business." [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "You have to stay abreast of processes, techniques, changes, and upgrade equipment. You can't – that's one of the challenges for us, having the additional revenue. You can't – you need new equipment. You need to find out what new processes are. You have to be able to make those changes and implement those changes. Leaving the whatever you were using and switching to microfiber or if you apply a floor finish, it used to be, 20 years ago, you put the wax in a bag, in a trash bag, in a bucket. Then you used a rayon mop to apply it, to make that application. Well, that's not the case anymore. You use a flathead microfiber. You have to stay abreast of technology and changes. In order to do that, you need training. As a small business, you need training on your industry, what new processes are, the innovative ways of providing your service. Those things constantly evolve. If you don't have the time and the money to educate yourself, you're going to be left behind. You'll be able to provide service for someone, but those major clients that you would really like to have that would provide you with the revenue to really build your business, you'll never get them." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "That would be very helpful. I think small businesses often struggle with hiring and with executing well on employees because they don't know how to implement proper training programs. Baseline training programming that's accessible and

affordable, beyond just the training credits that are available, I think actual programming could be very beneficial to employers.” [#42]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Again, I don't know if there's a program or maybe I haven't looked. It doesn't mean the state didn't do a good job of it to find people. I know there are labor ready and laborers but we're a tech company. So, I don't need just laborers. What we need is more qualified individuals. I don't know if there is a website. Again, I don't like to say things because the state might have something. Just because I'm ignorant, I'm saying something. I haven't seen that part, the resource of what's available. Typically, for restaurants or low-income earners, like just plain labor and stuff like that, they have programs for that. But I don't see one for qualified individuals.” [#59]
- The Black American male owner of an MBE-certified construction firm stated, "Yeah, that would help out a lot. Because when you mentioned on-the-job training program you would help out with multi stuff, like I'd say, transportation, what the ins and outs and dos and the don'ts as far as DOT, and giving a class of what they do and what they don't do, just a brief example of it, and see numbers and all that. So you know what I'm saying, what it's for and what it's used for and a lot of details, because some people still don't know and still don't understand what the purpose of all these numbers.” [#69]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "On-the-job training? We might use those for some of the new grads, I mean, if they get paid. But I don't know how it will help us in any way. “ [#70]
- A comment from a majority-owned goods and services firm stated, “ [We need] more in the training arena to teach welding.” [#AV]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "I think I have heard of other cities, Philadelphia in particular doing apprenticeship programs in the building trades that are specifically focused on black boulders or Mexican American, framers, whatever. The apprenticeship programs are very specifically about bringing on representative people in and giving them the knowledge base, which then, as John said, once you have that knowledge base, once you have that expert knowledge, the barriers are falling in, you can then proceed with that knowledge forward and be successful. It's the very intentional bringing people in to give them the knowledge and give them the establishment in the field that then will allow them to flourish.” [#FG1]

4. Mentor/protégé relationships. Twenty-eight business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses or participate in unofficial mentoring relationships with other firms. [#1, #2, #3, #4, #6, #17, #25, #26, #27, #30, #31, #36, #37, #38, #39, #41, #42, #45, #47, #48, #49, #59, #65, #70, #76, #FG1, #PT1] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I've had people reach out to me who want to start a woman-owned business and I have spoken with them about how to do so. It wasn't necessarily a long term relationship, but I'm super happy to help people. I think it, I'm sure that it helped them. It's, and I would say I didn't have a mentor protegee, but I did know people at the state who were

kind enough to kind of give me some advice and I don't, I couldn't have done it without them." [#3]

- The non-Hispanic white male owner of a construction firm stated, "I just know they offer those. To high school kids and other people that are out of work and looking for new, looking to get into new businesses or new industries and help further their education." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "I feel like we mentor people all the time. We have guys that come in fresh off the street into the union. We take them under our wing and have our guys teach them everything we know." [#6]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "I think that would be having a good mentor advisor company that wouldn't see me as competition, but would be willing to sit with me and say, 'Now here's the best way to set up your accounting system,' you know? Or, 'Here's some of the basics that helped us get going.' Yeah, another one is capital funding, and what's the best way to not overreach, but yet have access to the things you need. Yeah, probably a construction company that's, maybe I would call it like a small business to medium sized construction company that's been in it for a while. It might also be helpful to have a mentor that was somebody related to the small business capital, you know, operating funds, to understand that better. Because the other things I think about are what's the wise thing to do with these big equipment loans? Is it good to have those out there and leave them out there? Should I pay them all off? And so, I would like to have a credible person that is in that field of financing business. And not just the idea that, 'Oh yeah, we can get you an operating loan, or we can get you capital.' It's more about that mentorship of what strategically, what is the best way to run financially your business and the debt and the capital associated with it. So how do we ratchet up without sinking the ship?" [#17]
- The Black American male representative of a construction trade organization stated, "Yeah so I'll say ourselves, we historically have run mentor-protégé programs where we take a diverse firm and then we pair them with a larger non diverse firm and that larger firm helps them figure out how to operate a larger capacity by learning more about how the bigger companies operate. Also, that creates partnerships, right? Between diverse firms and large institutions. I think our past graduates of our programs have swore up and down that they've been valuable, not every mentor-protégé relationship is a success but then overall we get a lot of positives from that. We were basically able to recruit 11 diverse firms to be part of the relaunch. We had a goal of 20 that we would have hoped to recruit in round one with the possibility that we might, if everyone signed up, have to have the ability or capacity to manage 30 or 40, if not 60 but 30 to 40 protégés. Right? We were wondering how we were going to do that but, in the end,, we only got 11 to sign up. So, we could have probably marketed better, more strategically, marketed harder so to speak. But at the same time even when the program was available it wasn't like we were overwhelmed with applicants. I would say the challenge might be that any of these programs take time so it's additional time that you have to spend beyond doing something that you can immediately connect in generating business or revenue. And so particularly diverse firms, particularly the smaller ones, they don't have a lot of extra bodies lying around or a lot of extra time so I think time becomes very valuable and where they spend it becomes very valuable." [#25]

- The Black American male owner of an uncertified MBE goods and services firm stated, "I believe that's the key to success. If the ability to create a protégé-mentor relationship with a prime or with even another organization that can offer its experience, background to a particularly small and startup businesses, that I think changes their probability of success." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "We have that type of relationship with a lot of our subs, but not formal." [#31]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "If it's offered, I don't know if I would take advantage because I trust the current mentor that I have." [#36]
- The Black American male owner of an MBE-certified professional services firm stated, "I think that's very important. I think that's very important, especially for the younger persons that's starting a business." [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I have not had this experience, but I think it would be helpful. This business owner that I was mentioning earlier that has great receipts and is a large business, I think he was referred to me from the person that came out to do my onsite certification. He said, 'You should reach out to this guy. He's doing very well. He'd be a great person for you to talk to. He could probably even – clients, potential clients that come his way that are too small for him, he could probably refer those to you.' When I called that guy the first time, he wanted to know who I was and what I wanted and he had worked hard and he wasn't going to give away his secrets." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I've never thought about that from a state standpoint. I've always thought about that more from a private and incubator type of standpoint. I guess if the state was going to have an incubation program, where they could guarantee quality mentors, that could be helpful." [#42]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "I just think when there are goals for a project that if you are a mentor for a XBE company that you should be able to get the credit for that XBE participation as a part of your individual goal for the overall team goal." [#49]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "It required a lot of knowledge and skill, and there are not sufficient mentors available. So, there is mentorship available, but the more people who have already started businesses who can actually give you that mentorship, it provides you an incredible boost. There are ways around it. So, by associating with a university like I am doing, and I am doing an MBA, so I have access to lecturers, professors, venture capitalists. But that was one of the hardest parts when I was starting. I had to find ways around it. And that's why I am doing the MBA, just for that. But ideally, not everyone wants to join an MBA just for mentorship. And the quality of the mentors is also – it's also really important. And I think especially people who have already started businesses and done everything, it's the most

important thing, because having to relearn everything from scratch is really, really tough.” [#65]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "That will be awesome. I mean, what we do is, right now I actually pay like \$7000.00 to \$8000.00 to MentorMe, like Tony Robbins, y'know, and other private mentors. They charge a lot of money. But if there are some people who can mentor who are successful in business, that will be awesome." [#70]
- The Subcontinent Asian American representative of a business development organization stated, "The small vendors who are Asian vendors who are really struggling to figure it out. The responses could be coming out, it's because they've been not mentored very well. I think that could be another thing." [#76]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "We are seeing a number of programs, whether it's the ACE mentors group or other groups that are being implemented within the high schools to get more variety of students from all different backgrounds involved in the construction and design industry, I think we're seeing some of the fruits of those efforts." [#FG1]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "I'm going to speak on behalf of the contractors, I'm certain they're not going to want me to, but I think they have to get more serious about mentoring, XBE contractors, and maybe stop viewing them as their potential competitor, which they will eventually be. But they need to probably step up a little bit and put some skin in the game and have a little more of an outreach by saying, 'Yes, we're going to start mentoring these new XBE contractors to be the next generation.' I know it's difficult for them because they're on very tight bid schedules, they're bidding one project and another one's coming in. It's very competitive. It's hard to start thinking about, 'well, I'm going to mentor this contractor over here," but I think that would go a long way to increasing the number of XBEs available in the construction industry." [#FG1]
- A respondent from a public meeting held in Greenfield stated, "Building a pipeline, almost like what you would find in business of a mentor/protege relationship so that we can continue to develop a pipeline of small particularly women and minority owned businesses in the state of Indiana so that as these opportunities come about, there is a pool recognizing that maybe a newer business is not going to be as proficient and may need to partner with someone who has been in the industry longer." [#PT1]

5. Joint venture relationships. Twenty-nine business owners and managers thought joint venture relationships are helpful for small and disadvantaged businesses or had successful experiences with joint ventures. [#1, #2, #3, #4, #6, #7, #10, #13, #26, #27, #29, #30, #31, #33, #34, #35, #36, #38, #39, #41, #42, #44, #45, #47, #48, #49, #59, #70, #75] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We do a lot of joint work with other contracts. But it's limited." [#1]
- The non-Hispanic white male owner of a construction firm stated, "I know that schools offer it through like construction and stuff like that. I actually did the plumbing for a couple

houses in Carmel where the Carmel schools student built a house under supervision of other licensed contractors.” [#4]

- The female representative of a WBE-certified construction firm stated, "There are times when we work in conjunction with [the owner]'s brother. He owns a contracting business. And we do work in conjunction with him from time to time. It's very rare, though. So it isn't really, when we have to go into a wall or something, we'll call him and say, 'Hey, you know, can you come over here and give them an estimate on fixing the wall.' And then he'll come over there and do that. So, there's not really, because he bills the customer directly, as well. You know what I'm saying?" [#10]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "It's the concept of back again at 1986, whoever had the best equipment won, whoever buys the fastest gets the most. And now it's, 'How can we partner, work together better? You have this equipment, I'll have that. How about I give you this and you give me that?' It's what working towards now. So, when you got things that are a million dollars, you can buy \$1 million thing and then share it with somebody else who's bought a different million-dollar thing." [#13]
- The Black American male owner of an MBE-certified goods and services company stated, "It seems like some of the joint ventures are a little less stringent than the banks on credit scores and just 'cause joint ventures see the person versus banks see a number." [#26]
- The Black American male owner of an MBE-certified goods and services company stated, "There could be a joint venture that could be really beneficial to the city or state as well as to us. It would be mutually beneficial. To do something like that, you need a long-term deal. Again, it can't be a bid that I bid on their 200 million gallons of bleach a year. What you're gonna have then is a price – and you can probably find out what their price is – you're gonna have a price in this marketplace somewhere in that 50 cent plus or minus, 45, let's say, to 65 cents a gallon. The cost to make bleach, just the material cost and electricity cost, based on the numbers that we were using, was about 12 and a half cents to 15 cents a gallon. And so, if you said, 'Hey, city or cities' because something like that you would really want to get more involved. New York's done it. Tampa has done it. Tampa bonded and built a plant there for City of Tampa. And to say, man, okay, two million gallons a year. What if we add in Carmel? What if we add in Lawrence? What if we add in Gary, who we also had for many years? Can we get our cost from 50 on average down to 30 on average? And if you got 5 million gallons worth of bleach and said, 'Hey, we just saved 25 cents a gallon,' that's significant. But I think after 26 years and all the years before that doing the same kind of business, I think we pretty much know our business what to do, how to do. The greater work would come in in how do we partner with the state and utilize the things that we know and the things they know, bring 'em together, and find a synergy. And again, to find a synergy you have to have folks sitting in the same room for a day and saying, 'Hey, let's attack this,' as opposed to, 'Well, just send me a quote, and I'll let you know if you won.'" [#29]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes, that is – that is probably the No. 1 way for particularly small businesses to do business with the larger organizations because in many cases the capital requirements of the upfront equipment investment, they might not be able to make it." [#30]

- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "We have done joint venture in the past but now we do – that's not as much of a thing as it used to be, I don't think." [#31]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Well, that might be helpful. If it could become more people, I think, yeah. They've got to be nice to the smaller firms. Not necessarily minority firms, but smaller firms. There's a lot of small firms that are owned by a white guy that – I mean he's struck." [#34]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "Joint venture, yes. That would be a big one for us. I try to do my networking within the different contractors and stuff. If they're doing a certain type of job, roadway contractor, that they put an estimate that we do the work. Try to be – it's a magnitude process. But again, going back to the good ol' boy network that they have the favorite contractors that they've used for many years. We're trying to get in there and it just makes it that much harder to do." [#35]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "That would be interesting. I think I would take advantage of that." [#36]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "That would be very interesting. I think a lot of partnerships here in Indiana, especially with us being sort of a start-up hub, any sort of venture relationship navigation that could be implemented could really be helpful across a variety of industries, especially as we start to look at blending some of these together for innovative solutions." [#42]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Oh, I would love to learn about 'em, but I don't have any – I haven't – I don't know anything about it." [#47]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "We do have it and I think it's working well, I really do. We're involved with a bunch of projects that way. We're involved one right now. Works well." [#49]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "That's really something which I'm looking, because I'm a hundred-percent owner right now, and it seems like a family, but the long-term goal of ours is to change the structure from LLC to a corporation where we can actually bring on the venture capitalists." [#70]

6. Financing assistance. Thirty-four business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses. [#1, #2, #3, #4, #7, #12, #13, #17, #23, #26, #27, #28, #30, #32, #33, #34, #35, #36, #37, #38, #39, #41, #42, #45, #48, #49, #61, #62, #65, #66, #69, #FG2, #PT1, #PT3] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Financing assistance. Financing is kind of like having a girlfriend. It's very personal and very tailored to who you are as a company. So, you go to these seminars, they teach about financing or about loan guarantees or anything like that and they give you some very

broad stroke stuff. And what you need is somebody that really understands how this works to go and talk to a minority-owned business and find out their situation. Then tailor a program to help them instead of that broad-brush approach.” [#1]

- The non-Hispanic white male owner of a construction firm stated, "Yeah, it would be. But a lot of those are based on your credit scores again, so a lot of them, even if they're offered by the government, you may not qualify for them." [#4]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Well, one of the areas for start-up businesses is the one that I found was the most effective, especially for us. My customers always pay their bills. I have never had them not pay their bills. So, one of the ways that, in the beginning, what I did was, I factored my receivables. But that's an expensive way to do it. There's companies out there that do that. Sometimes it seems like there's a lot more of them, sometimes than others." [#12]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, “[Help] would be low interest loans.” [#13]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "So, let's see, so I went to a conference a year and a half ago at Ivy Tech and it was put on by, I'm not sure, the SBA or similar people, but they went through all the different kinds of financing, the 8(a)s and the different things that are out there available and sent us home with some stuff. So, I guess I have an introductory knowledge of that stuff, but I haven't explored it." [#17]
- The Black American male owner of an MBE-certified professional services firm stated, "Of course the opportunity to access capital, is always huge. Right? It's just an enormous opportunity. Have I received some capital? Yes. I received a micro loan to buy [equipment for] training center several years ago, it was a little \$20,000 loan for a flagship, I was able to pay that off and take care of that. The second thing though, I took out an SBA loan. [But] we talked about Department of Administration here in the state, the transfer of information, from the way that they're doing things, like in my business, they took a lot of money out of training, out of the Department of DWD, and put that money into Department of Education. For a guy like me on the ground, [to] hear about it way after it's happened and don't know really how I can- get to it, and access it, and all that if they're going to change a program, can you let me know prior to, don't just make it just go away? Can you give a guy a heads up, and say hey, like you do a normal business? The state don't do that, and you learn through and then by that time, like I was saying, they're tweaking through and telling you this, every week I'm spending money on payroll. All to get to the end, the state don't want to, you don't want to be the jerk that as soon as you hear some bad news, you lay people off. You want to be able to weather a storm. I was prepared to weather a storm, I wasn't prepared for the whole, basically, the number one funder of my business to just go away and not even know.” [#23]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I think they should give those loans to a percentage of the Blacks. Just make sure that that percentage – I don't know how many – what's the percentage now that those loans go to MBE's, but I think they should make it mandatory that a certain percent of those loans either bring the rate up high enough where it can – it could make people like me easier to

get the loan. Because it's – right now it's not easy at all. You just can't walk in there, and even though I've been in business for this long, and say, 'Well, I need \$50,000.00.'" [#28]

- The Black American male owner of an uncertified MBE goods and services firm stated, "Absolutely. If cost of capital and resources can be reduced, that obviously gives any organization options." [#30]
- The Black American male owner of an uncertified-MBE construction company stated, "What would be instrumental to help this issue of the small, struggling minority businessperson would be to make available a special funding program. Not what we got now, but something that's real, and that we could concentrate on. Make funding available for the small businessperson in a real way." [#32]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "Well, maybe they would support the bank. I go to the bank. It's kind of like an SBA thing. But I've never qualified for an SBA loan and yet the banks wouldn't loan me money, but they'd never say, 'Well, you should go to SBA.' No. Maybe I've got some rookie bankers, but like I tell my bank, I walk in and the tellers are nice to me. The helpful people in the cubicles, in the glass cubicle are nice to me. But the bosses walk in. I walked in, and then they look as to greet me or give me a nod or whatever. The loan officer was on my back to lend me money. Then once I submitted stuff, it took them forever. Then she comes back and says, 'No, we can't loan you any money.' 'Then refer me to SBA.' I would think that's how it works. But no." [#34]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "Taking on a certain type of project that I know that we can complete and then make some money on it, I like to reach out to different financial institutions for – to take on that project. If it's a couple hundred thousand dollars and I would be able to make money and pay it back quickly, I like to have somebody that we can work with on that standpoint." [#35]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "With the current business environment, it's just crippling to see there's not a lot of state leadership to get money loosened up for small business. I've discussed it with other business owners, and none of us are aware of any state assistance that could loosen up money." [#36]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Absolutely. Anything like that, that's going to be able to help small businesses navigate the financial market, especially when they're early in the process, and are still sort of learning and understanding how all of that works, I think any sort of programming starting with small business financial literacy, and moving through things like assisting and securing funding and guarantees and all of those sorts of things would be very helpful. You've got the SBA, who offers those types of solutions, but they can be sort of a step above where a lot of businesses are and can sort of be out of reach. I think anything the state could do to provide that more intimate experience and level of care would be really helpful in guaranteeing, or at least helping small businesses make it through those first two years." [#42]
- The non-Hispanic white male owner of a majority-owned construction company stated, "In my case, when I went to start the company, I had to go through a banker to get information

about state loans. So, a lot of people aren't aware of it, that they could actually – the state would actually help them. So, I don't know, maybe a little advertising, or I don't know how you'd do that, but..." [#61]

- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "I don't – to be honest with you, based on the criteria for which decisions are made, the only way that anything would help me or my firm would be a different criteria. Because where I'm at and where my company's at is the result of, I don't know, systemic let me say exclusion." [#62]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "Access to capital, just having lower cost loans or some bank guarantee – some kind of guaranteed loans or something like that. Stuff like that would be incredibly useful." [#65]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I would imagine one thing would be just access to start-up capital for those businesses, people that – just creating the opportunity." [#66]
- The Black American male owner of an MBE-certified construction firm stated, "They need something to suss to why they're doing their business and what they want to be productive out of life to do. So they need that kind of cushion to say, 'Hey, I'm going to go out and give this a try, and I have assistance, but I'm not going to use it but for bills and for business purposes, so I can proceed and be [productive] and achieve my goals.'" [#69]
- The Black American male owner of an MBE-certified goods and services firms stated, "The only way is to have a conversation with a bank, to change their [minds], being a financial institution, to change their requirements, and have a higher risk tolerance for, specifically for minorities, so that they can grow wealth. Because you can't grow wealth if you don't have a business, or you don't have a house. And those are the two main things for you to accumulate wealth is, you either own a home, or you own your business. And those are the two things that yeah, I mean, yeah, black people have issues with." [#FG2]
- A respondent from a public meeting held in Greenfield stated, "One of the barriers to success I think for MWBEs, and I am not talking about the upper crust, but the majority as a whole is financial resources. And in the state of Indiana it would be nice if there was a fund brought about for minority and women owned companies to utilize as a -- like a micro loan program for bonding, for them to keep their cash flow going through projects, et cetera. If the state itself would invest in a program, i.e., put aside a million dollars for minority and women owned businesses in the state they could utilize as feed and seed money to, you know, do various things that they need to do within their infrastructure to keep them going and sustaining them. There is nothing like that here in the state." [#PT1]
- The Black American male owner of an MBE-certified construction company stated, "One of the things we do need is that we need the state to go ahead and stress for these particular banks up here that they put their money into in order to extend themselves for the minority participation, I think it's called the REI. I think it's called the Reinvestment Act and everything else, and they are not doing their job as far as getting monies to minority companies in order to expand. Now, some of them have to put banks here. In order for them to put a bank here -- before they move onto another community which they really want to,

they establish a bank here. But even if they do it here, they still don't reach out and give money to minority companies in order to do it. That's one of the reasons that we have major problems, that's one of the reasons why this city and this whole particular area is not growing as far as this community is concerned. " [#PT3]

7. Bonding assistance. Thirteen business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses. [#1, #3, #6, #17, #30, #31, #32, #33, #38, #39, #41, #48, #49] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Bonding assistance, same thing. It's identical to financing." [#1]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "Bonding would be very important for me. That is probably, I haven't even thought about that for a long time, but if I'm really wanting to go INDOT and do some of these [big projects] and stuff. That ugly little snake is going to pop its head up and it's going to go, 'You need to take care of me' and I'm going to be going, 'Oh, crap. How do I do that?' And I understand them from their business perspective, why would I take a risk like that? So, it's a two-edge sword there. I understand. But how do I ever grow if I don't have some safety nets to be able to take that first two-year risk or that?" [#17]
- The Black American male owner of an uncertified MBE goods and services firm stated, "I am not in the business where I have requirements but I do have clients who have complained about the bonding requirements of particularly on the construction side that it ties up capital for an extended period of time and it's expensive." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "It probably would be helpful to people starting out but, I mean it's such a requirement that if you don't have that, then you're just not in a situation where you can bid on any of the projects that we've been on." [#31]
- The Black American male owner of an uncertified-MBE construction company stated, "what the small contractor needs now – if he gets that, he's going in with the confidence now that he knows that he's got a place he can go to get this bonding done. I believe if we had some kinda set-aside like that, just for this group, now, we're talking about – we're talking about being an elite group now, call ourself certified. We're not competing with the guys that ain't got nothing going on, but we certified now. So we can bid this job, 'cause we know all we gotta do is call whoever, say we bid this job, blah-blah-blah, we need a bond for \$2 million, whatever it might be. And we could operate also like the unions operate, with the workers. And say this could be where, okay, we need \$2 million, but 'No problem. We've got you.'" [#32]
- The Black American male owner of an MBE-certified professional services firm stated, "I think that can be very important as well. Now, for me, no. But I can see other small businesses that does something different than I, that can benefit." [#38]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I have not needed a bond, but it certainly – that information would be helpful. You just never know when you'll be presented with an opportunity to bid on a job

that requires a bond. If that's the case, what do you do? You need to know how to act accordingly." [#41]

- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "I don't know if you want to simplify that. I don't know that you do. You need some kind of guarantee, right?" [#49]

8. Assistance in obtaining business insurance. Twenty-one business owners and managers thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses. [#1, #2, #3, #4, #6, #26, #27, #28, #30, #33, #38, #39, #41, #42, #45, #48, #59, #68, #69, #70, #75] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I mean, anybody should get insurance if you've got the money. But the problem is, how do you make the most of it? People need to learn how to save money on work comp. How to save money on a liability. Most people don't know that you're going to get audited at the end of the year. If I tell you I'm going to get half a million dollars, write me a liability policy and I need a 750, the insurance company comes back to you at the end of the year and says, we just insured you for \$750,000 worth of work. More premium. So, people don't understand that. So, people need to be taught about insurance." [#1]
- The non-Hispanic white male owner of a construction firm stated, "I'm sure they do but it's pretty easy to get business insurance. I mean you can go online and get it in about 10 minutes from anybody." [#4]
- The Black American male owner of an MBE-certified goods and services company stated, "I would say that would be something needed if you have some big projects that's outside your normal scope of work." [#26]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "OSHA requires a lot of more stuff, materials and information for the insurances. I guess that – that's controlled by them. I don't think we can do much about it but do what they ask us to do. 'Cause if you don't, then you – you're not gonna get it. So that type of – when you get into that, I don't know who – where we can go to get more familiar – familiarize our self with that process. That definitely would stop some companies from getting what they need to get. So, we have to show more of eligibility in that process. 'Cause this is the first time – now, we went through it, but I had to have the help that I needed. I sought it from the people in the church." [#28]
- The Black American male owner of an uncertified MBE goods and services firm stated, "That's the same issue, as far as I'm concerned, as bonding. The cost of insurance depending on what it is you're doing can be excessive. And if you can't back fit that into the bid or make sure that that is covered by the bid, that obviously cuts into your margins." [#30]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Yeah, absolutely. Any sort of simplification of that process. Insurance is a really complicated, unregulated industry, and it's really difficult for businesses to understand what they need and what they don't, and make sure that they are spending their limited capital in a way that is legitimately going to protect them. I think any sort of

additional support from the government when it comes to that unregulated industry could be very helpful.” [#42]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "It's been tough to get health insurance. When an employee joins in, I almost have to have a degree to figure out how to get him on insurance." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Sometimes, it's pretty demanding, but other times, it's not." [#68]
- The Black American male owner of an MBE-certified construction firm stated, "Yeah. I would say that's one of the crucialist things, helping assisting with business insurance and also helping with purchase of vehicle, because when you first get started, if you don't have your money right, that can be a hinder because you're going to be working to go ahead to pay your vehicle and to pay your insurance. I would say both of those will go tit for tat, because of the fact that you don't want to first start out hindered, you feel, 'Oh, I've got to pay a car bill. Oh, I've got to pay insurance.' You want to make sure you've got a cushion. I think if I had anything to do with it, if there was a business loan and if I was the president I would say the first six months of – take your pick of your car payment or your insurance would be 75-percent half off, take half off, or just do away with it altogether for six months. I say six months because of – that's being fair and honest, giving the person time enough to know the job, get up on their feet, knowing their route, knowing the dos and the don'ts and the ins and outs. Not having a person scared to make a mistake, but if they do make a mistake, they have a little cushion." [#69]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "I don't know if the state offers any discounts, or if the state offers anything like if let's say I'm headquartered in Indiana, if the state offers anything at a discounted price or a better – like especially workman's comp. Those are the things which are really expensive, so if someone can connect and get some decent numbers on our insurance. Right now we pay about \$25,000.00 to \$30,000.00 a year to just run 30, 40 people. I mean, what if we grow to 100, 200, 400 people? Then it's a lot of money." [#70]

9. Assistance in using emerging technology. Twenty-one business owners and managers thought assistance in using emerging technology can be helpful for small and disadvantaged businesses. [#1, #2, #3, #4, #5, #11, #15, #16, #26, #27, #30, #31, #33, #37, #38, #39, #41, #45, #47, #48, #49] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "It needs to be taught by somebody who knows what they're doing." [#1]
- The non-Hispanic white male owner of a construction firm stated, "Well [I'd like] just getting permits and prints and stuff online. It's where you don't have to go in, you can do everything online. Obtain your permits, call for inspections, everything can be done online, and you don't have to physically go in at all." [#4]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "Well, I just had a company wanted me to go that route and I just said I don't know how to do it. And I just decided that I don't even want to learn to be honest with you, at my age. So,

I'm aware of it, that a lot of businesses now are you've got to bid online or you got to do your prices online. I just, I just don't want to do it to be honest." [#5]

- The non-Hispanic white male owner of a majority-owned construction company stated, "Not a barrier, no. It's actually a good thing really. The more technology the better out here, the easier it gets," [#11]
- The Black American male owner of an MBE-certified construction company stated, "I'm not computer savvy, so that's one of my barriers." [#16]
- The Black American male owner of an MBE-certified goods and services company stated, "'Cause everything's electronic now and you have to go to these sites and be able to find the right section that pertains to you and then break that down, which is time-consuming if you're searching the whole – where you search should be searched." [#26]
- The Black American male owner of an uncertified MBE goods and services firm stated, "I think that goes back to the training issue. When organizations, IDOA or anyone else offers electronic bid processes, there needs to be – make sure that there's an education, pre-education process for those who want to take advantage of that so that they know how the particular tools involved in the bit process work" [#30]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "I mean, for example, how to get those bids available in the public sector. Again, I know there are some websites or somewhere where I can access to them, to be able to have some training or seminars about it can be very beneficial." [#37]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Oh, absolutely. We need to know how to do that. I've not had assistance with that. I don't know how to do that. I would not know how to do that." [#41]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I don't know anything about it. I would like to learn more about it, and I'm sure other people in my field would like to learn more about it." [#47]

10. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Seventeen owners agreed that start-up assistance is helpful. [#3, #4, #12, #26, #27, #28, #32, #33, #37, #38, #39, #41, #45, #47, #48, #75, #AV] For example:

- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "The other part of it, too, is the knowing what you need to do. This is my biggest complaint. There is no one place to get the information to find out what it is that's required of you. The government is the worst about that." [#12]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "They helped – yeah, they helped 'cause they helped us to be aware of what's out there. They didn't do the leg work. We have to do the leg work on our own, which we did. But it was very, very helpful. But the workshops – it just gave me more knowledge of what's out there and how to approach the situation in a positive mind. And it's just some of the things that they ask for, you give 'em what you have, and that's not good enough a lot of times." [#28]

- The Black American male owner of an uncertified-MBE construction company stated, "What I would recommend for that is this. That I drove up, say, 'I want to become MBE certified.' I think the first order of business should be to give me a crash course or whatever in what – that little word, LDE. Business. What that word really means. If I'm gonna be in the plumbing business, what does that mean? I'm talking about in A-B-C language, where I gotta get some equipment. Being a certified, and I don't have nothing to work with, uh-uh. So, I think the first order of business ought to be, if I show up, certainly I gotta have something, a kinda ticket to get me in the door. I show up and I got a plumber's license; I done qualified to get that. Took me five years as an apprentice, or I took the alternate route, or whatever. But at the end of the day, I got a plumber's license. I'm a plumbing contractor, just like any other one. But now I need to go to work, and I wanna be MBE certified. I want to let my color mean something to me, if you will. So, I think if we had that, and go through something like, how do you organize this business? As I said early on, most small businesspeople work and don't get paid. The small business owner, he can't afford to pay his self. But we can fix that piece. That's a bad area we've got in, right there. That we can go, 'Okay, you gonna start something and then, then what you'll do for me is this. You've told me how that's gotta be,' and then the numbers start speaking for themselves. Then we've got an organization now. I've got a stoop and candle. I got an estimator. I got all these things that someone from the business place showed me, that I knew how much money I need for starters, to get started. Uh-huh. And then make that money available to me, and now I can go. I can move now. 'Cause I done put some gas in this Bugatti, y'know? Yeah, yeah. And then I got money in my pocket when that run low. That's a necessary evil. If that don't ever happen, the business about being certified don't mean nothing. So now, if we get that start like that, then okay. Then you can give me that little whatever-it-is, because to me, do you know what that represents to me? That's reparations in an indirect way. Yeah, uh-huh, okay. But if you give that to me, then okay, I can go help my neighborhood now. Yeah, yeah, I'll go help 'em, 'cause I can hire 'em, y'know." [#32]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "For me, it was not a problem because I had my accountant that was able to help me to do it. But, of course, I'm sure it could be very useful." [#37]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Absolutely. I – start-up assistance. I don't know that I had start-up assistance. I just went to the website, the Secretary of State's office and read on how to incorporate and I did. I think I might be a little different from some. I won't say most, certainly. But I just took initiative to find out what I needed to do and how to go about doing it and pursue those sources to get that information. But many people that I talk to who are in business or want to be in business just don't seem to have that sense of initiative to do that. It would be helpful if they had that assistance." [#41]
- The Hispanic American male owner of a uncertified MBE and VBE goods and services firm stated, "I've gone through a couple different start-up assistance programs, not from the government. And I've been in business a long time, so for me, start-up assistance isn't that valuable, but I could see where it would be valuable for someone who doesn't have any business experience." [#75]

- A comment from a Black American WBE and MBE professional services firm stated, "For starting a business there needs to be more training." [#AV]

11. Information on public agency contracting procedures and bidding

opportunities. Twenty-six business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities, noting its accessibility online. Others were unaware of how to access that information, and thought the information is helpful for small and disadvantaged businesses. [#1, #2, #3, #4, #7, #13, #26, #27, #30, #31, #33, #38, #39, #41, #45, #47, #48, #49, #59, #72, #75, #76, #AV] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "on the INDOT website, you'll get all the pay items, you'll get the plans, get the contract information, which tells you what the minority goals are, what the quality's like, any other special provisions that you need to know about. I went to an INDOT road show they had here in town for two days. It was worthless. Honestly, it was. On working for INDOT These people who are teaching these classes, they're clueless. That's what I'm saying about the whole minority business help that gets offered by INDOT. The people that are teaching the classes, they lack knowledge. So, don't use your own people. Set it up with some professionals that hire, that train the big guys. Provide money for your people to go in there. That's the way to do it. There's stuff that they have great systems, NDOT does, to learn this information. But, the people that try to teach that to minorities are sorely lacking in the knowledge." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I did, and I don't know if I was unsubscribing to what, but did it change? Didn't they just change their system? I'm thinking maybe I, and I cannot find, like I was spending time, and I ran out of time. I don't think I'm getting the emails anymore, and I can't find it on how to get it. When I went out to the IDOA procurement site where they have the bidding opportunities, it has a message there that says they're moving it. It looked so nice and clean." [#3]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "Well, I tell you what the government, we have tried that over and over and over, and we just can't seem to get anywhere with that. We have signed up with these people tell us they can help us get federal contracts and this and that. And we just can't seem to get the government pay attention to us for some reason. And we've actually done government contracts through other printers and they think we do an awesome job, but then we will try to bid at direct and they won't allow us. We won't get the job. We won't know what we do wrong." [#13]
- The Black American male owner of an uncertified MBE goods and services firm stated, "I think it would be a big advantage if a small business that is – we're only talking about in the public bid sector. In the private bid sector, you're kind of on your own. But in the public bid sector it would be really, really helpful if IDOA or other governmental agencies ensured that any company that bids with them had to go through the education process of how the State of Indiana does business. I know they offer it as an option. I would highly recommend that that be a mandate. Yeah, that process has to always stay open. It is currently an open process now. The problem is if you're not familiar with it, you as a small business, and you

don't understand that it is an everyday part of your marketing outreach, it's gonna be a challenge for you so I don't – it would help if the prenotification process was a signup and you – and I know at one time that was under discussion. But the pre-notification process was a signup, and you would get these auto notices. I think that still happens. I'm not sure how the follow-up of that is made when you're targeting women and minority businesses.” [#30]

- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Most all of that is pretty clear in the different literature cut out." [#31]
- The Black American male owner of an MBE-certified professional services firm stated, "I can see how that can be helpful for emerging or new small businesses." [#38]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I would be interested. I'm currently not doing it, and I'm sure everyone else would be interested, too." [#47]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "I don't know if they publish a newsletter or something the state does with contracts that people can bid on. I know there are e-mails that go out on and off but some kind of more general website or something like that would be great." [#59]
- The Black American male owner of an uncertified MBE construction company stated, "Will they offer me contracts to the way – or somebody – some numbers I can take, you know what I'm saying, to talk to some people, to reach out, to better my business so I can get some contracts due to knowing that I'm a minority? Because I'm quite sure that minorities supposed to have so many contracts, know I'm saying, or coming toward them a year, you know, especially by being small businesses, small business minorities, you know I'm saying. But, you know, they really don't talk to us about that. They really don't let us know about that. They really don't offer to help for us, know I'm saying, to take the impact on some things like that, of the opportunities that we are, or could have, know I'm saying, by being a minority business." [#72]
- The Hispanic American male owner of a uncertified MBE and VBE goods and services firm stated, "Y'know, just being notified of work that's coming up in my field. 'Cause we do get an e-mail from, I don't know what agency it is, but it's pretty broad, right? Roadwork in northern Indiana, blah-blah-blah-blah-blah. And I don't do roadwork, so at some point those e-mails get convoluted to me, and I don't look at them because they don't really apply to me. But having work being posted that actually applies to the type of work I do would definitely be helpful. I'm not versed enough to know what agencies are which, and who I would be able to reach out to. So maybe a list of agencies that have work out there, that put work out there, that would be helpful." [#75]
- The Subcontinent Asian American representative of a business development organization stated, "I think what really happens is the amount of RFPs coming out. At times, it's a very short notice. I have seen some of the RFPs are not written very well, so unless you don't know who has written ... from which organization the RFP's coming out, then you have your ... not insider information, but understanding what are the needs of that organization, you cannot be successful. some of the RFPs, which were super early written. I would have said, "Okay, you're not giving us all the information or not providing enough time." “ [#76]

- A comment from a Subcontinent Asian American MBE and VBE goods and services firm stated, "Need information on possible work opportunities with the state." [#AV]
- A comment from an Asian Pacific American MBE professional services firm stated, "Is there a way I can get more engaged in what contracts the state of Indiana has to offer?" [#AV]
- A comment from a Black American WBE and MBE professional services firm stated, "I would like more information on how to obtain contracts with the state of Indiana. Who should I contact?" [#AV]
- A comment from a Black American WBE, MBE, and VBE goods and services firm stated, "Not clear on how to get contract with the state/government. hard to information when dealing with state and county. make it difficult for the smaller companies to get a bids." [#AV]

12. Registration with public agencies. Twenty business owners and managers thought online registration with public agencies as a potential bidder are helpful for small and disadvantaged businesses. Most noted that online registration is considered essential to bid on public projects. [#1, #2, #3, #4, #7, #26, #27, #30, #31, #33, #36, #38, #39, #41, #42, #45, #47, #48, #49, #PT5] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We're listed. So, I can try the directory of potential subcontractors. That's by job. It's on that website." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I mean, I think it's the same list that I'm on." [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "You have to register [to work with] Indiana." [#3]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I wouldn't have a problem doing bids online. I was aware that you probably had to do it online, but I didn't know they offered programs to help you learn how." [#7]
- The Black American male owner of an MBE-certified goods and services company stated, "Some of those I think is fairly straightforward, but there might be sometimes some other categories, somebody needing help, because we don't have real complicated classifications. So that was pretty simple. But I could see somebody having some technical thing doing – like you don't try to red shirt, don't know what to classify themselves, yes." [#26]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yeah, obviously, yeah, that goes without saying, yes." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Once you're qualified, once you go through the qualification process, you're automatically listed on there." [#31]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "I would take advantage of something like that," [#36]

- The Black American male owner of an MBE-certified professional services firm stated, "That would be great. I mean, that would be great because that's gonna help them get their foot in the door without even really leaving the house." [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, "I know it would be helpful, that definitely." [#39]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Yeah, I think that could be beneficial, depending on what kind of projects are funneled through that. Online registration can often remove sort of face-to-face interaction that's necessary for earning client-vendor trust, but it could be a great way to start those relationships." [#42]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Don't know anything about it; would like to, and I'm sure others would as well." [#47]
- A respondent from a public meeting held in Greenfield stated, "I think that all the E-mails are nice as far as coming from the city, the state, all the other contractors for MBE participation. I think they do a very good job of that." [#PT5]

13. Directories of potential subcontractors. Nineteen business owners and managers thought a hard copy of electronic directories of potential subcontractors would be helpful for small and disadvantaged businesses. Many firms knew how to access that information through IDOA's or INDOT's websites, while others did not know how to access that information. [#3, #4, #6, #7, #11, #25, #26, #27, #30, #31, #33, #38, #39, #41, #45, #47, #48, #49, #FG1] For example:

- The non-Hispanic white male owner of a construction firm stated, "Yeah, I think they have a website for that, where you can get on there and you can be a contractor and you can put your name on there." [#4]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "Some of the emails that I have, yes. They'll attach potential sub-contractors for different things should you decide to bid it. Personally, I would ask around. I may pull up one of those lists and see who's available. But I would ask other contractors that I have a relationship with if there's someone that they recommend, that they've used that has done them a good job, has shown up." [#6]
- The Black American male representative of a construction trade organization stated, "Here's my personal gripe. Let's say right now if I call the state agency, she has the list of certified XBEs. I would say things like, can you give me the XBE firms in this particular area or in this industry or this type of work. What they will do is direct me to the page on their website which has the Excel spreadsheet which gives you, it's hundreds of companies and when you've got to be a [wizard] to figure out which codes fit your area of service and then you've got to filter for... It takes hours of work, right? That should be a call and I should be able to at least get, here are 10 companies that are at the top of our list, or here's the top 10 performers in business or here's something, right? Instead you get a massive spreadsheet with 2000 companies, 400 [NAICS codes], that doesn't help me find the help and I think that element of can that be managed better or can there be someone more knowledgeable

around that, so you don't just get points or a spreadsheet, you actually can get directed towards XBEs in particular areas of work. Even just like, so let's say, I mean I know from the Indianapolis disparity study that veterans is a hard category to fill because you don't have veteran companies across every aspect of a construction project. So then if you could reach out to the state and say, can you give me a list of the veteran owned companies in construction. Then I might be able to do some of the stuff I said earlier, like oh well there's no one in fire protection that's veterans so I can't even segment that work out, but there are these three companies that do concrete that are veteran-owned companies. And oh, there's a Hydro Vac company that's veteran-owned. So let me then give these companies as much business as I can and then I can offset my overall veteran spend goal by not overspending, so we say, but dare we say overspending with these veterans in this aspect of a job." [#25]

- The Black American male owner of an MBE-certified goods and services company stated, "That would be ideal, where someone could go and say, 'I'd like to get a copy' whether it be – mainly I'd think electronic copy, 'cause that way if they could submit you can go and say, 'I'd like to get an electronic copy of all the prime on this fit to bid' and they send it to you in an e-mail for or whatever, with e-mail links you can go with out of that and shoot a blast to those people. That would help a small business out tremendously. Because sometimes you go to those sites and you try to get a copy of their e-mail list, people have to print in little boxes. You can't even read their e-mail, you don't know if they got it right, so it bounces back four days later." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "Yes. I have direct experience with that and that is helpful." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Both obviously would help. I think that exists right now. I know it does at the state level and a City of Indianapolis level." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "You're required to reference that each month whenever we've been on INDOT or IDOA work 'cause it changes all the time." [#31]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I don't have anything like that anymore. I would be interested to look at it, and I'm sure others would as well" [#47]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "I think a lot of it is, I know there are black-led electrical contracting firms out there. I don't know where to find them. It's really a lot of just knowing where you can find the people that are qualified that can do the work." [#FG1]

14. Pre-bid conferences. Twenty-one business owners and managers thought pre-bid conferences where subs and primes meet are helpful for small and disadvantaged businesses to network and develop relationships with project managers and primes. Many firms explained that for large projects, such meetings are mandatory. [#1, #2, #3, #4, #6, #7, #26, #27, #30, #31, #33, #36, #38, #39, #41, #42, #45, #48, #49, #59, #70] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "They usually have pre-bids on their really big jobs. And, unless you're going to bid

on a really big job, you go to the pre-bid conference. Sign in, you get the list of who's there, meet people. It's a good networking." [#1]

- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "The meetings where vendors could go and talk to them and leave their information and get sample types of jobs to bid on and stuff like that. Where you could bring the procurement people and suppliers together because that is the biggest barrier to getting into these places is not knowing the person to talk to. And as a small business, you can't just walk in the door and say, 'I'd like to talk to so and so.' Most of the time they're going to run you around or run you out." [#7]
- The Black American male owner of an MBE-certified goods and services company stated, "They're still beneficial. I think some of it is just good old fashioned networking and comfort level and you have to keep putting your face in front of the people over and over and over, to get the work." [#26]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "I would try to take advantage of something of that nature." [#36]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I've attended some of those. Those are helpful, I guess." [#41]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "Definitely needed." [#49]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "That's what I'm looking actually to be, y'know, like – So if I can meet some contracting officers and have some relations, and see and spread our word and get in contact with them, y'know, and see if we have any opportunities that they can provide, or they have any requirements which we can fulfill, that's really a good opportunity for us, if we can kinda get connected with the people." [#70]

15. Plan holder and other lists. Nineteen business owners and managers thought distribution list of plan holders or other lists of possible prime bidders to potential subcontractors are helpful for small and disadvantaged businesses. Some firms described how they access that information via IDOA's or INDOT's website. [#1, #2, #4, #7, #11, #26, #27, #30, #31, #33, #38, #39, #41, #44, #45, #47, #48, #49, #71] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Here this is on the INDOT website too. This is your plan holders list. Here's the potential bidders. Yeah, we've already got that. if you want to know who the plan holders and bidders are, look on the prequalification list. Because you can't bid on a state job unless you're pre-qualified as a prime. So, there is a pre-qualified contractors list on the INDOT website." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "Are helpful, very helpful. I don't think it's hard to get. If you go to a pre-bid meeting you get to see who's signing up as a prime. If they buy the plan or the prints, they spend thousands of dollars to buy that, they're serious." [#2]

- The non-Hispanic white male owner of a construction firm stated, “ [You find it] on the webpage of the government if you're bidding on a state or local job that's government funded.” [#4]
- The Black American male owner of an MBE-certified goods and services company stated, "I don't really work off those lists very much. A lot of those companies try to provide that. Unless you have somebody with a big database and can do e-mail blasts it doesn't really work for a small business. You don't have the time to mess with it.” [#26]
- The Black American male owner of an uncertified MBE goods and services firm stated, "Yes, that process exists already.” [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "With the Internet, that's kind of covered because the things that we all subscribe to, to find the work list all the other people.” [#31]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "That is one, yes, that's one obstacle that we do run into. Now, when it's public, it's not an issue because public will always – I think they have to present that information or produce that information or tell you where to go get it. We can find it. But that is probably one of the top four or five challenges that we have dealing with private and I don't think there's anything you can do about it. But for us – and I don't think we're atypical, again, with anybody else. I got invited by one general contractor to put a bid out and the bid is \$200, 300, you know, half a million dollar job, it would make sense for me to bid out what every other general contractor who's bidding on that. And usually we try to contact the architect but that becomes very difficult because some architects will be very helpful and get right back to you within a very short period of time and take care of other things and help tell you where you need to find and every – and other ones you can call and write and send emails and you will never hear back from them. So, yes, that's a real, real issue with a small business and, like I said, I don't know if that has to do with minority or not, but it really is a real issue dealing with some contractors – some architects, I should say. Once you get the information from the architect, then the contractors are pretty, you know, they're willing to work with you. But they don't know who you are if you haven't been able to contact them so that's a real issue for us. That's very much a real issue.” [#44]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Don't use it; would love to know more about it, and I'm sure they would love to know more about it.” [#47]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "Yeah, [that would be helpful] so you'd know who to submit your bids to.” [#49]
- The Black American male owner of an MBE-certified professional services firm stated, "I have not [had any issues] learning about them. On occasion, getting them to respond.” [#71]

16. Other agency outreach. Twenty-eight business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. Many shared their experiences with the State’s outreach efforts. [#1, #3, #4, #13, #25, #26, #27, #30, #31, #33, #34, #35, #36, #37, #38, #39, #40, #41, #42, #45, #48, #49, #59, #69, #70, #75, #76, #PT1] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I do go to those. Yes. Those are good." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I have. I have not gone very recently, and I think ... I don't know how that's being communicated. Probably on that same ... It's not the same distribution, but I have enjoyed them in the past." [#3]
- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "We attend shows pertaining to our industry, we also do a lot of online training. We have a seat learning center in our facility, and we do tell our people that to be a good employee you have to keep learning. You can't be stagnant. And also feel like I'm preparing for them. If anytime they did lose their job, they could be an employable person somewhere else. I try to make their time with us well-spent. And so we do a lot of online training and then we have like the national postal forum that we attend every year and we have different people going there and then they bring their classes online also." [#13]
- The Black American male representative of a construction trade organization stated, "You have the opportunity to even as a diverse supplier who may be, you know, a mid-level, maybe even a lower second, third tier supplier working on a project, that you actually have the opportunity to get your name, your information in front of owners. So now, theoretically an owner probably doesn't care who delivers [rebar] to a job site, but they know that D delivers rebar and they know D's rebar, then when they get a proposal and they see four companies delivering rebar, and none of them are XBEs, well wait a minute why don't you call D rebar? So then that element of access to owners is critical for XBEs to be on people's radar more." [#25]
- The Black American male owner of an uncertified MBE goods and services firm stated, "I've been to those. Those have been held I know particularly under IDOA, INDOT, et cetera, in the past and those were extremely helpful for me to get opportunities to introduce myself and my firm to individual departments within the State of Indiana." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "We have attended several of those, the outreach events. city of South Bend just had one. It was really good. We've never actually gotten any work from it, but I think it's our type of work as much as anything. I feel like trucking-like companies that do more varied things than what we do are in a better situation to benefit." [#31]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, "I think the State of Indiana used to have those locally here at the districts, just how to do business with them. I think that was good. I don't know if the State of Indiana does that anymore. I know there's the Department of Administration will have some seminars in Indianapolis down in Northwest Indiana. Say, 'Come on over this day. We're going to have a speaker. We're going to have this.' I don't know if it's a chamber. But I think it's the Department of Administration sends me a lot of emails. But it's mostly to do construction services like construction engineering, surveying stuff. We don't do that that much. In 15 years, we had half a dozen meetings away from Indianapolis. So, I always said we had to have meetings throughout the state more often, at least half our meetings, throughout the year, once a month, should be at a different venue. But no, they were always at Indianapolis.

We'd go a couple of years, they were always in Indianapolis. So, to try to get them to move the dog and pony show to other parts of the state, logistically, might be difficult for the Department of Administration. They've always got their cutbacks. But I do get that outreach, but it's always in Indianapolis." [#34]

- The Hispanic American male owner of an uncertified-MBE construction firm stated, "We're part of the Chamber, the local Chamber here. But they do different events throughout the year and different companies from manufacturers to contractors and so on. That's typically how I network myself with that." [#35]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "Yeah, I currently participate in other networking events The Chamber or other B&I business networking groups. I try every other month." [#36]
- The non-Hispanic white male representative of a construction company stated, "That would be more assistance as far as getting more business. It would be beneficial. Because, like I said, I've never been contacted on the event side. From anybody, that was word-of-mouth, basically. Through Indiana and even the INDOT, they'll ask us. You know, we've had even people within INDOT contact us and ask us if we'd be willing to work for 'em, even though we're one of their registered vendors." [#40]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I've received that information and I've attended some of those. So, yeah. I mean I've never gotten any work out of them, but they are helpful." [#41]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Any sort of interaction and networking like that is great. The private networking that takes place can be very costly for small businesses, and can be prohibitive of them being able to take advantage of those networks" [#42]
- The Black American male owner of an MBE-certified construction firm stated, "That is a big plus, because you never know who you may run into, for the simple fact like if I'm at vendors and so forth at let's say a job fair for owners, business owners, Black business owners, or business owners in general, and how to get contracts or just basically running with a company that needs me there. So, it's being mindful and thoughtful that we can have people in our area that's small business owners that can transport what needs to be transported. But if you don't know it how do you get it? You know what I'm saying, you're not going to get it if you don't know it. So, I think it's always good. I call that 'meet and greet,' 'cause you meet and you're greeting yourself and they're knowing your service. Is like one thing I wanted to just give you an example of all the business owners in my area; I just wanted to have like a finale of business owners to say, 'Hey, I'm in this area if you need me for this, this, and that.' You're just promoting yourself. You're just putting yourself out there. You're just putting yourself to make yourself known just a little bit more. They'll say, 'Hey, this guy does transportation, but I need him to do this, this, and that. I didn't know he was just right in this area; I could've had him take these glass doors, you know, RVs and everything that's made around here. And parts always need to be shipped on a regular, everyday basis, but we can't wait on a semi to get it there all the time, because semi droppers is really at a drop.' It's crazy, but it is what it is, people going to other things

because they don't want to deal with semi-tractor, 'cause the money's not like it was back in the day." [#69]

- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "That will be really nice, to have lot of connections, but if there are any else that kind, I really would like to go and, y'know, spread the word and connect with really good people so we can grow." [#70]
- The Subcontinent Asian American representative of a business development organization stated, "But I think even those other vendors that have a direct services provided to governmental agencies and all, I think we as community don't even understand what are the opportunities." [#76]
- The female owner of a WBE-certified professional services company stated, "We have seen that like affinity groups for vendors where they connect and get to know one another related to construction mostly, at least what we have seen so I am not sure if we are missing opportunities. We do business management consulting. If there is opportunities to connect with other vendors and have relationships with people we haven't worked with before, whether that's other MWBEs or just other people who might be prime contractors on other bids, and that it's been really helpful for us when IDOA has had the bidders' conferences, proposal conferences where they post attendees for those meetings because that's a concrete way to try to connect with what we have determined could be a good match for the project and might be a good match to partner with people. And when those conference proposal meetings don't happen, then it is difficult to go through something like 1700 potential partners." [#PT1]

17. Streamlining/simplification of bidding procedures. Fifteen business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses, but also described the process as more straightforward than in previous years. [#1, #4, #5, #7, #26, #27, #30, #31, #33, #38, #39, #42, #45, #48, #49] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Actually, I want it to be harder. When I'm trying to get into the market, I want it to be easy. When I'm established, I want it to be harder." [#1]
- The non-Hispanic white male owner of a construction firm stated, "They streamline a lot and get a lot now by having everything available on the internet." [#4]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, "I think anything that simplifies it would be good." [#5]
- The Black American male owner of an MBE-certified goods and services company stated, "That's the number one obstacle. I don't know how they can make that better, other than somebody who has been doing it for 20 years, a novice person do it. This one needs to be simple, but I don't know how you can do that." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "The new umbrella contract is an example of that. That's been good." [#27]

- The Black American male owner of an uncertified MBE goods and services firm stated, "Sure, less is more, right?" [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "It's terrible. Every county has 5,000 different forms. I'm just working on a La Porte County bid right now but all of us are in the same boat there. There's no disadvantage, it's just. . ." [#31]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "Of course, yeah. Any sort of streamlining or unified approach to bidding I think would be really beneficial and make it much easier for small businesses to be able to throw their hat in the ring if they can just do the process sort of once and then template it out from there for future bids, as opposed to having to spend a large amount of time bidding on every single project." [#42]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated, "As long as you have all the bases covered." [#49]

18. Unbundling contracts. Nineteen 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, while others noted that it may increase the complexity of project management for the State. [#1, #3, #4, #7, #26, #30, #31, #36, #38, #39, #41, #42, #44, #45, #47, #48, #59, #69, #75] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "That's a problem. Yes. That's a huge problem right now. So, for instance, the state has decided that because of their lack of resources, they're going to bundle contracts. For instance, here is the base bid advertisement for the highway level. I'll show you a contract here. Here's a small one. Here's a bundle contract. See every one of these? This is a separate contract. But they bundle them into one job. One of them is Elkhart County. One of them is in Stuben County. One of them is in Nobel County. One of them is in El Carte, Noble, and Nobel. So, they're all over the place and they put them in one contract. Now, I'll almost guarantee if we look on the website, this contract, nobody got below the estimate. Because the cost estimated by the state was too low. To cover all that territory. And it's pipe lining. So, that's a problem. You need to break these up into smaller segments. But the state doesn't want to do that because they don't want to manage it as 10 different jobs. They want to manage it as one. And that's a problem for the little guy. It is. That's a huge, yeah, that's probably one of the huge problems in our industry right now." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I am aware that they've done it in the past. I think it's favorable. At least for me, it's favorable." [#3]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "It could be because it could also be a downfall. Let's say that you've got 14 different booklets that you got to put out and you're going to give a booklet to 14 different vendors. Well you want a consistent look, so each one is going to have to follow the exact same guideline. So when you break something apart into different pieces, you're going to have to be very careful to make sure that each part of it is going to mesh with the other parts and

that it's done consistently across the board. And that means color wise, that means layout, that means everything, paper, everything right across the board has to be consistent. So, it could be a downfall if that criteria is not done." [#7]

- The Black American male owner of an uncertified MBE goods and services firm stated, "That is certainly a recommendation if that is possible. I'm not sure that that is always possible, but if that is possible, that would certainly increase the potential pool of small businesses, women and minorities." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "They have gotten a little bit away from that. They used to do that more. They're more trying now to bundle different small jobs into a bigger job which, at this time, that has not hurt us. Sometimes it would be [helpful], yes." [#31]
- The Black American male owner of an MBE- and DBE-certified goods and services company stated, "That would be beneficial. Sometimes the contracts are just overwhelming when it comes from the state side, and it's just a lot of paperwork versus, 'Hey, this is what you need,' and stuff like that." [#36]
- The Black American male owner of an MBE-certified professional services firm stated, "Yeah, that's gonna be a tricky one because you gotta get the owner involved and get the client's understanding of how they're gonna do things versus how they want to do things." [#38]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "That could potentially be beneficial. That being said, it's going to really depend on the contract and the project. Oftentimes, one cohesive solution is far more effective than implementing multiple smaller pieces from a variety of vendors that may not necessarily integrate seamlessly. I think it would depend on the goal of the project and how it could potentially affect the success of that project." [#42]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "I have not done that on a grand scale, but that would probably be something that we could sharpen our tools more. If there were some kind of coaching or something that could help us, that would be nice to help out because, again, then that could work within our bonding capacity. So, if it's a million-dollar job and we could break it up into two or three different pieces, then we can meet our \$400,000.00 bonding issue." [#44]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "Why in the hell would you do that? I don't know the answer to that one. I want as much money as possible. And I don't know what other people wanna do with their time." [#47]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "That would work. We're a small company. Our trade can be considered somewhat electrical. We do low voltage, which is a small part of electrical work. Typically, a big electrical company will get the contract because the main building owner or the prime contractor will say I don't want to deal with five or six different people. So, they'll give it to the electrician, which either they'll sub it to us or do it themselves. I would say money, too, but they just don't care. They say I just want five contracts and we're done. I don't want to

deal with 15 or so. So, yes, that would help companies like us. Specifically, we sub under the electrician just because the prime contractor doesn't want to deal with us." [#59]

- The Black American male owner of an MBE-certified construction firm stated, "I think that's a good one. That makes more sense. That makes more – not need for people, but a need for people to get involved. Because if I have a sprinter van and if you've 100 people under your contract or 100 contracts to do it, whatever the case may be, and you're a business owner, and this man is sitting over here and doesn't have anything to do, I think it's fair to give him some too, because he wants a piece of the pie too. He don't want to step to the side. You know what I'm saying? That's just like if you're hungry and you're begging for food, you're begging, you're begging, you're begging, I'm not going to feed you." [#69]

19. Price or evaluation preferences for small businesses. Fourteen business owners and managers thought price or evaluation preferences for small and local businesses are helpful. [#1, #3, #6, #7, #26, #27, #31, #33, #38, #39, #41, #45, #48, #PT1] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "This would be like a buy Indiana, but if you're a buy small business and you qualify as a small business, they give you maybe so many bonus points, so you have an advantage to be able to bid. I think that's a great idea, but I am not aware of it." [#3]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "I've heard people talk of that but every time I see what goes down it's always low bid gets the job." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I was not aware that they offered that. I think that would be helpful because if you take two printers and you put them against each other, they're equally matched all across the board well, this guy has a crew of 15 but this one has a crew of four, but this one's a lady and this one's deaf. The other guy over here doesn't have anything, he just happens to fall into the category of under 25 people. You should award points for the person who's going to have to work a little harder." [#7]
- The Black American male owner of an MBE-certified goods and services company stated, "Yes, it definitely has structure for – especially with if you want to be more inclusive, reach out to more people and more small businesses, offer incentives for a new vendor you've never worked with before as a smaller percentage point increase or something." [#26]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Absolutely would help. I've not had that but that would help. Because one of the challenges that we have as small businesses is knowing what the market can bear. That's the statement I got from a SCORE counselor in the early days. 'How much do you charge?' 'Whatever the market can bear.' 'Well, how do you determine that?' So, if you don't know what the market pricing is for a certain service, then you're liable to either overbid or underbid. Having that information would put you in the playing field with the other competitors. You're not immediately disqualified because you bid way over or you're not giving the work away when it's really worth more." [#41]
- The female owner of a WBE-certified professional services company stated, "We are a WBE and have been frustrated by the fact that if we do apply as a prime contractor we don't get

any priority points and just don't understand why the MBE, WBE goals are set up that way and our recommendation would be to -- for the state to include that as priority points if you are a prime contractor." [#PT1]

20. Small business set-asides. Twenty-five business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses. [#1, #2, #3, #4, #7, #9, #16, #19, #25, #26, #27, #30, #31, #33, #35, #37, #38, #39, #40, #41, #42, #44, #45, #49, #75] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "That is if your business prime. When you're a sub that's difficult to do." [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "On the federal level they do it all the time and it's been official. On the state level, again, for what I do ... I don't know that that ... I think it's appropriate for minority business as a whole, just not for the space I play in." [#2]
- The non-Hispanic white male owner of a construction firm stated, "I think they should just have bids for small businesses." [#4]
- The Native American male owner of an MBE-certified construction firm stated, "A white guy small business, yeah, but what about all these projects that are woman-owned set-asides, what about Native American, what about Black, Hispanic, what about all of those? Why do they get an opportunity at those and I don't because they can bid small business too?" [#9]
- The Black American male owner of an MBE-certified construction company stated, "What you're saying is exactly what I'm interested in; just give me a piece of the cake, let me get some of that money." [#16]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Whether it's a thousand bucks in my pocket or 800 bucks or 500 or whatever, those little jobs add up and I would love to be able to do the little projects if somebody needs a loading dock or a canopy or whatever on a building, that's a little job. It's still got to go to the state and it still got to be done. I'm really responsive on things like that. I can get them in the office and get them out in a short amount of time." [#19]
- The Black American male representative of a construction trade organization stated, "So this owner in particular, they have an XBE spend goal for the year and then so the way they get to that in some ways is they mark certain projects as XBE projects. Where then, I don't know if the state could do this, but they literally say, okay that this project is so big and so critical that we've got to follow a normal bidding process for that. This project in particular is a unique project or a boutique project so to speak, it's significant work but it's not the mega project. So, then we're going to take that particular project and we're going to do that as an XBE project. Whether the prime or the GC of the project is an XBE and then that of course, the entire project then counts towards XBE spend. So then that would be a project I would like, that'd be a program I'd like to see." [#25]
- The Black American male owner of an MBE-certified goods and services company stated, "Yes, that would definitely break up those bid packages and make it where certified small businesses under xyz, whatever capital." [#26]

- The Black American male owner of an uncertified MBE goods and services firm stated, "If that's legally possible, sure I'd want it." [#30]
- The Hispanic American male owner of an uncertified-MBE construction firm stated, "That's something that could grow our business by 50 percent." [#35]
- The Hispanic American male owner of an uncertified-MBE construction company stated, "Of course, but I would need to know where I can find those programs, or bids, or companies that will hire, because that's, I think, the other problem, how to find them. because maybe today there are so many available, but I don't even know how to find them." [#37]
- The non-Hispanic white male representative of a construction company stated, "Definitely. If they did set it up and get it out to where we can be – it was more easier and beneficial to us, then, definitely, it would be – we'd definitely be extremely interested in it, especially if they could get it up to where we would have people to contact. You know, people that could actually answer any questions that we had. And like either a website or a central processing area where you could contact somebody and get the information on it." [#40]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I think that would be fantastic in the same way that sort of minority set-asides. Yeah, I think that would be absolutely fantastic to implement a platform like that." [#42]
- The Hispanic American male owner of a uncertified MBE and VBE goods and services firm stated, "Yeah, that would be helpful, especially for someone like me who doesn't like to get in over their head and have to go get loans." [#75]

21. Mandatory subcontracting minimums. Twenty-one business owners and managers shared their thoughts on mandatory subcontracting minimums. Many perceived mandatory subcontracting minimums as helpful for small and disadvantaged businesses, while others noted that industry specific requirements may be necessary. [#1, #3, #4, #6, #7, #26, #27, #30, #31, #33, #38, #39, #41, #47, #48, #62, #75, #76, #FG1] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "They kind of got that with the DBE goal. Small business contracting goals. We don't have that. We just have DBE goals. But, in the SBA world they have small business goals." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I think it's very helpful." [#3]
- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "I would absolutely hate that if somebody did that to me. I take my own work that I have, that we perform, and then I have to give it to somebody that I'm not sure they're going to do the quality of the work that we have and then I'm going to have to have somebody there to watch them too? If that happened to me, I would be pissed." [#6]
- The non-Hispanic white female owner of an uncertified WBE goods and services firm stated, "I don't think that would be helpful. I don't think it'd be helpful because I think it limit your choices on how you're able to do a job." [#7]

- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, mandatory is the key. And then hold them accountable if they don't meet those as far as pulling in prime contract offer. I think once that happens once or twice then the word will get out in the industry to stick with it. I've never – I don't know of a time that it's ever happened; I've heard threats of it. Never seen anybody actually do it." [#26]
- The non-Hispanic white male owner of a professional services firm stated, "I think that's what they do right now. I think it's a positive thing. It creates hurdles, but I think the goal is a good one." [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, "I would take that in a minute. I'm not sure that's legally possible. That is not the current practice of the State of Indiana. The current practice of the State of Indiana is they have stated, targets, not mandates." [#30]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Yes, and they do, do that. And that does help us." [#31]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I think that that creates and generates an opportunity for contractors who would otherwise never, ever get a foot in the door." [#41]
- The non-Hispanic white male representative of an uncertified WBE professional services firm stated, "I don't want it, I don't think it's right, and I don't want other people to have to be forced to do something they don't wanna do." [#47]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "I think just because my undergrad is in building technology, and I've worked as a construction manager, that having mandatory minimums is necessary. I'm not a proponent of set asides or participation goals in general. But I'm also not a proponent of discrimination, and until that is done away with, you need those requirements." [#62]
- The Subcontinent Asian American representative of a business development organization stated, "I think there's a general tendency amongst all the supplier or management teams I would call it when they're suppliers team. It's like, 'Oh, you know, we checked the box, and we have 10-person restaurant, then we have 20-person diversity and minority owned business, so I think we are good.' I think we need to change that mindset. Even if it's good service provider or a good contractor, it's okay to give them 100% work. It is almost that supplier diversity is almost working against us, because that limits our ... that just always just tells you that, 'You can only have certain amount of piece of pie. You don't deserve everything.' Which is very ... it inhibits our growth. Why one restaurant owned business cannot as a full contract? Because let's say you should only own 10%, so that drives the behaviors. I'm not a huge fan of those supplier diversity metrics. Yes. I'm glad that it would have that checks and balances, but on the flip side, it actually just limits us." [#76]
- The male non-Hispanic white partner of a majority-owned professional services firm stated, "Partnering, we are trying to, obviously, improve how we look outside of just our qualifications. But what does our team look like and our diversity. So, we are partnering more and more... But, at least a good solid dozen firms that we can go to, to partner up with, to try to have proposals that are 15%, maybe at a minimum of XBE representation against

some projects, some universities maybe hire 15% to 20%. We're not hitting that target at all universities." [#FG1]

- The male non-Hispanic white partner of a majority-owned professional services firm stated, "I think it is both an authentic desire to have underrepresented voices be heard and also a very again, branding oriented idea that we have to look right. This has to look right. It can't look like we're only working with white people. It has to look like we're serving a broader community. So, I think it's both those things. It's both very authentic desire to make the world better and it's a very calculated strategic approach of success. I do think that they're beneficial and I'm pleased to see it more, not just in the public side of projects, but also not for profit and for profit entities as well. Some of the difficulties with trying to meet those goals is one, trying to create or bring on a partner that is either not duplicating work that maybe provided by the prime consultant, but also just because of the perception that that would just be a token measure, just to bring somebody on your team to fulfill the requirement. I think that's also leads to one of the issues with how some of the criteria is written is. There really isn't a way to explain the firms that meet that requirement on your project team, where they're the added value is from the project parameters. This team, are they experts in this field? This is why they're brought on to our project to support the ultimate goal. The way my firm is organized, we have partners that we can bring on that, they're valued members of our team and they have the skills and the expertise that are needed to meet the project requirements. With other teams, sometimes just seems like the XBE components brought on just as a token measure to fulfill that category in the proposal. They don't really have more of an active role on the project team." [#FG1]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "It's wonderful to have these goals. They can be in practice extremely hard to meet and you end up your profit margins run really, really thin because you also spend a lot of time like I said, chasing after, trying to find who should we partner with? Do we partner with this person because it's a woman owned firm versus this one. It takes a lot of billable hours to do that work that ended up hours being, not billable because you're chasing it down in marketing. These goals, these objectives are not just on public works projects, but on private projects. Anybody that is socially conscious in the area that's building a large project, they're going to mirror the goals that the city has established. As the availability of opportunities for XBE to work on these projects expand, the number of available XBE goes down. So therein lies the problem to actually meet the objectives or the goals. The objectives are good, but sometimes they're impossible to meet. Then with the new city County Council resolution that was passed, the change, the code, there are now penalties associated with not meeting those goals. Now, is that going to be a chilling effect on contractors to say, 'Look, I can't run the risk of having my contract cut by 10% because I couldn't meet the XBE numbers.' Will that they didn't have the chilling effect of say, 'Well, I'm just not even going to bid these projects any longer. I'll go into another venue.'" [#FG1]

22. Small business subcontracting goals. Ten business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses. Most acknowledged that this is existing practice for many State projects. [#4, #6, #26, #27, #30, #31, #38, #39, #41, #48] For example:

- The Black American female and non-Hispanic white male owners of a WBE- and MBE-certified construction company stated, "I think most places have them. I think it's all in the paperwork but when you get down to the nuts and bolts of it and you get down to the guys that are doing the job, they're going to pick the guys that they know can do the job man. That's the trouble with this whole deal. You've got to run a legitimate outfit. You can't just be a minority and say I'm here and I'm not getting the work and bitch and moan and complain that I'm not getting the opportunity. Well, what's the quality of the work that you're doing? Is your quantity as good as everyone else? Are you men qualified? You've got to run a legitimate outfit. If you don't, then you're going to be sucking hind tit." [#6]
- The Black American male owner of an uncertified MBE goods and services firm stated, "That's the current – my understanding is that's the current practice in the State of Indiana now." [#30]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "Well, that's the cross and check. That's the checks and balances for that." [#41]

23. Formal complaint/grievance procedures. Eighteen business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses. Most firms stressed the need for confidentiality in these procedures. [#1, #2, #3, #4, #7, #11, #12, #23, #26, #27, #30, #31, #38, #39, #41, #42, #45, #48] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "I will tell you this. We get a report card. It's called a C-R two. Contractors report card. From every state job we work on, an engineer gives us a rating. And, if we get too many bad ratings, it affects our pre-qualification. They discount it. But we don't have any way to complain back. there's no way for us to complain. We're just, we're like second graders and they slap our hands. We don't get any way to complain." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I am not aware of that. I do not think they have it. I think it would be helpful. The problem is, okay, so I've told you about this one prime contractor. There's at least one other that I can think of that was similar. There isn't anybody that you can tell. You can go to the minority business office or IDOA, and be like, 'This prime isn't living up to their commitment.' But if they go talk to them, and they say, '[my firm] is not happy with you,' then that gets out not only to them and creates an issue, but it's other primes are like, 'You don't want to do work with [my firm] now. They're going to throw you under the bus,' because they don't know the whole story, or just word gets out, maybe a competitor, somebody else who would bid on work that we would bid on as a sub, could bad mouth you. It's just not good. I really think that the greater answer is holding these crimes accountable, and letting them know up front that they're going to be held accountable, and creating better transparency, which I think would be a pretty simple enhancement to the pay audit system." [#3]
- The non-Hispanic white male owner of a construction firm stated, "It could be helpful and it could be bad. Because then you're [stuck with] one person's word against another person's word." [#4]

- The non-Hispanic white male owner of a majority-owned construction company stated, "The only thing I know of would be through the union. They have their procedures if someone's not doing something correct, that's all that I know of." [#11]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, "Who do you complain to about the ones I'm talking about? Who do I go to complain to when I have the fire marshal that's a total jackbooted a-hole thug? There's nobody for me to go to. Nobody. I just have to take whatever that guy says. Who do I go to complain to when I have a a-hole, which I have had, detective from the ATF? There's nobody, you know? I mean, I can go and complain to my congressman or my senator. That's the best I can do. But that's risky, if I do that. That guy may come back and then just make my life miserable. There needs to be somebody that I can go to anonymously, just like what's happened to me. There should be some way to complain about that cop who drives like a total jerk and messes you over, or that government agency that does whatever, that makes everybody else look bad." [#12]
- The Black American male owner of an MBE-certified professional services firm stated, "What happened was, I got up through it and actually got a contract on the table, but the problem again was the contract didn't have a whole lot of teeth, he got me through to the [execution] but the guy in the lab who actually sends the work out did not give me the confidence that he was actually going to send the work. Do you know what I mean? It's kind of one of, that's why I didn't do it, it just didn't have any teeth behind it. Those are the type of opportunities where it would be awesome to have people in the state where you can fight, pitch that kind of stuff, because the public need it." [#23]
- The Black American male owner of an MBE-certified goods and services company stated, "Yeah, they definitely need to have that in place before they can take a business off of a contract, you know, and have an aggressive system saying, 'This xyz, you need to include this' or with a timeline to improve or something, not have the prime be so sure to just take them off. So, in the long-run that only benefits everybody being inclusive." [#26]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "INDOT and IDOA does both have that in place and they are good about if you do have an issue, I think." [#31]
- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I think that would be really helpful, depending on what the follow-through process is on that, the actual procedure that takes place after a grievance is filed. Potentially, that could be a valuable tool, I guess if you go back to sort of unearthing some of the good old boy relationships and things like that, that would give an opportunity to bring some of that to light and potentially intervene. Yeah, I could see that being valuable, as long as there was actual action taking place after something is filed." [#42]

K. Insights Regarding Race-, Gender, and Veteran-based Measures

Business owners and representatives shared their experience with IDOA's certification and small business programs and provided recommendations for making it more inclusive. For example:

1. Experience with IDOA programs; and

- Recommendations about race-, gender-, and veteran-based programs.

1. Experience with IDOA programs. [#1, #3, #23, #31, #39, #41, #44]

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, “I used to sit on a committee that INDOT put together. [The Deputy Director] was in charge of the DBE program and she put together a bunch of DBEs. People she thought made some sense and we would get together once a month and talk about issues. And we weren't allowed to talk about a specific job. Okay? Like this guy didn't pay me on this job. We just talked about general issues that affected the DBE program that we'd like to see changed. We made some great progress. I would like to see [the head of the DBE program] put together a group of DBEs that would come in and you pick our brain and we'll pick your brain and let's solve some of these issues. Our contractor group, Indiana Constructors, we have a group called the joint cooperative meeting. We meet quarterly. It's contractors and INDOT. We have the head of construction at INDOT. We're not allowed to talk about any particular job. We're allowed to talk about specifications, better ways to do things, safety, how to get along better on the jobs and it's really profitable for all of us. It keeps things moving forward. But the DBE program does not do that. We're very fragmented.” [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “No, the only thing that I would say is that I want the State to know how I appreciate this program and how their goal has paid off. So, we have, I mean, hired a lot of people.” [#3]
- The Black American male owner of an MBE-certified professional services firm stated, “They don't work. All my friends who are bigger than me, the mentors ahead of me, say that they sit you in that program and they don't give you any work, all they do is try to prepare you to get the work and you never get the work. I got mentored, who got businesses way bigger than mine, [by] guys driving Corvettes and [I] can't get the work income. They're getting, they're eating off the government work. They're getting contracts with the library; I got a friend of mine who owns the facility service business. He provides facility stuff to the state, to the prisons, to all that stuff. I do my forklift training in his warehouse, and we laugh, how I was able to get in Cummins and he can't. He's in a diversity program, he's done all the right things, he is my mentor. We need companies to build trust with African American businesses and let us get some work. That's what I would have to say about that. I'll allow you to take that service.” [#23]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, “I think that they've done a better job of requiring people to seek bids from MBEs and DBEs. Anything for us like that is positive from a prime standpoint. It's challenging also. With the veteran-owned and most of the DBEs are like us. If they're a DBE, they're also either an MBE or a WBE but the veteran ones, there's not a lot in Indiana in our area to solicit work for or get work for. But that's increasing, so that's gotten better.” [#31]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, “The only comment, when we contacted them, I mean they were very helpful, we're just trying to figure out how we can grow our business, so they gave us some links to look at online and stuff, about our 8(a) certification. We're going after our 8(a) certification. We

didn't know nothing about that, and we found out about being 8(a) certified, so that was very helpful." [#39]

- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, "I mean because – other than the certifications that the varying agencies have, I really don't know a lot about what some of those programs are. One of the things that I don't do, whether or not I could or should is another story, is I don't necessarily pursue programs based on my ethnicity or the fact that I'm a veteran or a woman. I don't necessarily see life through that lens." [#41]
- The Black American male owner of an MBE- and DBE-certified construction firm stated, "I have been at some of these events with some minority vendors, and sometimes we get into a point where we're bitching about the work and we're bitching about not getting opportunities. And then come to find out that some of the guys that are bitching about it, they really don't have their line of credit established. They don't have, as I said earlier, when we had to get together, we had our – we weren't really organized. We got together really fast and we started making money. Okay, good. Everybody's getting paid. But as far as putting everything down into a system and laying it all out, we didn't have any of that. And I think what the process of going through the MBE with the State of Indiana as well as with the State of Illinois, the guidelines are set. They give you a checklist and say these are all the things you need to pull together. You need your three years of taxes. You need contracts that you've signed. You need ... da, da, da, da and they lay it all out. So, when I run into some of my minority company friends who might be complaining about the process or whatever else, I ask them did you take a look at your checklist and did you go through the checklist? And if you haven't, like I said, most of these organizations from the CMBDC, which is for private companies, all the way to the MBE for the State of Indiana and the DBE for the State of Indiana, there's checklists and process and numbers to call for every one of those processes. So, bringing it full circle, I truly believe that the – at least the State of Indiana has done a very fair job in laying out what the guidelines are, what you have to do to get certified and what you have to do to win these jobs or be able to compete in the job. And I am also – I'm not naïve so just because I have my MBE does not mean that I can just walk in and get an order, or a contract signed. I'm very much aware that sometimes, you know, I think I have a very good number and the number I have is high. And as I said, where I'm able to find out what the issue is because I was able to speak to the contractor and the contractor will tell me, 'Hey, you missed this job by \$10,000.00' and then I go back and look in my bid and I go oh, guess what. \$10,000.00 was going to be the two excavators that we're going to have to rent for the two weeks and so, guess what, I'm out. There's nothing I can do about that. So, I'm comfortable with dealing with the State of Indiana. I'm comfortable dealing with the county of Lake County and Porter County and, quite frankly, Porter County doesn't have a lot of minority participation anyway. It's pretty – but even with that I have found that, for example, the woman who handles the MBE application for the State of Indiana is a white woman who knows the system backwards and forwards. And when we get together as a group, she's always coaching everybody up on how to look for opportunities within the system. So, I don't know if that's contrary to other states. I don't know if that's contrary to other counties, but I give high marks to the State of Indiana. I give high marks to Lake County, Porter County because they do reach out to give us the information that we need and also the city – Marion County, Indianapolis, because

everything is headquartered there. They do a really good job of inviting us to networking events, processes on how to – and I think that there's almost, except within the State of Indiana, there's almost a learning opportunity once a quarter. At least once a quarter they have – there's an invite that says, 'Hey, if you haven't gotten your MBE and you still are struggling, there's going to be this event.' And someone will come up and speak for an hour or two hours and then they'll break it down into individual sessions where you can actually meet with somebody. I don't know if everybody's doing that, but that's what the State of Indiana is doing. And, as I said earlier, the State of Indiana is even more aggressive when we get into dealing with the DBE applications because that puts minority and women-owned businesses together." [#44]

2. Recommendations about race-, gender-, and veteran-based programs.

Interviewees provided other suggestions to IDOA and the SEI agencies/colleges about how to improve their certification programs. [#2, #4, #11, #26, #27, #28, #31, #32, #33, #34, #37, #38, #39, #41, #42, #48, #62, #69, #72, #75, #76, #FG1, #FG2] For example:

- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, "I wish there could be muscle put into the program where there would be ... Without compromising any kind of corporate trade information, provide for disclosure, when using public funds why can't everybody know what everybody is ... How they're participating? If you're going out and you are evaluating distributors, evaluate all the distributors and make sure that you're applying a universal standard that is the standard dictated by the federal government for the program. That standard should be applied to everybody." [#2]
- The non-Hispanic white male owner of a construction firm stated, "I think the state should really have a small business website for local small businesses to go to. To bid on jobs or bid on things to where larger companies can't. I mean you're already registered as a small business through the state anyways. So, then you could have sole access to these sites to where you're bidding on a job that you know, the other guys bidding on, but you know the other guy is in the same boat you're in. I'm a firm believer that a lot of the small businesses, and I'm talking small, small businesses with less than 10 to 15 employees, that's what makes the world go round. I think the state should reach out to more small businesses to let them know and make aware of the opportunities to bid some jobs and stuff like that. It seems like when you have a larger company you can have somebody in the office all the time just researching these jobs. You know, to where that being a small company with only two, three employees, every night you have to go home and do it and by then it's already done, somebody else has already got it." [#4]
- The non-Hispanic white male owner of a majority-owned construction company stated, "If it was more visible, which it could be and maybe I'm just not looking in the right places. Maybe a website or something, or you could go and find out information. Maybe even a tutorial on how to submit the bids or something like that for the state. Something along those lines." [#11]
- The Black American male owner of an MBE-certified goods and services company stated, "I think they could – you know, to be more inclusive, get the state to put something in guidelines saying, 'Hey, you know, this bid is out here. We want to make a more well-

rounded, diverse.' I understand having contacts and relationships, but if they say, 'This bid here, we know [this firm] uses the same people. This particular bid you're getting xyz points,' you find a new relationship occasionally. Kind of enticing them to broaden their horizon, 'cause sometimes you get people that stick with the same people they use, which is not good for everybody else, because you're never going to get a shot to even do anything as well. So, you can take an offer opportunity where, you know, as an incentive, you know, we're going to give three more percentage points if you can include somebody inclusive that you haven't used before or something occasionally. One of the things that I've found to be – I don't know whether it's federal level or state level, what I've found to be disheartening as a veteran-owned business, every time I inquire about that no one seems to include Indiana Reserve or National Guard person as a veteran on business, which is really disturbing to me, because you sign up for the same thing and you could be activated and go to war and you did your weekend, you did this. To me that should be a veteran-owned business; it's a service to do your two weeks of summer training, specialized training. So, I think that needs to be really evaluated and as to being an acceptable addition to the veteran-owned business stat. 'Cause my understanding, still, you have to do active duty full-time service with one of the other agencies, and it's almost you get – you don't get the same benefit of a veteran-owned business, which just kind of blows me away. You can put in 20 years, or 14 years like myself. I'm still trying to figure out if and why not we don't get to classify as a veteran-owned business." [#26]

- The non-Hispanic white male owner of a professional services firm stated, "It would be nice to have – if there was a navigator role – and maybe there is one in the government – that a small business could come to and say, 'Hey, I want to learn how to do business with the government.' Maybe they would have some workshops so they could have. But kind of a point person of this is somebody who can guide you through the processes and – you know." [#27]
- The Black American male owner of an MBE- and VBE-certified goods and services company stated, "I'm thinking that some of this stuff should automatically be set apart, that it would be directed for MBE. That would make it more fair. It would make it that this – you shouldn't even have to bid on it. Just a sum – just set aside just for just making sure that the minority has a certain amount of work. So, in my mind – and my mindset is that it's broken. I believe that it doesn't help the minority in a way that it is designed to. And I just think that it just should have a – just a big overhaul to make sure that the MBE's have their share because it's – even today I don't have a subcontract with the state or anything like that. I think that they should set aside certain POs that is geared from the state and federal levels that just only the minority businesses if they're capable of fulfilling their contract should go out to. I think that would solve the whole problem." [#28]
- The non-Hispanic white female owner of a WBE-, VBE-, and DBE-certified construction company stated, "Besides just there being a requirement on certain contracts, which helps us when there is. Not so much besides that. Just for them to continue to seek out and approve veteran-based ones because it's hard to meet that requirement at this time. Pretty much all the other areas you can get – there's enough competition. A lot of its supply and material type things. That type of thing. Most of the veteran-owned companies are more geared toward that but there are a few that are, very few, that are construction." [#31]

- The Black American male owner of an uncertified-MBE construction company stated, “Now, here’s what I said one time in another meeting along the way. I was talking about this minority piece, and I said it to the person who was leading the meeting. He was from the SBA. I used to be an 8(a) contractor. So, I said, ‘I’m not the minority in Gary, Indiana, where I live, from a number perspective.’ I said, ‘I’m a majority, because we’re about 80 percent of the people in the city.’ So, what I have observed from that perspective, that along the way that we would look at this through, ‘Where are we now?’ But I think some things have been misdealt with, if you will, and worked against us as minority contractors when we take that the wrong way. Now, I’m not a lawyer or that kinda thing, but I think what needs to happen is, this whole idea of what can we set aside for minorities – And here’s what I did with that, I said, ‘Now, if you’re gonna take ten percent of something and set it aside for 80 percent of the people, there’s something wrong with that picture.’ So that’s what we’ve been dealing with So I’d say this – I would be more than willing to be on a committee, if you will, to do another study on what did we get wrong. It’s like what we sitting here watching TV now; they trying to figure out a vaccine for the virus. I think we need to go back to the table, and come up with another approach, because what we got going on now is simply not working. And with all due respect, you understand what I’m trying to say? Well, again, it all boils right back down to the same thing, y’know? We’re talking about rainy days. Construction businesses up there next to restaurants, y’know, for going out of business, because they can’t stand a long wait for nothing. They gotta have something going all the time. But we had a – there was another word that I’m trying to say, but some access to some monies been set aside – something like the government is doing right now, with the corona virus piece. If the MBE-certified contractors had access to a pool of money somewhere that the state’s got, that when these dry times come, for whatever reason, that we would have a place to go. But right now, the way it’s been, the place you can go is out the back door. We haven’t had that.” [#32]
- The non-Hispanic white female owner of an uncertified-WBE goods and services company stated, “I guess I am unaware of anything out there, so is there a website or a membership, a group that we could join that we kind of network together? Again, I would recommend a website or some sort of marketing group, networking group that we could all maybe update our businesses through, let people know what we do have to offer, what we’re looking for in a client, something like that.” [#33]
- The Hispanic American male owner of an uncertified-MBE professional services firm stated, “Make LGBTQ – discriminating against them a hate crime. I mean I don’t think they’re recognized yet as a minority group. They need to start there. Then just – just say they’re people. What are you going to do, grind them up, throw them in the ocean? But they’re not recognized as a minority group, as a – I think as LGBTQ [person]. They just don’t recognize them. You can still get fired from your business for being gay and you don’t have any standing. You’ve just got to take it. They can start there.” [#34]
- The Hispanic American male owner of an uncertified-MBE construction company stated, “I would say just tools of training, tools for searching for jobs, programs to learn more about my field. Yeah. Probably we already said that, but those tools, and tools on how to learn or how to be better.” [#37]

- The Black American male owner of an MBE-certified professional services firm stated, “I guess the only thing I would add – and I think we’ve already touched on this kind of several times – is offering for having them to increase the percentage. I guess that’s one of the discussions I did have with the gentleman about Washington Township Schools. But when we went through the whole thing and we were talking through it, I’m sitting there thinking the whole time, ‘Man, that is a really small percentage.’ Because, again, from working in the business for so many years – and I don’t think of them as WBE or MBE. They’re just engineers, they’re architects, they’re people that I’ve worked with over a number of years. And they’re as good as anybody else that I’ve worked with over the number of years. And so, when I see, okay, they’re gonna be recommending to do such a small percentage, my thought process is that percentage needs to be bigger because if the percentage is bigger, then whomever they’re working with or whomever they’re working for can see: hey, these firms or these entities, these professionals are just as good as anybody else, but they just happen to be MBE or WBE or VBE or what-have-you. So, if anything, I would add is figure out a way to get the percentages increased.” [#38]
- The Black American male owner of an MBE- and SBE-certified goods and services firm stated, “Well, again, just getting more information out to let them know what’s available to them, letting them find more help, and letting them know that they’re not out there by themselves.” [#39]
- The Black American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, “I think it would be really, really helpful for small businesses if some of the programs that you mentioned training and seminars. So, early on, I attended a seminar at Ivy Tech. When I say early on, I mean within my first year of incorporating as an LLC. I don’t know how I found out about this seminar. I attended this seminar. It was an all-day event, seems like – 20 years ago. But I learned so much, that I needed to have insurance and what kind of insurances and that I needed to have an accountant and someone to do my books. The difference between a 1099 and a W-2 employee. I mean they crammed – it was probably a Small Business Administration event. They crammed a gallon into a pint. But the information that I received at the seminar established, for me – was overwhelming, no doubt. But it let me know all of the things that I needed to know and all of the different aspects of business that I needed to pursue, that I needed insight on, that I need to make sure that I was doing correctly. It just made the world of difference. It is a part of why, 20 years later, we’re still here. I mean I found out that I had workers that I was working as independent contractors but they were really employees. Oh, I prayed to make it to the end of the year – please, let me make it – so I could hire them as employees and not independent contractors. I mean I didn’t know the difference between the two, initially. But when presented with that knowledge, I quickly made that change so that I wouldn’t be held liable to that and all of the fines and penalties from a taxation standpoint that go along with having people wrongly classified. So, as a small business, I mean when you incorporate, I think, with the city, with the Secretary of State, there ought to be some things lined up right away that will educate the entrepreneur on some of these things. ‘If you’re one person, if you’re going to have employees, if you’re going to do this, these are things you need to know. These are the agencies that you will have to give an account to, that you will be responsible to that will govern and regulate your business.’ No one’s going to tell you that. If no one tells you that, you will never know. You will just never know. It’s amazing to me the

number of people that have a business idea or they're already in business and I ask them, 'Have you ever gone to SCORE?' 'No, what's that?' They don't even know about the Small Business Administration and the free help, free counsel, free advice. They've never heard of it. I don't know how I came across that organization. I don't know how I ended up in that first seminar. But I talked to so many businesspeople that don't have a clue. Many of them are operating. They are providing services. They are providing supplies, or equipment, or goods and they have no – and they're completely intimidated by the prospect of going to one of these meetings or consulting one of these agencies about how to do. I ran into a lady that I've known for many years. She and her husband are in business. He's a contractor. She's still keeping all the books. I ran into her at a SCORE seminar. She's still doing so many things, keeping the books, and didn't know about QuickBooks and hiring a bookkeeper and just – that's why so many small businesses end up in trouble with the state, with the tax man, whether it's state or federal, because they just don't know. They're operating. No one's bothered to say, 'Hey, well, did you know you need to – these are some of the things, these are the agencies that regulate your business and all aspects of it so that you can comply?' No one offers that insight, that information to usher them along so that they can conduct business legally and honestly and with integrity and dot all the Is and cross all the Ts. No one's going to offer that. If you ask another business, they automatically see you as this competitor. 'You're this foe and I don't want you in my little circle. I'm not going to tell you what I do and how I do it, because then you're going to take something from me.' Really? There's enough business out there for everyone. So, many people are gifted and talented and they have no idea how to plug in. It all just seems impossible to them." [#41]

- The Black American male co-owner of an uncertified MBE and LGBTBE professional services firm stated, "I think explicit legislation protecting that specific class [sexual orientation] would be incredibly helpful. It would give businesses the ability to leverage that in protecting themselves and would make it easier to pursue and obtain business and overcome prejudice over time as a result of having a foundation to stand on." [#42]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "The classification as DBE, MBE is still very helpful and necessary, because I do think that that firms are on the outside of the good ol' boy network and it's very difficult to get in." [#48]
- The Native American female owner of an uncertified MBE and WBE professional services firm stated, "There needs to be more engagement, and from a legislative standpoint, you know, I don't know if there's something that can be done, because who, private entity or a public entity, selects to provide a professional service. I don't know if there's any type of governmental regulation that can be involved in that. I don't know. If there is, great, yeah. Do more for professional services. Generate a database. Give that to the institutions. These are the minority firms, these are the women-owned firms, and give them projects, not have them be 5 or 10 percent of what you're doing. Give them the project." [#62]
- The Black American male owner of an MBE-certified construction firm stated, "Being able to know all the laws and all the regulations and everything that's updated, no one's going to be sitting at a computer all day and night to look at logs and regulations and it's got to be some type of thing that when I do hire one, my secretary can go once a week and just briefly just sit in a class to say, 'Hey, okay, you know' – or somebody sitting on the phone, just someone to talk to, just kind of say, 'Hey,' they're drilling you or they're telling you what new thing is

up-and-coming or what it's supposed to look out for or what not to look out for, because we don't need it. And you know once the economy pops back you know there's going to be all kinds of fines here and there. Everybody's got to get their money back for the time that we were off. There's going to be a whole lot of police officers writing tickets. It's going to be a different world; we already know that. As RV drivers, FedEx, UPS, whatever you drive, you know, DOT is going to be doing their thing, everybody's going to be on their Ps and Qs, trying not to make a mistake. And that's the crucial part, where a business is going to go out because of the fact that you're going to tag them for what they don't know, what they thought they knew when they could've knew. So, I'm saying all that plays part because of the fact that they didn't get proper training. No one's up on top of things like that right now. How can you be because of what's happening in the world today? So, my thing is that more training, more people that care. And being mindful and grateful and respecting others. So that's all in a nutshell, because respecting others – you get some people on the phone that can be so rude because you don't understand something; they will actually hang up on you or put the phone down. But you're trying to know the type of job and what you want to do, and you have questions about it. So, you'll be on hold for so long; that's disrespectful. If we don't have the people power to tell our people in which direction to go, we just set the phone down and ignore and then they finally hang up, or you hang up on them by accident and then it's like hell getting them back on the line. You know what I'm saying, you have to wait three or four, five, six days to get to talk to anybody, 'cause you're always on hold. But you want to go ahead and get started on your business, and that's not fair." [#69]

- The Black American male owner of an uncertified MBE construction company stated, "I think they should have like reach out to the minority-owned businesses, try to bring us all together like having like events – not especially events but like having somebody like to come like to talk, like pull us all together, like send memos out and be like, 'Yo, if you all want to better your all business or whatever we got some valuable information and some people that can help you all do what need to be done to better your all businesses. We holding a crusade somewhere like where the [inaudible] somewhere, blah-blah school,' you know what I'm saying? And if the people really more so about their business and want to reach out to every minority they got the opportunity to come. And if they don't come then that's on them. But for the ones that's minority that really needs the help and want to learn and want to grow and want to – I just think it'd be a great opportunity for them, don't you think?" [#72]
- The Hispanic American male owner of an uncertified MBE and VBE goods and services firm stated, "Something for veteran-owned companies that, y'know, there's a lot of us that are minority- and veteran-owned, and having contracts set aside for that combination I think would be very helpful." [#75]
- The Subcontinent Asian American representative of a business development organization stated, "I am really looking for the chief diversity equity and opportunity officer [that] could be instilled in governor's office. Which I believe the interviews have been already in process. It' going to happen in probably next one months I believe. Yes, I know, but what governor has made a public statement, and I heard him just yesterday speaking at another even also. We need a cabinet level overarching person to now lead the entire state that individual is going to then provide those directional guidance to all the agencies. I would like to have some Asians be part of that person's advisory board. Having Asians in those

advisory committees and all where we can then provide some guidance, because we are still sitting outside ... like we're almost strangers. Having that advisory relationship would help us. " [#76]

- The male non-Hispanic white partner of a majority-owned professional services firm stated, "I'd say in Illinois where, when you're doing public work, I wouldn't say it's not the same in Indiana. Illinois is strongly led by the Capital Development Board, CDB, out of Springfield, an agency that delivers projects. It's very heavy handed. So universities, by and large, don't really run their own projects maybe outside of University of Illinois. They have lots of materials, lots of information over there, their website has three or 400 XBE firms on a list that are certified to do work there. It's a little more available to find and partner those professionals than it is, seemingly in Indiana." [#FG1]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, "When we're designing a project, we want to do community outreach and get to people in the neighborhood, in the community and find out what their thoughts on it are. One of the big watch words in the community outreach world right now is you have to meet people where they are. That you can't just say, 'We're going to have a meeting Tuesday at 6:30, and everyone needs to come and that's your only opportunity to give input,' because there's going to be so many people who cannot meet that schedule, because they have childcare, because they work a night shift, because they don't have transportation, because of all these things. Finding a way to meet people where they are, to me, the most important thing. Going back to the construction world, if you have a WBE or an XBE requirement for a bid, and there's one meeting at 10:30 on Wednesday, that's required to be at, if you want to bid on this project, that means my firm has to have someone who's available at that time, who can go and do that. If I don't have that person available, then I'm not going to meet the requirements. To me, it's meeting people where they're at. If someone's trying to establish a small firm, how do you make it so that they can do it online or do it in a way that will allow them to, number one, in the moment we're in right now, they're probably homeschooling their children because their kids can't go to school. How do you make it so that it's more accessible for that black woman, who's starting her own business to be able to meet the requirements to even attempt the bid. That to me is a huge part of it." [#FG1]
- The Black American male owner of an MBE-certified goods and services firms stated, "Well, it's our tax dollars. So, I mean, they can just put more money into black businesses. I mean, it doesn't have to be the Black Chamber, but put in a black ran organization, when you're talking about black businesses. Put in a black ran organization that is focused on black businesses, so that they can help them become primes, and more than just subcontractors, or at least, that they can help get these businesses to become qualified subcontractors." [#FG2]

L. Other Insights and Recommendations.

Other recommendations for IDOA, SEIs, or other public agencies in Indiana to enhance the availability and participation of small businesses. Interviewees shared

other insights or recommendations. [#1, #2, #3, #5, #12, #13, #19, #22, #26, #27, #30, #40, #46, #65, #66, #67, #71, #72, #AV, #FG1, #PT3] For example:

- The Hispanic American male owner of an MBE- and DBE-certified construction company stated, “We should have a closed-door forum to talk about, with minority subcontractors, just talk about our problems without the primes there. we should have a couple IDOA people. At INDOT we should have Woody. And, we should have about six DBEs. Women, Blacks, Hispanics, a white and we should also have the veterans and women on business. We should all get together in a room and close the door and have a two-hour meeting and talk about how some... just talk. There's all kinds of improvements that can be made if we work on it.” [#1]
- The Black American male owner of an MBE-, DBE-, and SDVBE-certified goods and services company stated, “If the federal government has established its policy, rules, regulations ... and that's your funding source, and that's how they apply it at the federal government, why are we applying it differently at the state level? There should be no, even perception that politics plays a part and anybody in government get to pick winners and losers. Under no condition should a minority dissipate his business that has all the certifications. Need to be fighting with the administration. The administration should be supporting them in trying to get business.” [#2]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “You have the prime put in their amount paid to sub, and then the sub goes in and puts in an amount received by prime. Okay, and then they're looking to see if that matches. But what if the State had invoice received, or invoices paid, right? And then, if there was something here, 8% commitment, benchmark, or whatever goal to date, your spend goal to date, or something. And so, you take this number, I guess this number, and you do 8% of this number. And so then, you can say, ‘What's the difference?’ And so, they can be working toward hitting that goal, or maybe it's visualized and it's a little bit of a, spend to date is here, and it should be about something. Do you see what I'm saying? So, there would be accountability, and that the State could get flagged when it's half of the goal, and then know to reach out. This alone does not create accountability, or if it was on here, are you aware of accountability? I'm not aware of how they're being held accountable. The system in and of itself, I think there's a process issue, or a transparency issue. That's my two cents.” [#3]
- The non-Hispanic white male owner of an uncertified-VBE professional services firm stated, “Well I know that I would like to see a percentage of what we collect, it doesn't have to be a lot, but some kind of a little compensation for the work that we have to do to collect sales tax for the state. And I think it's unfair that we're bringing in thousands and thousands of dollars every month to the state and not getting a stinking thing and if you don't pay them up, they're going to put you in jail. So, you don't have an incentive over then the fact that you might go to jail if you don't pay it.” [#5]
- The non-Hispanic white male co-owner of a VBE- and WBE-certified goods and services firm stated, “Stay out of the way. You put these government bureaucrats that screw businesses over in multiple ways, and you don't realize. And it's unreasonable stuff. If you keep government bureaucrats to where they keep torturing businesspeople and making

their life difficult, you're going to keep losing businesspeople. So, there needs to be some way, and whether that be the cops that are bad cops that make the black people's life miserable, or it's the Department of Homeland Security that makes fireworks people... Or church people, actually, too. Whoever it is, there needs to be some way, some phone number, to be able to say, anonymously, so that you don't get the payback coming back at you, that somebody can investigate and say, 'This is a bad DOT guy. This is a bad cop.' And then they're getting rid of, and then it's beyond the union people. It needs to be not just cops doing it, you know what I'm saying? There needs to be other people involved. Not just their people. That's what needs to happen." [#12]

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated, "I would like for the state to form a focus group that sees what's available in the state and monitors, whether it's actually given to people in our state or not, I really would like to see that happen. I think there needs to be someone monitoring to say, 'We appreciate that you did this little bit of business, but in terms of what the actual contract was, that will perfectly capable of doing the same thing they are, shipping it. Then the state is paying to ship it to California and then paying for it to come back in the mail to Indiana residents.' United Healthcare has a big, huge contract going on right now with the State of Indiana somewhere. And we did a little bit of the printing, but it was ridiculous, because then we just shipped them out to California instead of us doing the mailing portion of it, which is what we do here best. I would love to see a task force set up to help monitor that, that you could actually call someone, and they would do a little follow up and help us with that there needs to be a task force that monitors that more carefully, to make sure that people are doing what they say they're going to do. If this is supposed to be happening, who's monitoring that. That's what I always wanted to know. And like, what's that company that has the mail room up there? They can't handle it all. So, I've been trying to find out where they're mailing from, but they don't want us to learn too much about the state business. They wouldn't allow us to help them. We've been working on that too. And to me, they should be held accountable to make sure they're doing business with WBEs and minorities." [#13]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "To reach the degree where you're a registered architect, that's quite an accomplishment and most of the people I would say to have achieved registration are competent and can work at a high level. I would like to see the state reach out a little bit and get away from some of the bigger firms that are in Indianapolis that take them out to dinner or whatever. You take all these jobs, after job, after job, but you don't make any money on just trying to work your way into the system. Then the million-dollar job comes up and a firm in Indianapolis gets it because they took them out to dinner while they were at the board of education convention. They were a bigger firm and everything else too, but I would like to reach out to the local professionals. That would be fantastic." [#19]
- The Asian Pacific American male owner of an uncertified MBE professional services firm stated, "There should be a better way that the government be able to reach out to those small businesses. Especially, the new ones, in order for us to know that there's this help." [#22]

- The Black American male owner of an MBE-certified goods and services company stated, “Other than having an office or a liaison person that can – I don't know if they have a workshop on a Saturday or one day a week where if a person's working on a contract to state - a person who's familiar with how to fill them out, has a person that come in and bring what they have and physically ask the questions or have someone – someone could e-mail. In general. We know they can't know everything, but that stuff is general questions that a person's trying to fill one of those out without knowing what the correct answer is. And you don't want to put the wrong answer and eliminate yourself and the opportunity you're doing with it. So sometimes you have a lot of basic questions that someone could give the answer to on those bids. And I suppose I'm not sure if we can reach out to the person who posted the bid would be the person to reach out to, but a lot of times most people don't know who to reach out to if you have a question. From what I've seen, they have these workshops, a lot of times they'll space them out within a two-hour, hour-and-a-half reach of each other. I think that's okay. I think the frequency – I don't think they have them, you know, if they had once a month somewhere. But, you know, I missed a spot, so next time I want to go here. I don't think they have it as well. They only have quarterly, and I don't see them very often popping up region-wise. But they did have that weekly or month-ending, or say, ‘Hey, the state's going to be here.’ During that there's going to be a – you know, have a whole day where it's going to be helping people bring – you need to bring this to get certified and then you need to be – help you get basically down the track with some of the paperwork. That would be instrumental in, you know, an event that's held on a Saturday or Sunday. Most businesses a Saturday or Sunday would be probably time they'd have the time free to actually do that. But that would definitely help myself. That's probably, okay, I want to get some information as a DBE and they put a list, you know, to bring – the first year, bring this, bring this, little corporate book, bring this there. And then have a stationary and a copier – like you're going to get a lot of paper knocked out right then and there and answer questions while they're there, three or four people that maybe are helping to get certified. It will get more people certified.” [#26]
- The non-Hispanic white male owner of a professional services firm stated, “I think Indiana has a good government. They pay on time. They are good to do business with. I don't see a lot of corruption. I don't know what it's like in other states, but I don't think it's as good as what we have here. So, I appreciate that.” [#27]
- The Black American male owner of an uncertified MBE goods and services firm stated, “I think the IDOA does a fairly good job of making what they can offer available to businesses. I also think the City of Indianapolis does a fairly good job of making the opportunities available. We have a regional minority administrative group here in the city that does a reasonable job of making minorities aware of what opportunities are out there. The problem is that the ability of some minorities’ and women’s or veterans’ groups to bid on these projects is limited by what is decided how a project is bundled. If the bundled project is too large, it's going to by its very nature exclude small businesses. A \$10 million contract is not necessarily gonna be opportunities for some small businesses to bid on that but packaging it smaller than that might not be positive for the organization that's making the offer. I understand that. That's just the way it is.” [#30]
- The non-Hispanic white male representative of a construction company stated, “I would say, trade training. More emphasis on getting the trades back into schools and getting

people trained in the trades. I know, supposedly, there's supposed to be an effort to do that, but I'm not sure how effective it is in the schools to get people to go into the trades. Because a lot of our employees are older, so if it's not pushed in the schools and everything else, then we're gonna run into a situation where we're not gonna have the people to work once they start retiring." [#40]

- The Black American female owner of an uncertified MBE and WBE goods and services firm stated, "It would be nice to know how to get them. I have no education on that. Hell, I didn't even know who you guys were until somebody called. So, you were not a blip on my radar. And maybe making yourselves more known to us would be helpful. I mean you have access to the information, you see when somebody opens up a new store, I would think, you know, because we have to register with the government and get our TIN numbers and whatnot. That's your opportunity to reach out, send an e-mail or some literature in saying, 'Hey, here we are. This is what we do. This is what we can offer. Here's our website'—like you just did, 'Here are some links that may be helpful to make you successful. What else can we do for you?' And I'm not saying you've got to put out a monthly newsletter, 'cause that's expensive. But had I known that this resource is here, I may have made some different decisions last year. I maybe would've had resources at my ready had I known. But I didn't know. There is so much that you have to learn becoming a new small business owner. And so many things I'm sure I'm going to stumble on for the next ten years; didn't know it was out there." [#46]
- The Subcontinent Asian American male owner of an uncertified MBE professional services firm stated, "I've found sort of the new business website and all that have been updated in the last two years. A lot more user-friendly. I think there's an improvement to sort of ease of access and ease of registration. So, I don't know whether or not you're involved with the South Bend - Elkhart Regional Group Partnerships, but they do a very good job with connecting people to mentors and advice and making sure that they have access to capital. But investing in these sorts of local, community-based organizations, like city-based organizations, I think that's really helpful." [#65]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Anything that they can do to help develop the workforce that we talked about very early on from – at the high school or trade school level, to create knowledge of the building trades in general, whether it's from a labor standpoint or if it's from a – on a design track. Workforce development is a huge issue for the AE industry. We don't create enough engineers. We certainly don't create enough draftsmen. The places to go and gain that experience, there's not enough of them." [#66]
- The non-Hispanic white female owner of an uncertified WBE professional services firm stated, "I think they need to be aware of in the state of Indiana who's out there. And like I say, I use that other example. I think people don't pay attention from a community level all the way up to the top. We need to say, 'This is our state of Indiana. There are great agencies that can produce really good work.' And I think they need to have more of a personal relationship, especially with these younger upstarting companies. It's hard to get to the right people. It's hard to get in front of people sometimes. And I think it's important for them to know who's out there. I think there's a lot of talent in our own state, in our own community, in our region. And I think a lot of times, whether it's political or whatever, people just don't get that opportunity to be known. And especially with the – I think it

would be hard to be starting a company now, young company. But I just think they just need to be aware of who in their state can provide some really good services instead of going other places, and just to make themselves aware of the talent that is around. You know, I have a company in Detroit that loves our talent and they worked with us for 20 years they like us so much. But I feel like I hate to see companies and the government miss out on who these people are that can actually do really good work for them. So, I think they need to raise their awareness as to who's in their backyard. If that's a good answer. And make it easy for us to actually have a relationship with them instead of a binder. I guess it would be connection with the people in the State of Indiana would be great, maybe a representative, maybe somebody that would come and visit from the state and come to our agency and visit and say, 'We're going to visit Northwest Indiana and look at the talent that's here.' Not just us, but maybe put a face out there for our state, to say, 'We're a great state. We want you to know about us, we want to know about you.' But maybe that sounds really old fashioned and silly, but I think we have lost a lot of the personal connections, and everything is a binder or something online, a thing to fill out, and you don't even know where you end up. So, I think like my long-winded response, I just think it would be nice to raise awareness and make it easier for people to call somebody down state and say, 'What do I do? I'm a new agency, I'm women-owned, can you tell me – can you guide me? Can you tell me the best way to do this?' Because nobody knows all that stuff. And you're trying to get a business, you're trying to do stuff, you're trying to run your day-to-day business, but sometimes a helping hand, somebody that says, 'Look, we're excited for you. You've just started your company, you're working hard, I'm going to give you – my name is Bob Smith, and I'm going to tell you the best way for you to go about this.' But maybe just raise awareness and then also make it a little bit easier, we probably missed the boat. All of those times I drove to Indianapolis and got up at 5:00 in the morning to go to that meet-and-greet, I never got any work. I think I told you that a long time ago. I put my name down, I left my business card, and then I was just like, 'Forget it. I'm not going doing this anymore.' I quit going. We just never got business out of that. So maybe there's a different way to be seen. So, I guess that's my answer. I don't need to be seen anymore, but I hope upstart companies have more of an opportunity. it's real important to me, these agencies are – and I hate to say the tourism thing, but they need to do business in their own state. They need to do it in their region, they need to do it – that is probably, and I hope you don't mind that I say this, but I think that has been the most frustrating thing, is when we have all these different public sector agencies in our region or in our state that we're overlooked by them and they go outside of the state or outside of our region. I think a lot of our public sector people need to look in their own backyard. They don't have to come to me, but they can go to the other agency down the street or to – I've seen contractors that are totally overlooked when they're doing public sector work and they're bringing in contractors from out of state. So probably my biggest complaint is we live in this state, we try and shop and do everything in our state, even though I have to go to Chicago sometimes. But my first preference is always what's in my backyard and how I can support my local business, freelancers. I look in my own backyard first, and I think that's the most important thing I could say today. Because years ago, when our Tourism Department spent thousands and hundreds of thousands of dollars with a company out of California, that's bad. That's not good for our state." [#67]

- The Black American male owner of an MBE-certified professional services firm stated, “Truthfully, I think IDOA and others are trying to do a reasonable job. I mean, all you can largely do is educate and inform, and then try and make sure it's a level playing field, or as level as reasonable. So, I think once you've done that to a reasonable degree, I think the balance becomes the responsibility of the XBEs to respond in kind. And then if did not receive a favorable response to a solicitation, to my view was always, ‘Okay, if you were shortlisted, that means they thought you could do the work.’ If you weren't shortlisted for whatever reason, they didn't. But if you're shortlisted, they thought you could do the work. So then I would always take the approach, ‘Okay, if I'm shortlisted, then do a debrief so I could understand what I could've done better in terms of response to this solicitation.’ Again, if you weren't shortlisted, then maybe you'd wanna do a debrief just in general, not – So I guess what I'm getting at, I'd say to some degree, at some point, the responsibility will shift from the public aid entities to the XBEs. And I think there are almost as many circumstances where the fault falls on the XBEs for either not responding appropriately to a solicitation, or not following up if they were shortlisted to get additional information as to what we could've done better for solicitation. So, yeah, I don't necessarily know if there's reasonably more you could ask the public entities to do at this point in time. I think. ‘Cause I mean, you're having meetings requiring certain solicitations, engagement. I think there's a point of reasonableness. Is it reasonable that the public entity reviews all subcontracts to make sure they are fair and equitable? No, there's not. If in your contract you feel something's not fair or equitable, you talk to that prime. If you still feel it's not fair and equitable, you could raise a question to said public entity. That's an example.” [#71]
- The Black American male owner of an uncertified MBE construction company stated, “I feel like there just really no benefit for as a small businesses to really – because it's just, you know, ‘Oh, we did the questionnaires for these business, these business, these business’ and just, you know I'm saying? It gives them more reference towards the companies that they help small businesses that they have called, like it really ain't no – I really see that it ain't no beneficiary situation for me for real. Because it ain't no call like, ‘What can I do to help? How can I assist you?’ then it really don't do me no justice. due to the politics, our opinions really don't matter because they already got it set up to how they want to do things.” [#72]
- A comment from a majority-owned construction firm stated, “I would like to see the area build up around Gary Indiana. [We need] more programs to build up the city.” [#AV]
- The female non-Hispanic white partner of a WBE-certified professional services firm stated, “I think that we need to be very open about talking about it and not be embarrassed to say populations have been underrepresented and it's good for us, as a society, to get more diversity in voices at the table. Just to flat out say, for a public space, should be able to take in the voices of all of the people that the public is comprised of. Here I am dancing around saying it. I just feel like we need to be able to just be more upfront about saying the world has been based on a narrow view and it's only good for all of us if we widen that view. I feel like that that just being able to talk about it is more important. I will give one very quick example. I'll try to be quick. My sister's a doctor in Arizona, she's been working on a COVID vaccine trial and for this COVID vaccine trial, which is the AstraZeneca trial, which the vaccine was developed in Great Britain. They very clearly said, ‘In the United States, we need to test this on a cross section of Americans that's representative of Americans.’ They just put it out there. ‘We have to have a representation of all of the ethnicities backgrounds

that America has to offer. Because that's the best way we're going to get good science. It's not, if we only tested on white people, that's not going to be good science.' I feel like the language around talking about this is really creating its own barriers. If we can figure out a way to just speak more openly about good design being representative of a lot of ideas, all the better." [#FG1]

- The male non-Hispanic white partner of a majority-owned professional services firm stated, "I think having teams that reflect the communities in which we work and live in, I think is a key to achieving that. I do agree. We need to have some of these difficult conversations, and we need to make people uncomfortable." [#FG1]
- The Black American male owner of an MBE-certified construction company stated, "One of the major problems that we have here with the Indiana Department of Administration in my particular point of view is that we need an office here because it is hard for us to go in and get this information that you have and all the opportunities that the Department of Administration and that state contracts has because it is down there. And I made this point before that we have one -- we are practically the largest minority residence in the state of Indiana in this particular quadrant here and we have to go all the way down to Indianapolis in order to get service and I think that's wrong. I even mentioned this to the governor's staff at one time about a couple years ago when you came up here again for the disparity study, and no matter what we said or what we did, we didn't get any kind of service whatsoever. So, I am hoping that -- this city here can grow, this whole Northwest Indiana can grow, but we need your support in order to do it. We need an office up here for the -- if you have like a tax -- I think you have a tax office in Merrillville, but we definitely need a Department of Administration and the Department I am talking about is a minority and women owned business enterprise. This is a Mecca here that can be as far as making -- as far as business development, but only if we had your office here in order to help the people either get business, get contracts, and also get the banking opportunities here, too." [#PT3]

APPENDIX E.

Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of minority-, woman-, and veteran-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts that the Indiana Department of Administration (IDOA), the Indiana Department of Transportation (INDOT), and state educational institutions (SEIs) awarded.^{1, 2} Appendix E expands on the information presented in Chapter 5 in five parts:

- A. Overview;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

A. Overview

BBC worked with Engaging Solutions and Davis Research to conduct telephone and online surveys with businesses throughout the *relevant geographic market area (RGMA)*, which BBC identified as the entire state of Indiana. Businesses that they surveyed were businesses with locations in the RGMA that BBC identified as doing work in fields closely related to the types of contracts and procurements that IDOA, INDOT, and SEIs awarded between July 1, 2013 and June 30, 2018 (i.e., *the study period*). BBC began the survey process by determining the work specializations, or *subindustries*, for each relevant prime contract and subcontract that participating organizations awarded 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 businesses 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 16,961 local businesses that perform work relevant to IDOA, INDOT, and SEI contracting and procurement and was able to successfully contact 6,886 of those businesses, 2,882 of which completed availability surveys.

B. Representative Businesses

The objective of BBC's availability approach was to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. It was not to collect information about each and every business operating in the RGMA. That

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

² Analyses for IDOA include contracts and procurements that any executive branch agency awarded during the study period except INDOT.

approach allowed BBC to estimate the availability of minority-, woman-, and veteran-owned businesses for IDOA, INDOT, and SEI work in an accurate, statistically valid manner. In addition, BBC did not design the research effort so the study team would contact every local business possibly performing construction, professional services, and goods and other services work. Instead, BBC determined the types of work specializations most relevant to IDOA, INDOT, and SEI contracting and procurement in terms of the percentage of total dollars the organizations awarded during the study period and contacted businesses for surveys that D&B listed as having their primary lines of business within those work specializations.

Figure E-1 lists the 8-digit work specialization codes within construction, professional services, and goods and other services that were most related to the contract and procurement dollars that IDOA, INDOT, and SEIs awarded during the study period and that BBC examined 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 local businesses working in industries relevant to IDOA, INDOT, and SEI contracts and procurements. As an example, the survey instrument that the study team used with construction businesses is presented at the end of Appendix E. BBC modified the construction survey instrument slightly for use with businesses working in other industries in order 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 businesses.)

1. Survey structure. The availability survey included 13 sections, and Engaging Solutions and Davis Research attempted to cover all sections with each business they successfully contacted that was willing to complete a survey.

a. Identification of purpose. The surveys began by identifying IDOA, INDOT, and SEIs as the survey sponsor and describing the purpose of the study. (e.g., “The State of Indiana is conducting a survey to develop a list of companies interested in providing construction-related services to government agencies in the state.”)

b. Verification of correct business name. The surveyor verified that he or she had reached the correct business. If the business name was not correct, surveyors asked if the respondent knew how to contact the correct business. Engaging Solutions and Davis Research then followed up with the correct business based on the new contact information (see area “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 and work specializations included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Carpet and floors		Heavy construction (continued)	
17520000	Floor laying and floor work, nec	16110205	Resurfacing contractor
17719903	Flooring contractor	16110000	Highway and street construction
Concrete and related products		Heavy construction equipment	
14420000	Construction sand and gravel	50820300	General construction machinery and equipment
29510201	Asphalt and asphaltic paving mixtures (not from refineries)	73530000	Heavy construction equipment rental
32730000	Ready-mixed concrete	Insulation, drywall, masonry, and weatherproofing	
50320500	Concrete and cinder building products	17419905	Marble masonry, exterior construction
Concrete work		17439903	Terrazzo work
17419908	Tuckpointing or restoration	17420101	Drywall
17719902	Concrete repair	17990209	Waterproofing
Electrical equipment and supplies		17990206	Fireproofing buildings
39930102	Scoreboards, electric	Landscape services	
59999910	Electronic parts and equipment	07110000	Soil preparation services
38220206	Temperature controls, automatic	07210410	Weed control services, after planting
50840700	Instruments and control equipment	07829903	Landscape contractors
50630304	Electronic wire and cable	Other construction materials	
50639905	Motors, electric	50310200	Building materials, interior
50630403	Lighting fixtures, commercial and industrial	50720000	Hardware
36259907	Electric controls and control accessories, industrial	57139901	Carpets
Electrical work		Other construction services	
17310203	Environmental system control installation	16290302	Golf course construction
17310000	Electrical work	16239905	Pumping station construction
Glass and glazing		Paint supplies	
17990203	Coating of Metal structures at construction site	52310200	Paint and painting supplies
17930000	Glass and glazing work	Painting, striping, and marking	
Heavy construction		17210200	Commercial painting
16110200	Surfacing and paving	17210201	Exterior commercial painting contractor
16110204	Highway and street paving contractor		
17710301	Blacktop (asphalt) work		

Figure E-1 (continued).
Subindustries and work specializations included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction (Continued)			
Plumbing and HVAC		Structural steel and building construction (continued)	
17110401	Mechanical contractor	15420100	Commercial and office building contractors
17110301	Fire sprinkler system installation	15420101	Commercial and office building, new construction
17110200	Plumbing contractors	15420400	Specialized public building contractors
Plumbing and HVAC supplies		15429902	Design and erection, combined: non-residential
50750200	Warm air heating equipment and supplies	15429903	Institutional building construction
50740300	Plumbing fittings and supplies	17910000	Structural steel erection
35850000	Refrigeration and heating equipment	15420103	Commercial and office buildings, renovation and repair
50750000	Warm air heating and air conditioning	Water, sewer, and utility lines	
Remediation and cleaning		16239906	Underground utilities contractor
17990500	Exterior cleaning, including sandblasting	16230203	Telephone and communication line construction
Roofing		16230302	Sewer line construction
17610102	Roof repair	Windows and doors	
17610100	Roofing and gutter work	76991804	Door and window repair
17610000	Roofing, siding, and sheetmetal work	34290103	Door opening and closing devices, except electrical
Structural steel and building construction		50390200	Glass construction materials
15420406	School building construction	Wrecking, demolition, excavation, drilling	
15410000	Industrial buildings and warehouses	17950000	Wrecking and demolition work
15419909	Renovation, remodeling and repairs: industrial buildings	17949901	Excavation and grading, building construction
15420000	Nonresidential construction, nec	17959902	Demolition, buildings and other structures
15420100	Commercial and office building contractors		
Goods and Other Services			
Advertising goods		Cleaning and janitorial supplies (continued)	
51999901	Advertising specialties	59999908	Cleaning equipment and supplies
Cleaning and janitorial supplies		50870304	Janitors' supplies
73490101	Building cleaning service	50870300	Cleaning and maintenance equipment and supplies
73499902	Cleaning service, industrial or commercial	28420100	Specialty cleaning
50870301	Carpet and rug cleaning equipment and supplies, commercial	35890200	Commercial cleaning equipment
28410000	Soap and other detergents		

Figure E-1 (continued).

Subindustries and work specializations included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Other Services (continued)			
Communications equipment		Furniture	
73590501	Audio-visual equipment and supply rental	25220202	Panel systems and partitions, office: except wood
50650409	Video equipment, electronic	50210107	Public building furniture, nec
50650200	Communication equipment	50210106	Office furniture, nec
50650100	Telephone and telegraphic equipment	50210100	Office and public building furniture
57319907	Radios, two-way, citizens band, weather, short-wave, etc.	50210000	Furniture
59990601	Audio-visual equipment and supplies	25220301	Cabinets, office: except wood
59990600	Telephone and communication equipment	25220200	Office bookcases, wallcases and partitions, except wood
50990500	Video and audio equipment	25220102	Chairs, office: padded or plain: except wood
Elevator goods and services		25210000	Wood office furniture
76992501	Elevators: inspection, service, and repair	59320501	Office furniture, secondhand
17969901	Elevator installation and conversion	25310000	Public building and related furniture
50840803	Elevators	57129904	Office furniture
Farm equipment and supplies		25220000	Office furniture, except wood
59990800	Farm equipment and supplies	Industrial chemicals	
02799901	Apiary (bee and honey farm)	28999943	Salt
59990803	Feed and farm supply	51690000	Chemicals and allied products, nec
02919901	Animal specialty farm, general	51690200	Industrial gases
Food products, wholesale and retail		51910102	Fertilizer and fertilizer materials
51479904	Meats, fresh	Industrial equipment and machinery	
51419901	Food brokers	50850000	Industrial supplies
20860000	Bottled and canned soft drinks	50840518	Welding machinery and equipment
51490801	Canned goods: fruit, vegetables, seafood, meats, etc.	50830300	Agricultural machinery and equipment
20510103	Bread, all types (white, wheat, rye, etc); fresh or frozen	Office equipment	
51420000	Packaged frozen goods	50440000	Office equipment
59630200	Food services, direct sales	50440207	Photocopy machines
Food services		50440200	Copying equipment
58120400	Lunchrooms and cafeterias		
58120402	Cafeteria		
59630203	Food service, coffee-cart		
58120201	Concessionaire		

Figure E-1 (continued).

Subindustries and work specializations included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Other Services (Continued)			
Office supplies		Safety equipment	
51129907	Office supplies, nec	50849912	Safety equipment
39559902	Print cartridges for laser and other computer printers	59990100	Alarm and safety equipment stores
51119902	Printing paper	59999917	Police supply stores
51120405	Laser printer supplies		
51110000	Printing and writing paper	Security guard services	
51130100	Shipping supplies	73810105	Security guard service
59439902	Office forms and supplies		
51120000	Stationery and office supplies	Security systems	
		73820000	Security systems services
Other goods		Sporting goods	
01810303	Seeds, vegetable: growing of	50910000	Sporting and recreation goods
Other services		Transit services	
47259901	Arrangement of travel tour packages, wholesale	41310000	Intercity and rural bus transportation
47249901	Tourist agency arranging transport, lodging and car rental	41410000	Local bus charter service
75210101	Parking lots	41420000	Bus charter service, except local
Petroleum and petroleum products		Uniforms and apparel	
51719901	Petroleum bulk stations	56990300	Sports apparel
51720203	Gasoline	56990102	Uniforms
Printing, copying, and mailing		Vehicle parts and supplies	
73319904	Mailing service	55310107	Truck equipment and parts
27520101	Offset printing	50130108	Automotive supplies
Recreation goods and services		Waste and recycling	
79999916	Ticket sales office for sporting events, contract	49530203	Rubbish collection and disposal
Safety equipment		49530201	Garbage: collecting, destroying, and processing
50630503	Fire alarm systems	49530100	Hazardous waste collection and disposal
50990100	Firearms and ammunition, except sporting	49539904	Medical waste disposal
50990301	Fire extinguishers		

Figure E-1 (continued).

Subindustries and work specializations included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Professional Services			
Advertising, marketing and public relations		Environmental services and transportation planning	
73119901	Advertising consultant	87480200	Urban planning and consulting services
73110000	Advertising agencies	87489905	Environmental consultant
Architecture and design services		Finance and accounting	
87120000	Architectural services	87210000	Accounting, auditing, and bookkeeping
07810201	Landscape architects	87210200	Accounting services, except auditing
87120101	Architectural engineering	Human resources and job training services	
87120100	Architectural engineering	73610000	Employment agencies
Business services and consulting		87420200	Human resource consulting services
87429902	Business management consultant	IT and data services	
Construction management		73749902	Data processing service
87420402	Construction project management consultant	73790200	Computer related consulting services
87419902	Construction management	73710300	Computer software development and applications
Correction facilities health services		Medical providers	
80990000	Health and allied services	80939903	Rehabilitation center, outpatient treatment
Engineering		80939902	Mental health clinic, outpatient
87110404	Structural engineering	83220400	Rehabilitation services
87119903	Consulting engineer	Medical testing, laboratories and pharmaceutical services	
87110402	Civil engineering	28999952	Drug testing kits, blood and urine
87110000	Engineering services	80710000	Medical laboratories
87119909	Professional engineer		
87110202	Mechanical engineering		

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, they described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work that they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

e. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4). The study team also asked business owners 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 government and private sector contracts, either as prime contractors or subcontractors (Questions B1 and B2).³

g. Interest in future work. The surveyor asked about businesses' interest in future work with government agencies in Indiana, either as prime contractors or subcontractors (Questions B3a and B3b).⁴

h. Geographic area. The surveyor asked whether businesses are able to, or have previously tried to, work in various geographical areas of Indiana (Questions C1a through C15b).

i. Largest contracts. The study team asked businesses about the value of the largest contracts on which they had bid on or been awarded during the past five years. (Question D1).

j. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 and E2). If businesses indicated they were minority-owned, they were also asked about the race/ethnicity of the business's ownership (Question E3). The surveyor also asked whether businesses were at least 51 percent owned and controlled by veterans of the United States military (Question E4). The study team confirmed ownership information through several other data sources, including:

- IDOA, INDOT, and SEI vendor data;
- State of Indiana MBE/WBE/IVOSB certification list;
- INDOT Disadvantaged Business Enterprise certification list;
- Purdue XBE certification list;
- City of Indianapolis MBE/WBE certification list;
- Business websites; and
- Reviews that IDOA, INDOT, and SEIs conducted of study information.

³ Goods and services businesses were asked questions about subcontract work.

⁴ Goods and services businesses were asked questions about subcontract work.

k. Business size. The surveyor asked about businesses’ size in terms of their revenues (Question F1).

l. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning working in the region and general insights about conditions in the local marketplace as well as interest in participating in a follow-up interview about those topics (Questions G1 and G2).

m. Contact information. The survey concluded with questions about the participant’s name and position with the organization (Questions H1 and H2).

D. Survey Execution

Engaging Solutions and Davis Research conducted all availability surveys in 2020. They made multiple attempts at during different times of the day and on different days of the week to reach each business and attempted to survey a company representative such as the owner, manager, or other officer who could provide accurate and detailed responses to survey questions.

1. Businesses that the study team successfully contacted. Figure E-2 presents the disposition of the 16,961 businesses that the study team attempted to contact for availability surveys and how that number resulted in the 6,886 businesses that the study team was able to successfully contact.

Figure E-2.
Disposition of attempts to survey businesses

Source:
BBC availability analysis.

	Number of Establishments
Beginning list	16,961
Less duplicate phone numbers	76
Less non-working phone numbers	1,096
Less wrong number/business	809
Unique business listings with working phone numbers	14,980
Less no answer	7,192
Less could not reach responsible staff member	888
Less language barrier	14
Establishments successfully contacted	6,886

a. Non-working or wrong phone numbers. Some of the listings that Engaging Solutions and Davis Research attempted to contact were:

- Duplicate phone numbers (76 listings);
- Non-working phone numbers (1,096 listings); or
- Wrong numbers for the desired businesses (809 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

b. Working phone numbers. As shown in Figure E-2, there were 14,980 businesses with working phone numbers that Engaging Solutions and Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- There was no answer after eight attempts at different times of the day and on different days of the week for 7,192 businesses.
- They could not reach an appropriate staff member after multiple attempts at different times of the day on different days of the week for 888 businesses.
- They could not conduct the availability survey due to language barriers for 14 businesses.

Thus, Engaging Solutions and Davis Research were able to successfully contact 6,886 businesses.

2. Businesses included in the availability database. Figure E-3 presents the disposition of the 6,886 businesses that Engaging Solutions and Davis Research successfully contacted and how that number resulted in the 1,991 businesses that the study team included in the availability database and considered potentially available for IDOA, INDOT, and SEI work.

Figure E-3.
Disposition of successfully contacted businesses

Source:
BBC availability analysis.

	Number of Establishments
Establishments successfully contacted	6,886
Less establishments not interested in discussing availability for work	3,726
Less unreturned fax/online surveys	278
Establishments that completed surveys	2,882
Less not a for-profit business	81
Less multiple establishments	130
Less no interest in future work	643
Less line of work outside of study scope	25
Less do not perform work in Indiana	12
Establishments potentially available for entity work	1,991

a. Businesses not interested in discussing availability for government work. Of the 6,886 businesses that the study team successfully contacted, 3,726 businesses were not interested in discussing their availability for IDOA, INDOT, and SEI work. In total, 2,882 successfully contacted businesses completed availability surveys.

b. Businesses available for IDOA, INDOT, and SEI work. BBC deemed only a portion of the businesses that completed availability surveys as potentially available for the prime contracts and subcontracts that IDOA, INDOT, and SEI award. The study team excluded many of the businesses that completed surveys from the availability database for various reasons:

- BBC excluded 81 businesses that indicated that they were not for-profit businesses.
- BBC excluded 130 businesses that 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.

- BBC excluded 643 businesses that reported not being interested in either prime contract or subcontract opportunities with government agencies in the region.
- BBC excluded 25 businesses that indicated that their main lines of business were outside of the study scope (e.g., software development).
- BBC excluded 12 businesses that indicated that they do not perform work within Indiana.

After those exclusions, BBC compiled a database of 1,991 businesses that were considered potentially available for IDOA, INDOT, and SEI 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 representatives from any of the locations 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) that locations of the same business reported into a single response. For example, if the representative from one location reported that the business works as a prime contractor and the representatives from another location reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within its relevant subindustry.⁵
- BBC considered the largest contract that representatives from any locations 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 potentially available).
- BBC coded businesses as minority-, woman- or veteran-owned if representatives from a majority of its establishments reported such status.

E. Additional Considerations

BBC made several additional considerations related to measuring availability to ensure that availability estimates for IDOA, INDOT, and SEI 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 IDOA, INDOT, and SEI contracting dollars for which minority-, woman-, and veteran-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 participating organizations' work and should not be used in that way. Federal courts and other authorities have approved BBC's approach to measuring availability, and federal regulations around minority- and woman-owned business programs recommend similar approaches to measuring availability for organizations implementing business programs.

⁵ Goods and services businesses were not asked questions about subcontract work.

2. Using a custom census approach to measuring availability. Federal guidance around measuring the availability of minority- and woman-owned businesses for an organization's contracts and procurements recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when estimating the availability of businesses for IDOA, INDOT, and SEI work is that such an approach undercounts the existence of minority-, woman-, and veteran-owned businesses and does not account for business characteristics that are crucial to estimating availability accurately. The methodology that BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple count. For example, the availability surveys that the study team conducted provided data on qualifications, relative capacity, and interest in government work, which allowed BBC to take a more detailed approach to measuring availability. Courts considering implementations of minority- and woman-owned business programs have decided in favor of such approaches to measuring availability.

3. Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. For example, it was not possible for BBC to include all businesses possibly doing work in relevant industries without conducting surveys with nearly every business located in the RGMA. In addition, some industry codes are imprecise and overlap with other work specializations. 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 classify businesses more accurately 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 and business lists. BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from participating organizations. For example, certification databases include data on the race/ethnicity, gender, and veteran status of the owners of certified businesses. BBC compared survey responses concerning business ownership with such information.

b. Contract data. BBC examined IDOA, INDOT, and SEI contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts that businesses bid on or performed with actual contract data.

c. Organization review. Participating organizations reviewed contract and vendor data that the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

DRAFT Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Engaging Solutions. We are calling on behalf of the State of Indiana, including the Indiana Department of Administration; the Indiana Department of Transportation; and public universities and colleges across the state.

This is not a sales call. We are developing a list of companies interested in providing construction-related services for state or local government agencies or for public universities and colleges in Indiana.

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 SURVEY WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH STATE OR LOCAL AGENCIES AND PUBLIC UNIVERSITIES AND COLLEGES]

A1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

1=RIGHT COMPANY – **SKIP TO A2**

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – **TERMINATE**

Y1. What is the name of this firm?

1=VERBATIM

Y2. Can you give me any information about [new firm name]?

1=Yes, same owner doing business under a different name – **SKIP TO A2**

2=Yes, can give information about named company

3=Company bought/sold/changed ownership

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

Y3. Can you give me the complete address or city for [new firm name]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

A2. Let me confirm that [firm name/new firm name] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other - **TERMINATE**

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes - **SKIP TO A3c**

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of business at [firm name/new firm name]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

97=(NONE)

A4. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A5. Is your company a subsidiary or affiliate of another firm?

1=Independent - **SKIP TO B1**

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) - **SKIP TO B1**

99=(REFUSED) - **SKIP TO B1**

A6. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing construction-related work. During the past five years, has your company submitted a bid or received an award for any part of a contract—either in the public sector or the private sector—as either a prime contractor or subcontractor?

[NOTE TO INTERVIEWER - THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]

1=Yes

2=No - **SKIP TO B3a**

98=(DON'T KNOW) - **SKIP TO B3a**

99=(REFUSED) - **SKIP TO B3a**

B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 5= Other - SPECIFY _____
- 98=(DON'T KNOW)
- 99=(REFUSED)

B3a. Please think about future construction-related work as you answer the following questions. Is your company *interested* in working with state or local government agencies in Indiana, including public universities or colleges?

- 1= Yes
- 2= No - **SKIP to C1a**
- 98= (DON'T KNOW) - **SKIP to C1a**
- 99=(REFUSED) - **SKIP to C1a**

B3b. Is your company interested in working with state or local government agencies in Indiana as a prime contractor; a subcontractor/trucker/supplier; or both?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 98= (DON'T KNOW)
- 99=(REFUSED)

Now I want to ask you about the geographic areas your company works within Indiana.

C1a. Is your company able to do work in the Gary area?

1=Yes

2=No [SKIP to C2a]

98=(DON'T KNOW)

99=(REFUSED)

C1b. Has your company ever tried to get work in the Gary area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2a. Is your company able to do work in the Michigan City-La Porte area?

1=Yes

2=No [SKIP to C3a]

98=(DON'T KNOW)

99=(REFUSED)

C2b. Has your company ever tried to get work in the Michigan City-La Porte area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3a. Is your company able to do work in the South Bend area?

1=Yes

2=No [SKIP to C4a]

98=(DON'T KNOW)

99=(REFUSED)

C3b. Has your company ever tried to get work in the South Bend area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4a. Is your company able to do work in the Elkhart area?

1=Yes

2=No [SKIP to C5a]

98=(DON'T KNOW)

99=(REFUSED)

C4b. Has your company ever tried to get work in the Elkhart area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C5a. Is your company able to do work in the Fort Wayne area?

1=Yes

2=No [SKIP to C6a]

98=(DON'T KNOW)

99=(REFUSED)

C5b. Has your company ever tried to get work in the Fort Wayne area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C6a. Is your company able to do work in the Indianapolis area?

1=Yes

2=No [SKIP to C7a]

98=(DON'T KNOW)

99=(REFUSED)

C6b. Has your company ever tried to get work in the Indianapolis area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C7a. Is your company able to do work in the Lafayette area?

1=Yes

2=No [SKIP to C8a]

98=(DON'T KNOW)

99=(REFUSED)

C7b. Has your company ever tried to get work in the Lafayette area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C8a. Is your company able to do work in the Kokomo area?

1=Yes

2=No [SKIP to C9a]

98=(DON'T KNOW)

99=(REFUSED)

C8b. Has your company ever tried to get work in the Kokomo area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C9a. Is your company able to do work in the Anderson area?

1=Yes

2=No [SKIP to C10a]

98=(DON'T KNOW)

99=(REFUSED)

C9b. Has your company ever tried to get work in the Anderson area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C10a. Is your company able to do work in the Muncie area?

1=Yes

2=No [SKIP to C11a]

98=(DON'T KNOW)

99=(REFUSED)

C10b. Has your company ever tried to get work in the Muncie area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C11a. Is your company able to do work in the Terre Haute area?

1=Yes

2=No [SKIP to C12a]

98=(DON'T KNOW)

99=(REFUSED)

C11b. Has your company ever tried to get work in the Terre Haute area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C12a. Is your company able to do work in the Bloomington area?

1=Yes

2=No [SKIP to C13a]

98=(DON'T KNOW)

99=(REFUSED)

C12b. Has your company ever tried to get work in the Bloomington area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C13a. Is your company able to do work in the Columbus area?

1=Yes

2=No [SKIP to C14a]

98=(DON'T KNOW)

99=(REFUSED)

C13b. Has your company ever tried to get work in the Columbus area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C14a. Is your company able to do work in the Vincennes area?

1=Yes

2=No [SKIP to C15a]

98=(DON'T KNOW)

99=(REFUSED)

C14b. Has your company ever tried to get work in the Vincennes area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C15a. Is your company able to do work in the Evansville area?

1=Yes

2=No [SKIP to D1]

98=(DON'T KNOW)

99=(REFUSED)

C15b. Has your company ever tried to get work in the Evansville area, even if it wasn't successful in doing so?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. What was the largest prime contract or subcontract that your company either bid on or was awarded during the past five years? This includes contracts not yet complete and contracts in either the public sector or private sector.

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=\$200 million or greater |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED) |
| 8=More than \$10 million to \$20 million | |

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is *[firm name / new firm name]* a woman-owned business?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by individual(s) who identify as Black American, Asian American, Hispanic American, or Native American. By this definition, is *[firm name / new firm name]* a minority-owned business?

- 1=Yes
- 2=No - **SKIP TO E4**
- 98=(DON'T KNOW) - **SKIP TO E4**
- 99=(REFUSED) - **SKIP TO E4**

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=Black American

2=Asian-Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

E4. A business is defined as veteran-owned if more than half—that is, 51 percent or more—of the ownership and control is by a veteran of the U.S. military. By this definition, is [firm name/new firm name] a veteran-owned business?

[NOTE TO INTERVIEWER – U.S. MILITARY SERVICES INCLUDE THE U.S. ARMY, AIR FORCE, NAVY, MARINES, OR COAST GUARD.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

F1. What was the average annual gross revenue of your company, including all locations, over the last three years? Would you say . . .

[READ LIST]

1=Less than \$750,000

7=\$18.1 Million - \$20.5 Million

2=\$750,000 - \$5.5 Million

8=\$20.6 Million - \$24 Million

3=\$5.6 Million - \$7.4 Million

9=\$24.1 Million or more

4=\$7.5 Million - \$11 Million

98= (DON'T KNOW)

5=\$11.1 Million - \$15 Million

99= (REFUSED)

6=\$15.1 Million - \$18 Million

G1. Do you have any thoughts to share regarding general marketplace conditions in Indiana, starting or expanding a business in your industry, or obtaining work?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G2. Would you be willing to participate in an interview to discuss marketplace conditions in Indiana?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

1=VERBATIM

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _____

99=(REFUSED)

Thank you very much for your participation. If you have any questions or concerns, please contact Indiana Department of Administration Division of Supplier Diversity at Telephone: (317) 232-3061, Fax: (317) 233-6921, or E-mail: mwbe@idoa.in.gov.

Figure F-1.
Table of contents

Characteristics							
Table	Agency	Time period	Contract area	Department	Contract role	Contract size	Region
F-2	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-3	State agencies (w/o INDOT)	07/01/13 - 06/30/15	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-4	State agencies (w/o INDOT)	07/01/15 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-5	State agencies (w/o INDOT)	07/01/13 - 06/30/18	Construction	N/A	Prime contracts and subcontracts	N/A	N/A
F-6	State agencies (w/o INDOT)	07/01/13 - 06/30/18	Professional services	N/A	Prime contracts and subcontracts	N/A	N/A
F-7	State agencies (w/o INDOT)	07/01/13 - 06/30/18	Goods and other services	N/A	Prime contracts and subcontracts	N/A	N/A
F-8	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	Public Works	Prime contracts and subcontracts	N/A	N/A
F-9	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	Non-Public Works	Prime contracts and subcontracts	N/A	N/A
F-10	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Prime contracts	N/A	N/A
F-11	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Subcontracts	N/A	N/A
F-12	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Prime contracts	Large	N/A
F-13	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Prime contracts	Small	N/A
F-14	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	Northern Indiana
F-15	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	Central Indiana
F-16	State agencies (w/o INDOT)	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	Southern Indiana
F-17	INDOT	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-18	BSU	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-19	ISU	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-20	IU	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-21	Ivy Tech	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-22	Purdue	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-23	USI	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A
F-24	Vincennes	07/01/13 - 06/30/18	All industries	N/A	Prime contracts and subcontracts	N/A	N/A

Figure F-2.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
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	4,616	\$1,366,719	\$1,366,719				
(2) Minority and woman-owned	540	\$176,845	\$176,845	12.9	18.2	-5.3	70.9
(3) Non-Hispanic white woman-owned	411	\$108,642	\$108,642	7.9	10.4	-2.4	76.5
(4) Minority-owned	129	\$68,203	\$68,203	5.0	7.9	-2.9	63.5
(5) Asian American-owned	46	\$19,937	\$19,940	1.5	0.7	0.8	200+
(6) Black American-owned	43	\$45,082	\$45,090	3.3	3.4	-0.1	97.6
(7) Hispanic American-owned	9	\$1,400	\$1,400	0.1	0.5	-0.4	19.8
(8) Native American-owned	29	\$1,773	\$1,773	0.1	3.3	-3.2	3.9
(9) Unknown minority-owned	2	\$11					
(10) Minority- and woman-owned (certified)	268	\$123,730	\$123,730	9.1			
(11) Non-Hispanic white woman-owned (certified)	164	\$59,941	\$59,941	4.4			
(12) Minority-owned (certified)	104	\$63,789	\$63,789	4.7			
(13) Asian American-owned (certified)	36	\$19,028	\$19,028	1.4			
(14) Black American-owned (certified)	31	\$41,724	\$41,724	3.1			
(15) Hispanic American-owned (certified)	9	\$1,400	\$1,400	0.1			
(16) Native American-owned (certified)	28	\$1,637	\$1,637	0.1			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2015
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	1,794	\$644,488	\$644,488				
(2) Minority and woman-owned	215	\$84,537	\$84,537	13.1	21.2	-8.1	61.8
(3) Non-Hispanic white woman-owned	159	\$45,809	\$45,809	7.1	12.8	-5.7	55.6
(4) Minority-owned	56	\$38,728	\$38,728	6.0	8.4	-2.4	71.1
(5) Asian American-owned	28	\$16,805	\$16,807	2.6	0.2	2.4	200+
(6) Black American-owned	17	\$19,722	\$19,724	3.1	3.3	-0.2	92.5
(7) Hispanic American-owned	3	\$701	\$701	0.1	0.5	-0.4	21.3
(8) Native American-owned	7	\$1,496	\$1,496	0.2	4.4	-4.2	5.3
(9) Unknown minority-owned	1	\$5					
(10) Minority- and woman-owned (certified)	103	\$73,776	\$73,776	11.4			
(11) Non-Hispanic white woman-owned (certified)	59	\$37,034	\$37,034	5.7			
(12) Minority-owned (certified)	44	\$36,742	\$36,742	5.7			
(13) Asian American-owned (certified)	22	\$16,264	\$16,264	2.5			
(14) Black American-owned (certified)	13	\$18,417	\$18,417	2.9			
(15) Hispanic American-owned (certified)	3	\$701	\$701	0.1			
(16) Native American-owned (certified)	6	\$1,360	\$1,360	0.2			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2015-June 30, 2018
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	2,822	\$722,232	\$722,232				
(2) Minority and woman-owned	325	\$92,309	\$92,309	12.8	15.6	-2.8	82.0
(3) Non-Hispanic white woman-owned	252	\$62,833	\$62,833	8.7	8.3	0.4	105.4
(4) Minority-owned	73	\$29,476	\$29,476	4.1	7.3	-3.3	55.7
(5) Asian American-owned	18	\$3,132	\$3,133	0.4	1.1	-0.6	41.1
(6) Black American-owned	26	\$25,361	\$25,366	3.5	3.4	0.1	102.0
(7) Hispanic American-owned	6	\$699	\$699	0.1	0.5	-0.4	18.5
(8) Native American-owned	22	\$277	\$278	0.0	2.3	-2.3	1.7
(9) Unknown minority-owned	1	\$6					
(10) Minority- and woman-owned (certified)	165	\$49,953	\$49,953	6.9			
(11) Non-Hispanic white woman-owned (certified)	105	\$22,906	\$22,906	3.2			
(12) Minority-owned (certified)	60	\$27,047	\$27,047	3.7			
(13) Asian American-owned (certified)	14	\$2,764	\$2,764	0.4			
(14) Black American-owned (certified)	18	\$23,307	\$23,307	3.2			
(15) Hispanic American-owned (certified)	6	\$699	\$699	0.1			
(16) Native American-owned (certified)	22	\$277	\$277	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
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	1,885	\$196,669	\$196,669				
(2) Minority and woman-owned	119	\$6,626	\$6,626	3.4	20.6	-17.3	16.3
(3) Non-Hispanic white woman-owned	64	\$2,106	\$2,106	1.1	10.8	-9.7	9.9
(4) Minority-owned	55	\$4,520	\$4,520	2.3	9.9	-7.6	23.3
(5) Asian American-owned	16	\$2,061	\$2,061	1.0	3.4	-2.4	30.7
(6) Black American-owned	5	\$123	\$123	0.1	3.4	-3.3	1.9
(7) Hispanic American-owned	6	\$699	\$699	0.4	1.5	-1.1	23.8
(8) Native American-owned	28	\$1,637	\$1,637	0.8	1.6	-0.8	52.1
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	64	\$4,847	\$4,847	2.5			
(11) Non-Hispanic white woman-owned (certified)	10	\$362	\$362	0.2			
(12) Minority-owned (certified)	54	\$4,485	\$4,485	2.3			
(13) Asian American-owned (certified)	16	\$2,061	\$2,061	1.0			
(14) Black American-owned (certified)	4	\$88	\$88	0.0			
(15) Hispanic American-owned (certified)	6	\$699	\$699	0.4			
(16) Native American-owned (certified)	28	\$1,637	\$1,637	0.8			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
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	1,028	\$1,075,497	\$1,075,497				
(2) Minority and woman-owned	108	\$137,352	\$137,352	12.8	18.0	-5.2	70.9
(3) Non-Hispanic white woman-owned	67	\$87,513	\$87,513	8.1	10.6	-2.5	76.7
(4) Minority-owned	41	\$49,839	\$49,839	4.6	7.4	-2.8	62.7
(5) Asian American-owned	9	\$5,113	\$5,113	0.5	0.1	0.4	200+
(6) Black American-owned	29	\$44,559	\$44,559	4.1	3.5	0.7	119.0
(7) Hispanic American-owned	2	\$32	\$32	0.0	0.1	-0.1	3.6
(8) Native American-owned	1	\$136	\$136	0.0	3.8	-3.7	0.3
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	48	\$90,483	\$90,483	8.4			
(11) Non-Hispanic white woman-owned (certified)	23	\$44,267	\$44,267	4.1			
(12) Minority-owned (certified)	25	\$46,217	\$46,217	4.3			
(13) Asian American-owned (certified)	4	\$4,943	\$4,943	0.5			
(14) Black American-owned (certified)	19	\$41,242	\$41,242	3.8			
(15) Hispanic American-owned (certified)	2	\$32	\$32	0.0			
(16) Native American-owned (certified)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
Contract area: Goods and other 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	1,703	\$94,553	\$94,553				
(2) Minority and woman-owned	313	\$32,867	\$32,867	34.8	16.1	18.7	200+
(3) Non-Hispanic white woman-owned	280	\$19,023	\$19,023	20.1	7.1	13.1	200+
(4) Minority-owned	33	\$13,844	\$13,844	14.6	9.0	5.7	162.9
(5) Asian American-owned	21	\$12,763	\$12,774	13.5	1.7	11.9	200+
(6) Black American-owned	9	\$401	\$401	0.4	2.3	-1.9	18.6
(7) Hispanic American-owned	1	\$669	\$669	0.7	3.4	-2.7	20.6
(8) Native American-owned	0	\$0	\$0	0.0	1.6	-1.6	0.0
(9) Unknown minority-owned	2	\$11					
(10) Minority- and woman-owned (certified)	156	\$28,399	\$28,399	30.0			
(11) Non-Hispanic white woman-owned (certified)	131	\$15,312	\$15,312	16.2			
(12) Minority-owned (certified)	25	\$13,088	\$13,088	13.8			
(13) Asian American-owned (certified)	16	\$12,025	\$12,025	12.7			
(14) Black American-owned (certified)	8	\$394	\$394	0.4			
(15) Hispanic American-owned (certified)	1	\$669	\$669	0.7			
(16) Native American-owned (certified)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
Contract area: All industries
Contract role: Prime contracts and subcontracts

Public Works contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,256	\$165,984	\$165,984				
(2) Minority and woman-owned	106	\$7,441	\$7,441	4.5	19.4	-14.9	23.1
(3) Non-Hispanic white woman-owned	64	\$2,647	\$2,647	1.6	9.9	-8.3	16.1
(4) Minority-owned	42	\$4,794	\$4,794	2.9	9.5	-6.6	30.5
(5) Asian American-owned	16	\$2,210	\$2,210	1.3	3.2	-1.9	41.0
(6) Black American-owned	7	\$867	\$867	0.5	3.9	-3.4	13.4
(7) Hispanic American-owned	6	\$557	\$557	0.3	1.3	-1.0	25.1
(8) Native American-owned	13	\$1,160	\$1,160	0.7	1.0	-0.3	71.0
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	75	\$5,806	\$5,806	3.5			
(11) Non-Hispanic white woman-owned (certified)	40	\$1,977	\$1,977	1.2			
(12) Minority-owned (certified)	35	\$3,829	\$3,829	2.3			
(13) Asian American-owned (certified)	15	\$2,135	\$2,135	1.3			
(14) Black American-owned (certified)	2	\$113	\$113	0.1			
(15) Hispanic American-owned (certified)	6	\$557	\$557	0.3			
(16) Native American-owned (certified)	12	\$1,024	\$1,024	0.6			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.

Agency: State agencies (w/o INDOT)

Time period: July 1, 2013-June 30, 2018

Contract area: All industries

Contract role: Prime contracts and subcontracts

Non-Public Works contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,360	\$1,200,735	\$1,200,735				
(2) Minority and woman-owned	434	\$169,404	\$169,404	14.1	18.1	-4.0	78.0
(3) Non-Hispanic white woman-owned	347	\$105,995	\$105,995	8.8	10.5	-1.6	84.4
(4) Minority-owned	87	\$63,409	\$63,409	5.3	7.6	-2.4	69.2
(5) Asian American-owned	30	\$17,727	\$17,730	1.5	0.3	1.2	200+
(6) Black American-owned	36	\$44,215	\$44,223	3.7	3.3	0.4	111.4
(7) Hispanic American-owned	3	\$842	\$842	0.1	0.4	-0.3	17.4
(8) Native American-owned	16	\$613	\$614	0.1	3.6	-3.6	1.4
(9) Unknown minority-owned	2	\$11					
(10) Minority- and woman-owned (certified)	193	\$117,924	\$117,924	9.8			
(11) Non-Hispanic white woman-owned (certified)	124	\$57,964	\$57,964	4.8			
(12) Minority-owned (certified)	69	\$59,960	\$59,960	5.0			
(13) Asian American-owned (certified)	21	\$16,894	\$16,894	1.4			
(14) Black American-owned (certified)	29	\$41,611	\$41,611	3.5			
(15) Hispanic American-owned (certified)	3	\$842	\$842	0.1			
(16) Native American-owned (certified)	16	\$613	\$613	0.1			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
Contract area: All industries
Contract role: Prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,258	\$1,212,590	\$1,212,590				
(2) Minority and woman-owned	419	\$54,219	\$54,219	4.5	15.4	-10.9	29.1
(3) Non-Hispanic white woman-owned	347	\$38,853	\$38,853	3.2	9.8	-6.6	32.7
(4) Minority-owned	72	\$15,366	\$15,366	1.3	5.6	-4.3	22.7
(5) Asian American-owned	36	\$13,930	\$13,941	1.1	0.6	0.6	200+
(6) Black American-owned	3	\$101	\$101	0.0	1.3	-1.3	0.6
(7) Hispanic American-owned	5	\$624	\$625	0.1	0.5	-0.5	10.2
(8) Native American-owned	26	\$699	\$699	0.1	3.2	-3.1	1.8
(9) Unknown minority-owned	2	\$11					
(10) Minority- and woman-owned (certified)	190	\$17,387	\$17,387	1.4			
(11) Non-Hispanic white woman-owned (certified)	131	\$2,908	\$2,908	0.2			
(12) Minority-owned (certified)	59	\$14,479	\$14,479	1.2			
(13) Asian American-owned (certified)	27	\$13,097	\$13,097	1.1			
(14) Black American-owned (certified)	1	\$59	\$59	0.0			
(15) Hispanic American-owned (certified)	5	\$624	\$624	0.1			
(16) Native American-owned (certified)	26	\$699	\$699	0.1			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
Contract area: All industries
Contract role: 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	358	\$154,129	\$154,129				
(2) Minority and woman-owned	121	\$122,627	\$122,627	79.6	40.9	38.7	194.6
(3) Non-Hispanic white woman-owned	64	\$69,789	\$69,789	45.3	15.1	30.1	200+
(4) Minority-owned	57	\$52,838	\$52,838	34.3	25.7	8.5	133.2
(5) Asian American-owned	10	\$6,006	\$6,006	3.9	1.5	2.4	200+
(6) Black American-owned	40	\$44,981	\$44,981	29.2	19.5	9.6	149.3
(7) Hispanic American-owned	4	\$776	\$776	0.5	0.6	-0.1	80.9
(8) Native American-owned	3	\$1,074	\$1,074	0.7	4.1	-3.4	16.9
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	78	\$106,343	\$106,343	69.0			
(11) Non-Hispanic white woman-owned (certified)	33	\$57,033	\$57,033	37.0			
(12) Minority-owned (certified)	45	\$49,310	\$49,310	32.0			
(13) Asian American-owned (certified)	9	\$5,931	\$5,931	3.8			
(14) Black American-owned (certified)	30	\$41,665	\$41,665	27.0			
(15) Hispanic American-owned (certified)	4	\$776	\$776	0.5			
(16) Native American-owned (certified)	2	\$938	\$938	0.6			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.
Agency: State agencies (w/o INDOT)
Time period: July 1, 2013-June 30, 2018
Contract area: All industries
Contract role: Prime contracts

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	172	\$1,017,834	\$1,017,834				
(2) Minority and woman-owned	5	\$42,532	\$42,532	4.2	13.9	-9.7	30.1
(3) Non-Hispanic white woman-owned	3	\$30,841	\$30,841	3.0	9.3	-6.3	32.5
(4) Minority-owned	2	\$11,691	\$11,691	1.1	4.6	-3.4	25.1
(5) Asian American-owned	2	\$11,691	\$11,691	1.1	0.1	1.0	200+
(6) Black American-owned	0	\$0	\$0	0.0	0.7	-0.7	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	0.3	-0.3	0.0
(8) Native American-owned	0	\$0	\$0	0.0	3.5	-3.5	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	2	\$11,691	\$11,691	1.1			
(11) Non-Hispanic white woman-owned (certified)	0	\$0	\$0	0.0			
(12) Minority-owned (certified)	2	\$11,691	\$11,691	1.1			
(13) Asian American-owned (certified)	2	\$11,691	\$11,691	1.1			
(14) Black American-owned (certified)	0	\$0	\$0	0.0			
(15) Hispanic American-owned (certified)	0	\$0	\$0	0.0			
(16) Native American-owned (certified)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.

Agency: State agencies (w/o INDOT)
 Time period: July 1, 2013-June 30, 2018
 Contract area: All industries
 Contract role: Prime contracts

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,086	\$194,757	\$194,757				
(2) Minority and woman-owned	414	\$11,687	\$11,687	6.0	23.1	-17.1	25.9
(3) Non-Hispanic white woman-owned	344	\$8,012	\$8,012	4.1	12.3	-8.1	33.6
(4) Minority-owned	70	\$3,675	\$3,675	1.9	10.9	-9.0	17.3
(5) Asian American-owned	34	\$2,239	\$2,246	1.2	2.9	-1.8	39.6
(6) Black American-owned	3	\$101	\$101	0.1	4.6	-4.6	1.1
(7) Hispanic American-owned	5	\$624	\$626	0.3	1.5	-1.2	21.3
(8) Native American-owned	26	\$699	\$701	0.4	1.8	-1.5	19.6
(9) Unknown minority-owned	2	\$11					
(10) Minority- and woman-owned (certified)	188	\$5,696	\$5,696	2.9			
(11) Non-Hispanic white woman-owned (certified)	131	\$2,908	\$2,908	1.5			
(12) Minority-owned (certified)	57	\$2,788	\$2,788	1.4			
(13) Asian American-owned (certified)	25	\$1,406	\$1,406	0.7			
(14) Black American-owned (certified)	1	\$59	\$59	0.0			
(15) Hispanic American-owned (certified)	5	\$624	\$624	0.3			
(16) Native American-owned (certified)	26	\$699	\$699	0.4			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.

Agency: State agencies (w/o INDOT)
 Time period: July 1, 2013-June 30, 2018
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Northern Indiana

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	638	\$50,135	\$50,135				
(2) Minority and woman-owned	33	\$1,619	\$1,619	3.2	22.9	-19.7	14.1
(3) Non-Hispanic white woman-owned	17	\$623	\$623	1.2	12.3	-11.0	10.1
(4) Minority-owned	16	\$996	\$996	2.0	10.7	-8.7	18.6
(5) Asian American-owned	4	\$377	\$377	0.8	4.9	-4.2	15.2
(6) Black American-owned	1	\$54	\$54	0.1	4.0	-3.8	2.7
(7) Hispanic American-owned	1	\$52	\$52	0.1	1.2	-1.1	8.4
(8) Native American-owned	10	\$513	\$513	1.0	0.5	0.5	194.5
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	27	\$1,357	\$1,357	2.7			
(11) Non-Hispanic white woman-owned (certified)	11	\$361	\$361	0.7			
(12) Minority-owned (certified)	16	\$996	\$996	2.0			
(13) Asian American-owned (certified)	4	\$377	\$377	0.8			
(14) Black American-owned (certified)	1	\$54	\$54	0.1			
(15) Hispanic American-owned (certified)	1	\$52	\$52	0.1			
(16) Native American-owned (certified)	10	\$513	\$513	1.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.

Agency: State agencies (w/o INDOT)
 Time period: July 1, 2013-June 30, 2018
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Central Indiana

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,369	\$1,265,437	\$1,265,437				
(2) Minority and woman-owned	462	\$173,668	\$173,668	13.7	18.0	-4.3	76.3
(3) Non-Hispanic white woman-owned	355	\$106,756	\$106,756	8.4	10.2	-1.7	83.0
(4) Minority-owned	107	\$66,912	\$66,912	5.3	7.8	-2.5	67.6
(5) Asian American-owned	39	\$19,386	\$19,389	1.5	0.5	1.1	200+
(6) Black American-owned	39	\$44,907	\$44,915	3.5	3.4	0.1	104.2
(7) Hispanic American-owned	8	\$1,347	\$1,348	0.1	0.4	-0.3	25.7
(8) Native American-owned	19	\$1,260	\$1,261	0.1	3.5	-3.4	2.8
(9) Unknown minority-owned	2	\$11					
(10) Minority- and woman-owned (certified)	219	\$121,503	\$121,503	9.6			
(11) Non-Hispanic white woman-owned (certified)	136	\$58,970	\$58,970	4.7			
(12) Minority-owned (certified)	83	\$62,533	\$62,533	4.9			
(13) Asian American-owned (certified)	29	\$18,478	\$18,478	1.5			
(14) Black American-owned (certified)	28	\$41,584	\$41,584	3.3			
(15) Hispanic American-owned (certified)	8	\$1,347	\$1,347	0.1			
(16) Native American-owned (certified)	18	\$1,124	\$1,124	0.1			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.

Agency: State agencies (w/o INDOT)
 Time period: July 1, 2013-June 30, 2018
 Contract area: All industries
 Contract role: Prime contracts and subcontracts

Southern Indiana

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	609	\$51,147	\$51,147				
(2) Minority and woman-owned	45	\$1,558	\$1,558	3.0	20.1	-17.1	15.1
(3) Non-Hispanic white woman-owned	39	\$1,263	\$1,263	2.5	14.1	-11.7	17.5
(4) Minority-owned	6	\$295	\$295	0.6	6.0	-5.4	9.6
(5) Asian American-owned	3	\$174	\$174	0.3	1.1	-0.8	30.5
(6) Black American-owned	3	\$121	\$121	0.2	2.1	-1.9	11.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	2.3	-2.3	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.4	-0.4	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	22	\$869	\$869	1.7			
(11) Non-Hispanic white woman-owned (certified)	17	\$610	\$610	1.2			
(12) Minority-owned (certified)	5	\$260	\$260	0.5			
(13) Asian American-owned (certified)	3	\$174	\$174	0.3			
(14) Black American-owned (certified)	2	\$86	\$86	0.2			
(15) Hispanic American-owned (certified)	0	\$0	\$0	0.0			
(16) Native American-owned (certified)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.
Agency: INDOT
Time period: July 1, 2013-June 30, 2018
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	767	\$110,846	\$110,846				
(2) Minority and woman-owned	392	\$21,470	\$21,470	19.4	13.7	5.7	141.5
(3) Non-Hispanic white woman-owned	252	\$10,269	\$10,269	9.3	7.9	1.4	117.4
(4) Minority-owned	140	\$11,201	\$11,201	10.1	5.8	4.3	174.3
(5) Asian American-owned	7	\$205	\$205	0.2	0.2	0.0	83.7
(6) Black American-owned	78	\$3,843	\$3,843	3.5	3.7	-0.2	94.4
(7) Hispanic American-owned	49	\$1,973	\$1,973	1.8	1.3	0.4	133.3
(8) Native American-owned	6	\$5,180	\$5,180	4.7	0.6	4.1	200+
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	339	\$19,717	\$19,717	17.8			
(11) Non-Hispanic white woman-owned (certified)	206	\$8,630	\$8,630	7.8			
(12) Minority-owned (certified)	133	\$11,087	\$11,087	10.0			
(13) Asian American-owned (certified)	7	\$205	\$205	0.2			
(14) Black American-owned (certified)	72	\$3,752	\$3,752	3.4			
(15) Hispanic American-owned (certified)	48	\$1,950	\$1,950	1.8			
(16) Native American-owned (certified)	6	\$5,180	\$5,180	4.7			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.
Agency: Ball State University
Time period: July 1, 2013-June 30, 2018
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	5,291	\$365,695	\$365,695				
(2) Minority and woman-owned	446	\$40,329	\$40,329	11.0	19.9	-8.8	55.5
(3) Non-Hispanic white woman-owned	389	\$37,073	\$37,073	10.1	9.9	0.2	102.5
(4) Minority-owned	57	\$3,256	\$3,256	0.9	10.0	-9.1	8.9
(5) Asian American-owned	12	\$1,896	\$2,143	0.6	3.1	-2.5	19.1
(6) Black American-owned	20	\$389	\$440	0.1	4.9	-4.8	2.5
(7) Hispanic American-owned	9	\$229	\$258	0.1	0.8	-0.7	9.1
(8) Native American-owned	14	\$367	\$415	0.1	1.3	-1.1	9.1
(9) Unknown minority-owned	2	\$374					
(10) Minority- and woman-owned (certified)	166	\$19,265	\$19,265	5.3			
(11) Non-Hispanic white woman-owned (certified)	157	\$18,331	\$18,331	5.0			
(12) Minority-owned (certified)	9	\$934	\$934	0.3			
(13) Asian American-owned (certified)	3	\$614	\$614	0.2			
(14) Black American-owned (certified)	1	\$149	\$149	0.0			
(15) Hispanic American-owned (certified)	0	\$0	\$0	0.0			
(16) Native American-owned (certified)	5	\$170	\$170	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.
Agency: Indiana State University
Time period: July 1, 2013-June 30, 2018
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	2,457	\$299,501	\$299,501				
(2) Minority and woman-owned	365	\$22,506	\$22,506	7.5	15.9	-8.4	47.3
(3) Non-Hispanic white woman-owned	244	\$9,689	\$9,689	3.2	7.6	-4.4	42.5
(4) Minority-owned	121	\$12,816	\$12,816	4.3	8.3	-4.0	51.8
(5) Asian American-owned	55	\$6,084	\$6,130	2.0	1.9	0.1	105.3
(6) Black American-owned	3	\$137	\$138	0.0	4.0	-4.0	1.2
(7) Hispanic American-owned	51	\$5,778	\$5,822	1.9	0.6	1.3	200+
(8) Native American-owned	9	\$720	\$726	0.2	1.7	-1.4	14.5
(9) Unknown minority-owned	3	\$96					
(10) Minority- and woman-owned (certified)	122	\$7,150	\$7,150	2.4			
(11) Non-Hispanic white woman-owned (certified)	72	\$1,887	\$1,887	0.6			
(12) Minority-owned (certified)	50	\$5,263	\$5,263	1.8			
(13) Asian American-owned (certified)	2	\$153	\$153	0.1			
(14) Black American-owned (certified)	2	\$122	\$122	0.0			
(15) Hispanic American-owned (certified)	42	\$4,527	\$4,527	1.5			
(16) Native American-owned (certified)	4	\$461	\$461	0.2			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.
Agency: Indiana Univeristy
Time period: July 1, 2013-June 30, 2018
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	18,947	\$1,610,342	\$1,610,342				
(2) Minority and woman-owned	4,011	\$219,369	\$219,369	13.6	18.2	-4.5	75.0
(3) Non-Hispanic white woman-owned	3,000	\$162,513	\$162,513	10.1	9.1	1.0	111.2
(4) Minority-owned	1,011	\$56,856	\$56,856	3.5	9.1	-5.6	38.9
(5) Asian American-owned	174	\$11,148	\$12,561	0.8	1.7	-1.0	44.9
(6) Black American-owned	179	\$10,979	\$12,371	0.8	5.3	-4.5	14.6
(7) Hispanic American-owned	528	\$21,839	\$24,607	1.5	0.9	0.7	177.0
(8) Native American-owned	118	\$6,495	\$7,318	0.5	1.2	-0.8	37.3
(9) Unknown minority-owned	12	\$6,396					
(10) Minority- and woman-owned (certified)	2,361	\$111,083	\$111,083	6.9			
(11) Non-Hispanic white woman-owned (certified)	1,656	\$80,652	\$80,652	5.0			
(12) Minority-owned (certified)	705	\$30,432	\$30,432	1.9			
(13) Asian American-owned (certified)	115	\$5,340	\$5,340	0.3			
(14) Black American-owned (certified)	82	\$5,748	\$5,748	0.4			
(15) Hispanic American-owned (certified)	496	\$18,551	\$18,551	1.2			
(16) Native American-owned (certified)	12	\$793	\$793	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.
Agency: Ivy Tech
Time period: July 1, 2013-June 30, 2018
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	4,254	\$248,794	\$248,794				
(2) Minority and woman-owned	802	\$39,166	\$39,166	15.7	17.1	-1.3	92.1
(3) Non-Hispanic white woman-owned	413	\$14,993	\$14,993	6.0	9.2	-3.2	65.3
(4) Minority-owned	389	\$24,173	\$24,173	9.7	7.9	1.9	123.7
(5) Asian American-owned	72	\$5,398	\$5,398	2.2	1.9	0.2	112.1
(6) Black American-owned	110	\$10,319	\$10,319	4.1	4.1	0.1	102.3
(7) Hispanic American-owned	182	\$7,739	\$7,739	3.1	0.9	2.3	200+
(8) Native American-owned	25	\$717	\$717	0.3	1.0	-0.7	28.7
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	496	\$22,982	\$22,982	9.2			
(11) Non-Hispanic white woman-owned (certified)	179	\$6,531	\$6,531	2.6			
(12) Minority-owned (certified)	317	\$16,451	\$16,451	6.6			
(13) Asian American-owned (certified)	53	\$2,153	\$2,153	0.9			
(14) Black American-owned (certified)	99	\$10,051	\$10,051	4.0			
(15) Hispanic American-owned (certified)	156	\$3,786	\$3,786	1.5			
(16) Native American-owned (certified)	9	\$461	\$461	0.2			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-22.
Agency: Purdue University
Time period: July 1, 2013-June 30, 2018
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	10,443	\$605,094	\$605,094				
(2) Minority and woman-owned	1,581	\$73,963	\$73,963	12.2	21.7	-9.5	56.3
(3) Non-Hispanic white woman-owned	1,006	\$42,018	\$42,018	6.9	12.3	-5.4	56.3
(4) Minority-owned	575	\$31,945	\$31,945	5.3	9.4	-4.1	56.2
(5) Asian American-owned	247	\$12,245	\$12,660	2.1	1.5	0.6	138.9
(6) Black American-owned	50	\$1,438	\$1,486	0.2	5.2	-5.0	4.7
(7) Hispanic American-owned	194	\$7,721	\$7,983	1.3	1.4	0.0	96.6
(8) Native American-owned	58	\$9,496	\$9,817	1.6	1.3	0.3	126.4
(9) Unknown minority-owned	26	\$1,045					
(10) Minority- and woman-owned (certified)	609	\$36,985	\$36,985	6.1			
(11) Non-Hispanic white woman-owned (certified)	374	\$16,056	\$16,056	2.7			
(12) Minority-owned (certified)	235	\$20,929	\$20,929	3.5			
(13) Asian American-owned (certified)	21	\$4,335	\$4,335	0.7			
(14) Black American-owned (certified)	12	\$339	\$339	0.1			
(15) Hispanic American-owned (certified)	177	\$7,285	\$7,285	1.2			
(16) Native American-owned (certified)	25	\$8,971	\$8,971	1.5			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-23.

Agency: University of Southern Indiana

Time period: July 1, 2013-June 30, 2018

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	2,129	\$122,616	\$122,616				
(2) Minority and woman-owned	328	\$17,763	\$17,763	14.5	19.4	-4.9	74.8
(3) Non-Hispanic white woman-owned	312	\$16,325	\$16,325	13.3	9.9	3.4	134.9
(4) Minority-owned	16	\$1,439	\$1,439	1.2	9.5	-8.3	12.3
(5) Asian American-owned	0	\$0	\$0	0.0	2.3	-2.3	0.0
(6) Black American-owned	9	\$519	\$519	0.4	4.7	-4.2	9.1
(7) Hispanic American-owned	7	\$919	\$919	0.7	2.0	-1.3	37.0
(8) Native American-owned	0	\$0	\$0	0.0	0.5	-0.5	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	199	\$12,994	\$12,994	10.6			
(11) Non-Hispanic white woman-owned (certified)	190	\$12,306	\$12,306	10.0			
(12) Minority-owned (certified)	9	\$688	\$688	0.6			
(13) Asian American-owned (certified)	0	\$0	\$0	0.0			
(14) Black American-owned (certified)	5	\$91	\$91	0.1			
(15) Hispanic American-owned (certified)	4	\$597	\$597	0.5			
(16) Native American-owned (certified)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-24.
Agency: Vincennes University
Time period: July 1, 2013-June 30, 2018
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	1,777	\$103,639	\$103,639				
(2) Minority and woman-owned	337	\$9,455	\$9,455	9.1	15.6	-6.5	58.4
(3) Non-Hispanic white woman-owned	328	\$9,384	\$9,384	9.1	8.3	0.8	109.4
(4) Minority-owned	9	\$71	\$71	0.1	7.3	-7.3	0.9
(5) Asian American-owned	0	\$0	\$0	0.0	2.4	-2.4	0.0
(6) Black American-owned	1	\$12	\$12	0.0	3.4	-3.4	0.3
(7) Hispanic American-owned	8	\$59	\$59	0.1	0.3	-0.3	17.7
(8) Native American-owned	0	\$0	\$0	0.0	1.2	-1.2	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority- and woman-owned (certified)	203	\$4,246	\$4,246	4.1			
(11) Non-Hispanic white woman-owned (certified)	200	\$4,225	\$4,225	4.1			
(12) Minority-owned (certified)	3	\$21	\$21	0.0			
(13) Asian American-owned (certified)	0	\$0	\$0	0.0			
(14) Black American-owned (certified)	1	\$12	\$12	0.0			
(15) Hispanic American-owned (certified)	2	\$9	\$9	0.0			
(16) Native American-owned (certified)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting Disparity Analysis.